IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION
of 24 March 2009
on State aid C 47/05 (ex NN 86/05) implemented by Greece for Hellenic Vehicle Industry SA (ELVO)
(notified under document C(2009) 1476)
(Only the Greek text is authentic)
(Text with EEA relevance)
(2010/273/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above (1),

Whereas:

1. PROCEDURE

(1) The Commission received a complaint by letter dated 27 May 2002 alleging that the Greek authorities had granted state aid to ELVO — Hellenic Industry SA (ELVO).

(2) After an extensive exchange of views with the Greek authorities, the Commission informed Greece by a letter dated 7 December 2005 that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the Official Journal of the European Union (2). The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.


(6) A meeting between Commission officials and the Greek authorities in the presence of representatives of ELVO was held on 4 May 2007.

2. THE FACTS

2.1. The beneficiary

(7) ELVO is a company producing military vehicles, civilian vehicles and spare parts based in Thessaloniki, Greece. ELVO is the main supplier of motor vehicles to the Greek armed forces.

(8) According to the information available, the company produces the following types of vehicles: buses, trolley buses, tipper vehicles, waste bin lorries, water tankers, fire extinguishing vehicles, snow-ploughs, aircraft transporters, crane transporters, tractors, lorries, trailers, SUVs, tanks and armoured vehicles.

(9) The company was founded in 1972 as Steyr Hellas SA, producer of tractors, trucks, bikes and engines. In 1987 the company was renamed ELVO and the Greek Government became the principal shareholder.

(10) Mytilineos Holdings SA acquired 43 % of ELVO by a share sale agreement of 29 August 2000 after a public tender (hereinafter this sale is referred to as ‘the partial privatisation’). Currently, 51 % of ELVO is owned by the Greek Government.

(11) ELVO currently employs about 672 persons (2007 figures). Its turnover in 2007 was EUR 84 million.

(2) Cf. footnote 1.
2.2. The support measures

2.2.1. The tax waiver under Law 2771/1999

(12) Under Article 15(3) of Law 2771/1999 passed on 16 December 1999, the Greek state released ELVO from all debts to the public purse related to taxes and fiscal penalties for the years 1988 to 1998 (hereinafter ‘tax waiver A’). According to the Greek authorities, this corresponded to a waiver of GRD 1 193 753 186 (corresponding to EUR 3 503 310,89) due from ELVO to the public purse.

(13) In their comments further to the Commission's Decision to open the procedure under Article 88(2) of the EC Treaty the Greek authorities informed the Commission of two other measures in support of ELVO.

2.2.2. The tax waiver pursuant to Law 1892/90

(14) By a decision (4) taken pursuant to Article 49 of Law 1892/90, the Greek authorities waived EUR 3 546 407,89 of taxes from ELVO (hereinafter ‘tax waiver B’). This corresponded to ELVO's tax obligations from 1998 (year of the previous tax audit) until the sale to Mytilineos. The waiver took the form of repayments by the tax administration of taxes previously paid by ELVO. This breaks down as follows:

— EUR 2 912 380,90 concerned VAT paid by ELVO after the partial privatisation but due for the period between 1 January 2000 and the partial privatisation on 29 August 2000. This sum was repaid by the Greek authorities in two instalments on 7 November 2002 (EUR 900 000) and on 6 February 2004 (EUR 2 012 318,90).

— EUR 634 088,99 corresponded to taxes paid by ELVO for the operating years 1998, 1999 and 2000 (up until the partial privatisation). Greece has not indicated the exact date of the repayment.

2.2.3. The loan guarantee

(15) In 1997, ELVO was granted a loan corresponding to EUR 23 008 134,635 by the German bank Bayerische Hypo and Vereinsbank AG. This loan was secured by a guarantee from the Greek state (hereinafter referred to as ‘the loan guarantee’). ELVO provided no collateral for the guarantee but paid the state a fee of 1 % of the amount. The Greek authorities have informed the Commission that the loan was used to finance production for the Ministry of Defence procurement programmes, more specifically the production of [...] (5) intended for the Greek army.

3. REASONS FOR OPENING THE PROCEDURE UNDER ARTICLE 82(2)

(16) As mentioned above, the Commission informed Greece by a letter of 7 December 2005 that it had opened the proceedings under Article 88(2) of the EC Treaty in respect of tax waiver A, which it considered to constitute state aid. The Commission had doubts about the aid's compatibility with the common market on the following grounds.

(17) In the exchange of views that preceded the opening decision, Greece had argued that ELVO's activity in its entirety was covered by Article 296 of the EC Treaty since ELVO mainly produced military vehicles intended for the Greek armed forces. However, the Commission noted that ELVO also manufactured civilian and dual use vehicles. Greece had not shown that the tax waiver had only benefited ELVO's military production and that it was necessary for Greece's essential defence interests.

(18) Consequently, the Commission considered that only part of the financial support granted to ELVO was in favour of military production covered by Article 296 of the EC Treaty and that the aid granted to the production not so covered had to be investigated within a procedure on the basis of Article 88(2) of the EC Treaty.

(19) In the same letter the Commission enjoined Greece, in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 (5), to provide it with information on a number of points, among which were the following:

— information on any other financial support provided to ELVO from public resources,

— evidence that the cost and revenue accounts linked to the civilian production (including dual use) and military production were separated and that the aid only favoured the military production,

— data on the split of the turnover between product categories (civilian, dual use and military).

4. OBSERVATIONS OF THE GREEK AUTHORITIES

(20) Further to the Commission's decision to open the investigation procedure, Greece submitted the following comments.

(*) Information covered by professional confidentiality.
4.1. Other aid measures

(21) Further to the Commission's injunction, Greece informed the Commission of tax waiver B and the loan guarantee as described above. Greece stated that ELVO had received no other support from public funds.

4.2. Relevance of Article 296 of the EC Treaty

(22) Greece confirmed that ELVO did not maintain separate accounts for the civilian and military parts of its production. However, Greece argued that ELVO mainly produced military equipment. Thus in the years 1987 to 1998, 'military programmes' amounted to 85% of the company's sales. If military production accounted for only 54% of sales in 1999, this was an exceptional event due to the implementation of an agreement from 1997 to deliver buses and trolley buses to various public bodies (and indeed in the following years 2000-2002, the military share of sales was back at the normal high levels: 64.61%, 72.59% and 98.40%, respectively).

Thus, except for the year 1999, the overwhelming share of ELVO's production covered military material which could be covered by Article 296 of the EC Treaty.

4.3. Private vendor principle

(23) Insofar as tax waivers A and B would not be covered by Article 296 EC, they should be seen in the context of the partial privatisation of ELVO. This was performed through an open tender in which eight Greek and international groups expressed an interest. Four submitted eligible bids. Mytilineos' bid was considered the best.

(24) As part of the privatisation process, the Greek state decided that ELVO should be sold free of all tax obligations known before the sale was completed, and that any tax obligations that would arise before the sale but become due only later should fall to the Greek state. These conditions were part of the terms of the tender procedure and known to all bidders (whose bids consequently reflected their expectation that these debts would be written off). The purpose was to ensure the highest possible price for the shares (net of the waived tax claims).

(25) The Greek state argues that it is common commercial practice in similar deals for the vendor to assume the financial obligations of the sold entity that have not materialised at the time the transaction is completed. Furthermore, the Greek authorities argue that the price paid by Mytilineos (EUR 12,179,071) left them with a substantial net consideration, even when the waived debt is deducted (net EUR 5,129,298.12).

(26) Thus Greece claims to have acted in a manner similar to that of a private vendor seeking to maximise the profit from the sale of his asset and that therefore tax waivers A and B do not involve state aid.


(27) The Greek authorities also referred to the state aid scheme N 11/91 approved by the Commission by a letter of 11 July 1991. This scheme allowed state aid in the form of debt write-offs or debt capitalisation in relation to the privatisations of 208 identified undertakings in the public sector, amongst which ELVO. However, the scheme required prior notification of such aid to the Commission in two situations:

— if the sale of the undertaking was carried out through a procedure other than an open bid, i.e. through direct sale to a third party,

— if the undertaking operated in certain sectors, among which was the automotive sector.

(28) The Greek authorities claim that the debt write-off based on Law 1892/90 was covered by this scheme. The write-off did not require a prior notification to the Commission as the sale of the 43% of ELVO was carried out by means of an open bidding procedure, and since ELVO was a military producer it did not fall into the category of 'automobile' producers within the meaning of state aid provisions.

5. ASSESSMENT

5.1. Article 296 of the EC Treaty

(29) Before going into a substantive assessment of the support measures under the state aid rules it is appropriate to deal with Greece's contention regarding the implications of Article 296 of the EC Treaty.

(30) On the basis of Article 296(1)(b) EC the provisions of the Treaty do not preclude a Member State from taking 'such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.' This provision applies to a list of products drawn up by the Council (see Article 296(2) EC) and which includes among others (point 6 of the list) 'tanks and specialist fighting vehicles ... (b) Military type vehicles, armed or armoured, including amphibious vehicles; (c) armoured cars ...'.

(*) In French 'automobiles'.
This implies, as far as is relevant for this case, that the state aid provisions of the EC Treaty do not apply for measures relating to products included in the 1958 list, provided that such measures are considered necessary for the protection of the essential security interests of the Member State.

Case law requires a Member State which seeks to rely on Article 296 EC to furnish evidence that the exemptions do not go beyond the limits in such exceptional cases (7).

Greece has first argued that all ELVO's production, or at least a very substantial proportion thereof, concerns military material covered by Article 296(1)(b) EC, such that the state aid rules of the Treaty cannot apply to preclude any state support in favour of ELVO.

This view cannot be accepted. It is clear from the information in the case that ELVO's production concerns not only products covered by Article 296 EC but also products which are either suited for dual use or intended for purely civilian use (see recitals 8 and 17 above). For this reason alone, the Commission cannot accept the blanket assertion that all ELVO's activities are covered by Article 296(1)(b) EC. The application of this exception must be assessed separately for each aid measure in view of its purpose and scope.

In the case of tax waivers A and B the Commission cannot accept the contention that they are covered by Article 296 EC. Indeed, in the absence of any separate accounting between the civil and military production, it is impossible to ascertain whether these measures would benefit exclusively the military production.

The Commission considers that tax waivers A and B are state aid because they involve taxes which are state resources and grant a selective advantage explicitly to ELVO, which otherwise would have to pay these debts. The waivers are also clearly imputable to the state since they were effected through measures taken by organs of the state (i.e. a law in the case of tax waiver A and a repayment decision of the tax administration in the case of tax waiver B). Since there is competition and trade between the Member States in the vehicle industry, the financial advantages favouring ELVO compared to its competitors distort or threaten to distort competition and affect trade between the Member States.

The Commission is satisfied that the order for which the loan guarantee as provided concerned war material within the meaning of Article 296(1)(b) EC and that the guarantee was necessary for the supply of this material to the Greek defence forces. The Commission consequently accepts that the loan guarantee is exempt from the state aid provisions of the EC Treaty by virtue of the exception of Article 296(1)(b) EC.

The following analysis under state aid rules will consequently only concern tax waivers A and B.

5.2. Existence of state aid

5.2.1. Notions of state resources, selectivity, affecting of trade and distortion of competition

Pursuant to Article 87(1) of the EC Treaty, ‘… any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as such aid is necessary for the supply of this material to the Greek defence forces. The Commission consequently accepts that the loan guarantee is exempt from the state aid provisions of the EC Treaty by virtue of the exception of Article 296(1)(b) EC.

The following analysis under state aid rules will consequently only concern tax waivers A and B.

The Commission considers that tax waivers A and B are state aid because they involve taxes which are state resources and grant a selective advantage explicitly to ELVO, which otherwise would have to pay these debts. The waivers are also clearly imputable to the state since they were effected through measures taken by organs of the state (i.e. a law in the case of tax waiver A and a repayment decision of the tax administration in the case of tax waiver B). Since there is competition and trade between the Member States in the vehicle industry, the financial advantages favouring ELVO compared to its competitors distort or threaten to distort competition and affect trade between the Member States.

See in this regard the judgment of the ECJ of 8 April 2008 in Case C-337/05, Commission v Italy (not yet published), paragraphs 42-49.

 military purposes, as confirmed by a letter of the Ministry of Defence, Greece has also stated that […] are intended for and support military operations and were adjudged suitable for those purposes of […]. The Commission accepts that the vehicles are necessary for the protection of Greece’s essential security interests.
5.2.2. The criterion of advantage: Greece's claim to have acted as a private vendor

(41) Greece has however argued that tax waivers A and B do not constitute state aid as they do not provide an advantage to ELVO which it could not have received under normal market conditions. Indeed, as set out in recitals 23 to 26 of this decision, Greece argues that it has acted as any private vendor would have done in similar circumstances.

(42) This claim cannot be accepted.

(43) First, the Commission notes that whereas Greece claims to have acted in the same way as a private vendor would have done in similar circumstances, it nevertheless used powers which are the exclusive preserve of the state in order to grant the support measures to ELVO: a specific law in the case of the tax write-off under tax waiver A and a decision by the tax administration in the case of tax waiver B. These are powers of which a private vendor could never avail himself. It is therefore by definition excluded that the Greek state acted like a private operator acting in normal conditions (8).

(44) Furthermore, and by way of a subsidiary argument, the Commission also notes that Greece's contention that waiving the tax claims allowed it to achieve a higher net price (i.e. sale price of the shares minus the foregone tax revenue) for its shares in ELVO than it would have been able to achieve if it had sold the shares without writing off the tax claims is simply an assertion, unsubstantiated by any evidence (such as for instance a comparison between the actual sale price and the estimated share price in the alternative scenario). In the absence of even the slightest indication to this effect, it is not possible to accept Greece's suggestion that the tax waivers made business sense.

(45) The Commission consequently dismisses Greece's claim to have acted as a market economy vendor and finds that the tax waivers A and B gave ELVO an advantage that it would not have been able to obtain on normal market terms.

5.2.3. Conclusion regarding the existence of state aid

(46) The Commission finds that tax waivers A and B constitute state aid within the meaning of Article 87(1) of the EC Treaty.

5.3. Compatibility with the common market

5.3.1. Alleged compatibility under state aid scheme N 11/91

(47) In the course of the investigation Greece argued that tax waivers A and B, if found to constitute state aid, would in any event be covered by the above-mentioned scheme authorised by the Commission in case N 11/91, and consequently be compatible with the common market. The Commission cannot, however, accept the arguments of Greece set out in recitals 27 and 28 above.

(48) As a preliminary remark, the Commission notes that Law 1892/90, which was the subject-matter of the Commission's decision N 11/91, applies only in the event of the sale or any other form of transfer of an undertaking or of all of an undertaking's assets or of a majority of an undertaking's shares (Article 49 of Law 1892/90). However, in the present case, only 43% of the shares in ELVO was sold to a private party, and the Greek Government retained 51%. Already, on this ground, the Commission doubts that the partial privatisation of ELVO falls under the scheme.

(49) Even if it were, for argument's sake, accepted that the share sale agreement falls under scheme N 11/91, the conditions of that scheme are not met in the case at issue.

(50) Indeed, even if it were — again for argument's sake — accepted that the construction of military vehicles did not enter into the definition of the automotive sector for the purposes of the scheme, the fact is that ELVO, as shown above, manufactures a large range of dual use or civilian vehicles besides its specifically military production. ELVO's civil production itself suffices to qualify it as an automotive producer for the purpose of the scheme.

(51) In a case of privatisation of an automotive company, such as ELVO, prior notification to the Commission is a substantive requirement for compatibility with the common market under the scheme. (9) Greece did not notify the partial privatisation of ELVO. Tax waivers A and B cannot consequently be considered compatible with the common market by virtue of the scheme.

5.3.2. Other grounds of compatibility

(52) Greece has suggested no other grounds of compatibility, and the Commission does not find that the aid can be considered compatible with the common market on any other legal basis.

(8) See the ruling of the Court of First Instance of 17 December 2008 in Case T-196/04 Ryanair (not yet published), paragraphs 84, 85 and 90.

(9) It follows from case law that where an approved aid scheme requires certain forms of aid (for example to undertakings in a certain sector) to be notified, these aids are excluded from the authorisation contained in the scheme and require individual notification. The notification is thus a substantive requirement and not simply a matter of providing information. Cf. Joined Cases T-447/93, T-448/93 and T-449/93, AIETEC et al., [1995] ECR p. II-1971, para. 129 and 135; Case C-57/00 P and C-61/00 P, Frisstaat Sachsen v Spain, [1997] ECR 1-335, para. 28-29; Joined Cases T-132/96 and T-143/96, Frisstaat Sachsen v Spain, [1999] ECR p. II-3663, para. 203; Joined Cases T-57/00 P and C-61/00 P, Frisstaat Sachsen, [2003] ECR 1-7975, para. 114 et seq.
The state aid covered by the present decision was not
the common market.

5.4. Establishment of the aid amount

The incompatible state aid shall be recovered from ELVO.
However, as the Commission acknowledged in the
opening decision, the part of ELVO's production which
concerns military material can be considered covered by
Article 296(1)(b) of the Treaty. To the extent that the aid
benefited this part of the production, it should not be
considered as state aid, since the aid was necessary for
the protection of Greece's essential security interests. The
question then arises of how to apportion the aid between
the two sides of the production.

The state aid covered by the present decision was not
assigned to a particular activity, in that it was not
earmarked to finance a given project. The Commission
has therefore to determine the extent to which the aid
benefited the military activities and the extent to which it
benefited the civil activities. This calculation is
complicated by the fact that ELVO did not keep
separate accounts for the civil activities and for the
military activities. In these circumstances, the
Commission will base its analysis on the relative size
of the two activities. It must therefore assess the
relative weight of each activity. The Commission
observes that any state aid granted to ELVO and not
assigned to finance a particular activity has at the same
time covered debts from the past and given ELVO an
advantage in financing future activities. Therefore, in
determining the extent to which the state aid benefited
the civil and the military activities, the Commission
considers that the analysis cannot be limited to the
division between civil and military production (i.e. the
relative weight of each activity) in the year when the
support was provided, but that it is necessary to
calculate the average division between these two activities
over a sufficiently long period. The fact that the relative
weight of the two activities can vary strongly from one
year to another also justifies using an average over
several years. Indeed, a given year may not be represent-
tative of the average division between the two activities
over the longer term.

In the absence of separate accounts for civilian and
military production, this apportionment will necessarily
have to be based on an approximation. The Commission
considers that the division between ELVO's sales to
military programmes and civilian customers, as
explained by Greece, provides an acceptable approxi-
mation for the proportion of civil and military material
in ELVO's production and that the proceeds from tax
waivers A and B should be apportioned accordingly.

Greece has provided information on ELVO's sales to
military programmes and to civilian customers
respectively. Based on the period from 1987 to 2000
inclusive, i.e. the period covered by the tax waivers, the
weighted average proportion of sales to military
programmes is 79,9 %. The part of civilian production
is consequently 20,1 %.

Applying this ratio to the tax waivers, the incompatible
aid to be recovered from ELVO (all amounts in the
calculation rounded up to the nearest full
currency unit) is GRD 1 193 753 186 × 0,201 = GRD
239 944 390 for tax waiver A, and EUR 3 546 407,89 ×
0,201 = EUR 712 827,99 for tax waiver B.

However, if the Commission accepts that 79,9 % of any
inflow of state money would have financed the military
activities of ELVO, it must also conclude that 79,9 % of
any outflow of money from the company would have
been supported by the military part of its operations.
Since the greater part of ELVO's activity is military, and
since ELVO does not keep separate accounts for the civil
activities, there is a risk that reimbursement of the aid
received by the civil activities will be financed in the
main by funds which otherwise would have financed
the military activities. Consequently, in order to re-
establish the competitive situation that would have
prevailed without state aid and to prevent the granting
of additional aid to the civil activities, Greece will have to
to ensure that the aid is recovered exclusively from the civil
revenue of ELVO.

This decision does not prejudice the position that the
Commission may take on the compatibility of the
measures in question under common market rules
relating in particular to state procurement and
concessions,

HAS ADOPTED THIS DECISION

Article 1

The State aid amounting to GRD 239 944 390 and
EUR 712 827,99 unlawfully granted by Greece in favour of
ELVO, in breach of Article 88(3) of the Treaty, is incompatible
with the common market.

(10) For a similar approximation see the Commission decision of 2 July
2008 in State aid case C-16/04 implemented by Greece in favour of
Hellenic Shipyards (not yet published in the Official Journal but
available on http://ec.europa.eu/competition/state_aid/register/).

(11) See the judgment in case C-16/04 referred to in footnote 10, in
particular paragraph 340 et seq.
Article 2

1. Greece shall recover the aid referred to in Article 1 from the beneficiary. The aid shall be recovered exclusively from the revenue of ELVO from its civil activities.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until the date of their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 (12).

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Greece shall ensure that this Decision is implemented within four months following the date of notification hereof.

Article 4

1. Within two months following notification of this Decision, Greece shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be reimbursed by the beneficiary (in this respect Greece shall in particular indicate the exact date of repayment of EUR 634 088,99 under Tax Waiver B (see recital 14, second dashed indent));

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Hellenic Republic.


For the Commission
Neelie KROES
Member of the Commission

Information about the amounts of aid received, to be recovered and already recovered

<table>
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<tr>
<th>Identity of the beneficiary</th>
<th>Total amount of aid received under the scheme (*)</th>
<th>Total amount of aid to be recovered (*) (Principal)</th>
<th>Total amount already reimbursed (*)</th>
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(*) Million of national currency.