

COMMISSION DECISION

of 2 April 2008

on State aid C 38/07 (ex NN 45/07) implemented by France for Arbel Fauvet Rail SA

(notified under document number C(2008) 1089)

(Only the French version is authentic)

(Text with EEA relevance)

(2008/716/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

(3) France submitted comments in communications dated 12 October and 18 and 19 December 2007.

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

(4) The Commission Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments.

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

(5) The Commission has received no comments from interested parties.

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

2. AID DESCRIPTION

2.1. Beneficiary

Whereas:

(6) AFR is a manufacturer of railway equipment specialising in goods wagons and tank containers. It is one of the leading manufacturers of railway rolling stock on the European market. The company is located in Douai (Nord) and currently employs around 265 people.

1. PROCEDURE

(1) The Commission received a complaint informing it of certain support measures implemented by France for Arbel Fauvet Rail (hereinafter AFR). In communications dated 28 January 2006, 25 October 2006, 30 January 2007 and 6 June 2007, France submitted additional information.

(7) In 2005 AFR was wholly owned by Arbel SA ⁽³⁾ and employed around 330 people.

(2) By letter dated 12 September 2007, the Commission informed France that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the measure.

(8) AFR's business has been running at a loss for several years. The company's economic difficulties worsened from 2001 onwards. This trend gathered momentum between 2002 and 2005. The following table shows some of AFR's key performance indicators for the period before the aid was granted.

(in EUR)

	At 31.12.2004	At 31.12.2003	At 31.12.2002	At 31.12.2001
Turnover	22 700 000	42 700 000	42 000 000	70 000 000
Net result	- 11 589 620	- 14 270 634	- 2 083 746	- 10 500 000
Capital and reserves	- 21 090 000	- 23 000 000	- 8 700 000	- 6 600 000

⁽²⁾ See footnote 1.

⁽³⁾ On 29 June 2007 AFR was taken over by IGF Industries. Its business name changed to 'IGF Industries — Arbel Fauvet Rail'.

⁽¹⁾ OJ C 249, 24.10.2007, p. 17.

2.2. Support measures

- (9) On 4 July 2005 the Nord-Pas-de-Calais regional authorities and the Communauté d'agglomération du Douaisis jointly granted AFR a repayable advance of EUR 1 million each, making a total of EUR 2 million.
- (10) According to the information provided by the French authorities, the terms of the advances were as follows:
- the repayable advance from the regional authorities was granted at an annual interest rate of 4,08 % (equivalent to the Community reference rate applicable at the time), subject to the completion of a financing plan that AFR was drawing up. It was to be repaid in six-monthly instalments over a three-year period starting on 1 January 2006. As far as the Commission is aware, these advances have not yet been repaid in full,
 - the advance from the Communauté d'agglomération du Douaisis was granted at an annual interest rate of 4,08 % (equivalent to the Community reference rate applicable at the time), subject to payment of the advance from the regional authorities, repayable under the same terms, and to supply of proof of the irrevocable merger between AFR and Lormafer, another company controlled by Arbel SA. This advance was also to be repaid in six-monthly instalments over a three-year period starting on 1 January 2006.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (11) In its Decision to initiate the procedure, the Commission took the view that the repayable advances constituted State aid within the meaning of Article 87(1) of the Treaty. In this connection, it noted that the measures conferred an advantage on AFR in that the firm, given its financial situation, could not have raised funds on such favourable terms on the financial market.
- (12) The Commission also took the view that AFR was a firm in difficulty within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ('the Guidelines')⁽⁴⁾ and that the compatibility of the State aid it had received needed, therefore, to be assessed in the light of the Guidelines. The Commission was doubtful whether, in the light of the Guidelines, the aid in question was compatible with the common market.

4. COMMENTS FROM FRANCE

- (13) The French authorities claimed that, although AFR was going through a difficult period at the time the repayable advances were granted and then paid (i.e. July and the second half of 2005), it had maintained the confidence of its customers and bankers.
- (14) To support their claims, the French authorities mentioned the following points, which they described as 'signs of confidence' in AFR on the part of customers and banks:
- [...] (*) bank had increased the overdraft facility on AFR's current account by EUR 2 million (guaranteed by [...]),
 - AFR had received EUR 7 million in advance payments from its customers (guaranteed by [...]) (*), to which a further EUR 4 million in new advance payments was added in January 2006,
 - at the same time, the firm held supplier guarantees worth EUR 4 million with [...] (*).
- (15) The French authorities backed up their comments with documents which show the following:
- the overdraft interest rate was 4,4199 % as 1 July 2005,
 - the outstanding amount of the various guarantees (suppliers, contract guarantees, financial guarantees) provided by [...] (*) to AFR was EUR 29 million of at 6 May 2005.

5. ASSESSMENT OF THE AID IN THE LIGHT OF ARTICLE 87 OF THE TREATY

5.1. Existence of State aid

5.1.1. State resources

- (16) Article 87(1) of the Treaty stipulates that, save as where otherwise provided for in the Treaty, aid granted by a Member State or through State resource 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.
- (17) With regard to the repayable advances, the Commission notes the following.

⁽⁴⁾ OJ C 244, 1.10.2004, p. 2.

(*) Confidential information.

- (18) Article 87 of the Treaty does not apply only to aid granted by the national governments of Member States, but also to aid from local and regional authorities such as the Nord-Pas-de-Calais region or the municipalities in the Communauté d'agglomération du Douaisis. The funds of such authorities constitute state resources, and their decisions to grant the advances in question to AFR are attributable to the State.

5.1.2. Aid favouring certain undertakings

- (19) The advances were granted at a time when AFR was in a difficult financial situation. In its decision to initiate the procedure, the Commission was of the opinion that, given its financial situation as described in point 8, AFR was a firm in difficulty within the meaning of the Guidelines when the aid was granted. It also noted that the advances were granted without any guarantee being lodged for their repayment, whereas the interest rates applied are supposed to reflect the interest rate applicable to loans 'backed by normal security' ⁽⁵⁾. It therefore considers that there is no way that AFR, given its financial situation, would have been able to obtain funding on such favourable terms on the credit market. The advances in question therefore confer an advantage on AFR.

- (20) In this connection, it is worth noting that, basing themselves on the examples given in paragraph 14, the French authorities stated that AFR still had the confidence of its bankers and customers at the time the aid was granted. The Commission takes these comments to mean that France disputes the idea that AFR was unable to obtain funds on similar terms on the credit market (which amounts to disputing that the repayable advances conferred an advantage on AFR) and *a fortiori* that AFR was a firm in difficulty within the meaning of the Guidelines at the time the repayable advances were granted.

- (21) However, France's comments did not alter the analysis made in the decision to initiate the procedure, for the following reasons.

- (22) The examples of credit quoted by the French authorities (such as the current account overdraft facility and the advance payments from customers) are not comparable to the repayable advances in question. A current account overdraft is a very short-term credit facility, unlike the repayable advances, which have a maturity of three years. These different types of credit are not, therefore, subject

to the same risk analyses by creditors, and the fact that a debtor can obtain short-term credit is not sufficient to assess whether it could obtain a longer-term loan, the repayment of which depends on the debtor's ability to survive.

- (23) Concerning the advance payments from customers, the Commission notes that they were counter-guaranteed by [...] ^(*), an independent institution, which means that customers and suppliers were not incurring any risks in connection with AFR's financial situation and therefore had no reason to subject the payment of these advances to an analysis of the financial soundness of the firm along the lines of that which would have been carried out by a creditor considering the possibility of providing an unsecured loan.

- (24) In conclusion, France's comments do not lead to the conclusion that AFR would have been able to obtain funds on similar terms on the credit market.

5.1.3. Firm in difficulty

- (25) With regard to AFR's status as a firm in difficulty within the meaning of the Guidelines, the Commission makes the following observations.

- (26) Point 10(a) of the Guidelines states that a firm is in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months. This provision reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term. The Commission considers that this assumption logically applies *a fortiori* to a company that has lost all its registered capital and has negative capital and reserves.

- (27) As shown by the financial data set out in paragraph 8 (and not disputed by France during the formal investigation procedure), AFR had had negative capital and reserves since 2001 and had not, at the time the aid was granted, been able to reverse this trend and move back into a positive situation as regards capital and reserves. Under the circumstances, the Commission considers that AFR was a firm in difficulty within the meaning of point 10 of the Guidelines at the time the aid was granted.

⁽⁵⁾ See the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

- (28) In the alternative, the Commission notes that, at the time the aid was granted, AFR also fitted the definition of a firm in difficulty given in point 11 of the Guidelines, which states that, even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulty, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses and diminishing turnover. However, point 11 does stipulate that a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources. This provision is therefore a reminder that the status of a firm in difficulty must be determined in the light of all the relevant indicators, but with significant weight being given to the firm's ability to recover without State intervention.
- (29) In this regard, the Commission notes (as is clear from the table in paragraph 8) that, since 2001, AFR's turnover has fallen steadily while losses have persisted. These are signs of a firm in difficulty within the meaning of point 11 of the Guidelines. In its decision to initiate the formal investigation procedure, the Commission had already noted these signs in support of its preliminary conclusion that AFR was a firm in difficulty. Moreover, the negative trend in AFR's financial situation is clear from the fact that, from January 2004 onwards, the firm was unable to pay by the due date taxes and social security contributions totalling EUR 4,3 million and therefore needed to ask the competent authorities for a moratorium and an arrangement to clear the debt.
- (30) The only facts cited by France that might constitute signs to the contrary are the loans granted to AFR (current account overdraft and advance payments) and the fact that AFR had received certain guarantees from [...] (*). The Commission considers that these signs should be taken into account in the assessment, required by point 11 of the Guidelines, of the firm's ability to recover with the funds it obtains from market sources. In this respect, the Commission notes that:
- the fact that AFR had negative capital and reserves suggests that it was unable to overcome its difficulties with its *own resources*,
 - the French authorities indicated that AFR's *shareholder*, Arbel SA, despite the support it provided to AFR, was unable on its own to ensure the recovery of its subsidiary,
 - lastly, with regard to financial market sources, the loans and guarantees cited by France mean at the most that AFR still had some ability to obtain limited amounts of short-term credit. However, given the extent of AFR's difficulties, particularly its need for capital and reserves, the loans cited are not sufficient to conclude that AFR could have resolved its difficulties with funds from *market sources*.
- (31) Accordingly, it must be concluded that, at the time the aid was granted, AFR was in serious financial difficulties that threatened its survival in the short or medium term and that it was not in a position to address those difficulties without help from the public authorities.
- (32) The Commission therefore takes the view, in the light of the above observations and, in particular, of the financial results shown in paragraph 8, that AFR was a firm in difficulty within the meaning of point 10 and, in the alternative, of point 11 of the Guidelines at the time the repayable advances were granted. Given the difficulties being experienced by AFR, the Commission considers that AFR would not have been able to obtain funds on such advantageous terms on the credit market. The advances in question thus conferred an advantage on AFR by providing it with finance on more favourable terms than it would have been able to obtain on the credit market.
- #### 5.1.4. Effect on trade and competition
- (33) The repayable advances confer an advantage on AFR in relation to other firms in a similar situation in that they are available only to AFR.
- (34) The railway rolling stock manufacturing sector is characterised by the presence of several European operators and by intra-Community trade. Consequently, the advantage conferred on AFR is likely to distort competition and trade between Member States.
- #### 5.1.5. Conclusion
- (35) In the light of the above observations, the Commission considers that the repayable advances granted to AFR constitute state aid within the meaning of Article 87(1) of the Treaty.
- ### 5.2. Amount of the aid
- (36) In the case of aid granted in the form of loans to firms in difficulty, the aid element is made up of the difference between the interest rate actually applied and the interest rate at which the beneficiary company could have obtained the same loan on the open market ⁽⁶⁾.
- ⁽⁶⁾ See the Commission Decision of 2 March 2005 in *Chemische Werke Piesteritz* (OJ L 296, 12.11.2005, p. 19, points 107 and 108) and the Commission Decision of 24 January 2007 in Case C 38/2005 *Biria* (OJ L 183, 13.7.2007, points 27 and 83 *et seq.*).

- (37) In its notice on the method for setting the reference and discount rates⁽⁵⁾, the Commission states that the reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided) and states that, in such cases, the premium may amount to 400 basis points or more.
- (38) Thus, in *Chemische Werke Piesteritz*⁽⁶⁾, the Commission considered that a loan to a company in difficulty justified an interest premium of 400 basis points. It confirmed this view in *Biria*⁽⁷⁾, stating that the risk constituted by the lack of security justified an additional premium of 400 basis points, i.e. a total increase of 800 basis points. The Commission considers that the circumstances of this case are broadly similar to those of the above-mentioned cases, in particular in relation to the absence of security and the extent of the difficulties encountered. Consequently, the risks associated with the repayable advances granted to AFR may be subject to the same assessment.
- (39) Thus, the State aid constituted by the repayable advances is made up of the difference between the interest actually due under the terms of the repayable advances and the interest that would be due if the reference rate in force at the time the aid was granted, increased by 800 basis points, had been applied.
- 5.3. Compatibility of the aid with the common market**
- (40) Given AFR's economic situation at the time the aid was granted, as described in paragraph 8 (running at a loss for several years, negative capital and reserves, falling turnover), the Commission considers that AFR was a firm in difficulty within the meaning of the Guidelines at the time the repayable advances were granted. For the reasons set out in paragraphs 22 and 23, France's comments do not alter this analysis.
- (41) It is true that in 2005 AFR was part of a group controlled by the holding company Arbel SA. Aside from its railways division (made up of AFR and Lormafer), the group included a construction division made up of firms specialising in the manufacture of windows for the construction industry. However, it is clear from the information supplied by the French authorities in the correspondence exchanged before the initiation of the formal investigation procedure that the difficulties encountered by AFR were specific to it within the group as its activity had no connection with the construction division. Moreover, the Commission notes that AFR's difficulties seem to have been too great for the group to overcome, given its mediocre results. It therefore considers that point 13 of the Guidelines is no obstacle to AFR being considered eligible for rescuing and restructuring aid, despite its being part of a group.
- (42) The compatibility of the aid must therefore be assessed in the light of the Guidelines.
- (43) The Commission observes that the compatibility conditions for restructuring aid laid down in the Guidelines are not fulfilled. Accordingly, it notes that:
- the French authorities did not present it with a restructuring plan consistent with points 34 to 37 of the Guidelines,
 - the Commission was not aware of any compensatory measures designed to prevent any excessive distortion of competition that may be caused by the aid (points 38 to 42 of the Guidelines).
- (44) Nor does the aid appear to fulfil the compatibility conditions for rescue aid provided for by the Guidelines, given that the repayable advances were granted for a period of more than six months (see point 25 of the Guidelines).
- (45) These points suffice for it to be concluded that the aid is not compatible with the common market.

6. CONCLUSION

The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. As the aid is incompatible with the common market, France must bring it to an end and recover from the beneficiary the amounts already paid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France has implemented for Arebel Fauvet Rail SA is incompatible with the common market.

Article 2

1. France shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

⁽⁷⁾ Case C 38/05, cited in footnote 6 (see points 83 to 86).

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the day on which it was at the disposal of the beneficiary until the date of its recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁸⁾.

4. France shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of notification of this decision.

Article 3

1. France shall ensure that this decision is implemented within four months following the date of its notification.

2. France shall inform the Commission, within two months of the date of notification of this decision, of the measures taken to comply with it, and in particular the following:

- (a) the total amount (principal and interest) to be recovered from the beneficiary;

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

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

3. France 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 forward to the Commission, at the latter's request, any information on the measures already taken and planned to comply with this decision, as well as detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 2 April 2008.

For the Commission

Neelie KROES

Member of the Commission

⁽⁸⁾ OJ L 140, 30.4.2004, p. 1.