II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 May 1996

concerning certain measures granted by Italy in favour of Breda Fucine Meridionali SpA

(Only the Italian text is authentic)

(Text with EEA relevance)

(96/614/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 92 and 93 thereof,

Having regard to the Agreement on the European Economic Area, and in particular Articles 61 and 62 thereof,

Having given the interested parties notice to submit their comments, in accordance with the abovementioned provisions,

Whereas:

I

By letter dated 10 March 1995 the Commission informed the Italian Government of its decision to initiate the procedure pursuant to Article 93 (2) of the Treaty in respect of the aid received by Breda Fucine Meridionali (hereinafter referred to as 'BFM').

Following a formal complaint by a competitor of BFM, the Commission, by letter dated 17 October 1994, had asked the Italian authorities for information on the aid allegedly received by BFM.

According to the information received by the Commission:

— BFM was controlled by Finanziaria Ernesto Breda, which in turn was part of the EFIM group, a public holding company which went into liquidation in July 1992,

— Finanziaria Ernesto Breda was compulsorily wound up by a Decree of the Italian Minister for the Treasury of 11 March 1994. According to the Decree, the company was irreversibly insolvent, with liabilities of Lit 803 billion,

— BFM specialized, among other things, in the supply of railway equipment, and in particular steel crossing frogs, the same market as the one on which the firm which lodged the complaint operates. BFM's production of crossing frogs accounted for more than 40 % of its total output,

— BFM was falling into a deplorable financial situation. Information in the Commission's possession suggests that:

  — in 1992 BFM recorded losses had amounted to some Lit 27,6 billion on turnover of Lit 18,5 billion,

  — in 1993 its losses had risen to Lit 36 billion, while turnover had fallen to Lit 13,5 billion,

  — its debts reached Lit 88,7 billion in 1993, compared with share capital of Lit 17 billion, reduced to zero as a result of the firm's losses,

— in the period 1985 to 1994, Finanziaria Ernesto Breda and EFIM bailed out BFM several times by providing recapitalization funds, making good its losses and granting loans,

— BFM succeeded in remaining on the market and avoided being wound up, partly owing to an *ad hoc* provision contained in Article 7 (2) of Decree Law No 487 of 19 December 1992, converted into Law No 33 of 17 February 1993 (hereinafter referred to as 'Law No 33/1993') concerning the winding up of EFIM, which applies only to EFIM-controlled firms.

It is clear from the foregoing why the Commission encountered serious difficulties in determining whether the aid in question, in particular the recapitalization, the writing-off of losses and the loans granted by EFIM and Finanziaria Ernesto Breda, as well as the non-application to BFM of the general rules of the Italian Civil Code concerning the winding up and dissolving of companies, were compatible with the common market. The Commission none the less decided to initiate the procedure pursuant to Article 93 (2) of the EC Treaty in respect of the aid in question.

II

As part of the procedure, the Commission requested the Italian Government to submit its comments, other Member States and interested parties being invited to do so in a notice published in the *Official Journal of the European Communities* [1].

Comments following the initiation of the procedure were received from Manoir Industries SA (Manoir) by letter dated 21 November 1995 and from the German Government by letter dated 6 December 1995. The Commission forwarded the comments to the Italian authorities on 31 January 1996, asking them to send their reply, if any, within 15 days. No reply has been received to date.

In its comments, Manoir, a French competitor of BFM on the market for steel crossing frogs, made the following claims:

— BFM was able to stay in business solely because of the State aid it received, in particular the derogation from Italian Law No 33/1993 on bankruptcy and insolvency,

— from July 1992, BFM was able to suspend all payments to suppliers,

— BFM lost its capital several times, and its own resources are zero,

— BFM had been operating at a loss for several years,

— as a result, competition on the Community market for crossing frogs was severely distorted, with serious repercussions for Manoir which, being a privately owned company, was obliged to compete against BFM with its own, necessarily limited resources.

Manoir claimed, finally, that the aid in question did not qualify for exemption pursuant to Article 92 (3) of the Treaty and accordingly requested the Commission to seek repayment of the aid.

The comments from the German Government, which agrees with the Commission's decision to initiate the procedure, state that the assistance from the Italian Government through EFIM and Finanziaria Ernesto Breda would not have been provided by a private investor in normal market economy conditions, in view of BFM's debts which have only increased with time, and the financial situation of the firm, all of which indicates that the measures constitute State aid.

In its letter of 24 May 1995 the Italian Government, in response to the Commission's decision to initiate the procedure, made the following statements:

— in the period preceding the liquidation of the EFIM group (July 1992), BFM did not benefit from any guarantee scheme or measure,

— while EFIM was being wound up, the receiver paid BFM only the advances needed to pay its workers; as from 1992 and apart from the said advance, BFM did not receive any financing, either from Finanziaria Ernesto Breda or others, and the receiver appointed by the Italian Government to wind up the EFIM group consistently complied with the principle of a private investor in a market economy, without exception, the sole difference being that the liquidation of EFIM was governed by the Italian laws on EFIM,

— in the last few years, BFM's debts grew not as a result of the new loans granted but solely because of the financial charges accruing on previous debts, all the financing being granted at market rates,

— all the financing granted by the parent companies to BFM was essentially intended for productive investments which, at the time, could reasonably be expected to show a profit,

— even if the measures were to be regarded as constituting State aid, they should qualify for exemption pursuant to Article 92 (3) of the Treaty in view of (i) the situation and prospects of the firm, (ii) its sale to third parties, (iii) the location of the firm in the Mezzogiorno, in a region meeting the requirements of Article 92 (3) (a) of the Treaty,

[1] OJ No C 293, 8. 11. 1995, p. 8.

— BFM will become viable: in 1995, apart from its debts and financial charges, it achieved a profit, albeit a small one. It is expected to make a considerable profit in 1996,

— consequently, a negative decision seems unfair as it would entail the winding up of the firm without taking account of the efforts made to restructure it,

— Article 7 (2) of Law No 33/1933, which derogates from Articles 2446 and 2447 of the Civil Code with respect to EFIM, seeks to allow firms in the EFIM group to remain in operation only for the minimum time required to wind up the group.

III

The first task is to identify the Community rules applicable to the case in hand, taking account of the market liable to be adversely affected by the measures in question, namely the market for mangenese steel railway crossing frogs.

Whereas rails are covered by the ECSC Treaty, crossing frogs are covered by Articles 92 and 93 of the Treaty, as the distinction made in Chapter 73 of the combined nomenclature relating to articles of iron or steel (code 7302 30 00 — Switch blades, crossing frogs, point rods and other crossing pieces) makes clear. All BFM's other products are also covered by the EC Treaty.

Article 92 states that, save as otherwise provided for in the 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 is, in so far as it affects trade between Member States, incompatible with the common market.

It is therefore necessary to determine whether the public resources allegedly granted to BFM constitute State aid, whether they affect trade between Member States and, lastly, whether they qualify for exemption pursuant to Article 92 (2) and (3) of the EC Treaty and may therefore, although constituing illegal aid as they were not notified to the Commission, be regarded as compatible with the common market.

IV

According to the case file, BFM which was established in the mid-60's and was never profitable, has incurred heavy losses in the last 10 years, according to the balance sheets in the Commission's possession. Its debts, which exceeded Lit 85 billion at the end of 1994, are currently five times its initial share capital of Lit 17 billion. In just the period from 1990 to 1994, it lost:

— in 1990: Lit 18 billion on turnover of Lit 14,6 billion,

— in 1991: Lit 14 billion on turnover of Lit 18,4 billion,

— in 1992: Lit 27,6 billion on turnover of Lit 19,9 billion,

— in 1993: Lit 36,1 billion on turnover of Lit 14,7 billion,

— in 1994: Lit 13,8 billion on turnover of Lit 20,6 billion.

In the period 1985 to 1994 to BFM received from EFIM and its subsidiary Finanziaria Ernesto Breda:

(a) capital injections of Lit 7 billion in 1986 and Lit 5 billion in 1987;

(b) debt write-offs of Lit 7,1 billion in 1985, Lit 11,2 billion in 1987, Lit 3,9 billion in 1988, Lit 11,6 billion in 1990, Lit 17 billion in 1991;

(c) financing from the parent companies in respect of which BFM currently owes Lit 57 billion to Finanziaria Ernesto Breda and Lit 6 billion to EFIM. In this connection, it should be noted that EFIM, in its letter of 20 February 1996 in which it requests the Commission to authorize the capital conversion of the abovementioned debts, acknowledges that BFM owes some Lit 63 billion to the parent companies.

In the light of the foregoing there are grounds for concluding that, prior to the entry into force in July 1992 of the *ad hoc* provisions referred to below in Chapter V, BFM succeeded in remaining on the market in question thanks to the public measures from which it benefited: on the one hand, the financing and on the other the capital injections and wiping out of losses by the two parent companies.

In order to determine whether the measures in question constitute State aid, the Commission considers (see communication to the Member States of 13 November 1993 [1]) that public enterprises may derive an advantage from being State controlled: this is the case if the State provides public funds in circumstances that go beyond its simple role as proprietor. If any public funds are made available to the public enterprise on more favourable terms than those on which a private investor would provide them to a private firm in the same financial and

[1] OJ No C 307, 13. 11. 1993, p. 3.

competitive position, or are provided by the State to a public enterprise but would not be provided by a private investor to a similar private firm in the same financial position, then the public enterprise is receiving an advantage not available to private enterprises from their proprietors and competition on the common market is distorted. In this respect, it matters little whether the aid to public enterprises is granted direct by the State or indirectly through holding companies or other public enterprises.

Furthermore, the Court of Justice of the European Communities has consistently held, since its judgments in Case C-303/88 (1) and in Case C-305/89 (2) that, in order to determine whether a public measure constitutes State aid, what must be assessed is the difference between the terms on which the funds were made available by the State to the public enterprise in question and the terms which a private investor would find acceptable in providing funds to a comparable private firm, under normal market economy conditions. In its judgment of 3 October 1991 in Case C-261/89, *Italy* v. *Commission* (3), the Court of Justice held that 'the fact that a financial contribution is intended for productive investment does not by itself preclude such a contribution from constituting an aid when, regard being had to the situation of the undertaking, it appears improbable that a private shareholder would have subscribed the capital in question.'

In the case in question, the contested measures, including the alleged grant of aid, the capital contributions and the making good of losses, enjoyed by a firm like BFM, which has never been profitable and which, under normal economic and legal conditions would have already been wound up after losses which wiped out its share capital, cannot be regarded as measures which a private investor operating under normal market economy conditions would have adopted in the normal course of business.

In other words, the measures taken by the public authorities in question constitute State aid inasmuch as, in similar circumstances and according to *id quod plerumque accidit*, a private investor, even one as large as EFIM or Finanziaria Ernesto Breda, would not have injected capital and provided such large-scale financing without requiring a restructuring plan showing a prospect of future viability. The case file, however, does not indicate that any restructuring of BFM was planned, or that this was the aim of the public measures in question.

In fact, it is highly likely that, under normal conditions — if BFM had been a private firm — its owner would long ago have sought a declaration of bankruptcy; it is hard to believe that a private operator would have allowed a firm to remain on the market that had losses exceeding turnover, had no restructuring plan and failed to bring him any financial benefits.

While the behaviour of a private investor which is to be compared with that of a public investor is not necessarily that of an ordinary investor who puts in capital with a view to securing a return in the fairly short term, it should at least be that of an investor who takes action to ensure the survival of a firm which, although experiencing temporary difficulties, will return to profitability. This is not the case with BFM, whose debts are so large as to rule out any prospect of profitability, even in the long term. No private investor operating under normal market economy conditions could, even with a view to the longer term and the future sale of the firm, continue to finance an enterprise in such debt for so long a period.

In view of the foregoing, the Commission concludes that the public measures in question constitute State aid within the meaning of Article 92 of the Treaty.

V

Article 7 (2) of Law No 33/1933 provides for the non-application to members of the EFIM group, which includes BFM, of the mandatory rules contained in Articles 2446 and 2447 of the Italian Civil Code which provide that firms with losses which reduce their share capital to less than the legal minimum (Lit 200 million) must be wound up. BFM managed to remain on the market and avoid being wound up, unlike a private firm in similar circumstances, by virtue of the *ad hoc* derogation from the general system provided for in Article 7. The application of these Articles of the Civil Code to BFM would probably have led to its bankruptcy and disappearance from the market.

This provision, which is not a general but a specific measure intended to benefit a specific firm, constitutes State aid as it enabled BFM to avoid repaying its public debts, its debts to public enterprises, and its debts towards public financial institutions. The provision in question would thus enable BFM to remain in operation without repaying State aid declared incompatible and without being wound up. As a result, this Decision would be deprived of its effectiveness.

(1) [1991] ECR I, p. 1433.
(2) [1991] ECR I, p. 1603.
(3) [1991] ECR I, p. 4437, at paragraph 9.

The special rules, introduced in July 1992, should have been terminated at the end of 1994. However, as in 1995, Italy extended to 1996 by a Ministerial Decree of 24 January 1996 the measure relating to a special scheme for the liquidation of EFIM in respect of several members of the group not yet sold or wound up, in this case BFM. From July 1992, therefore, the Italian Government protected and continues to protect BFM from possible bankruptcy or insolvency, completely altering the original assessment of the liquidation of EFIM, namely as a scheme used for the minimum time needed to sell its companies or wind them up.

It is clear that any extension of this scheme on behalf of BFM, in view of the serious distortions of competition on the common market that are involved, can be justified only for objectively valid reasons. The italian authorities, however, have not given any reasons for extending the special scheme apart from stating that time was needed to find a buyer. It is obvious that this justification is unacceptable as otherwise the Italian authorities could prolong the scheme in question *sine die* for as long as they liked until a purchaser was found.

The impossibility of finding a purchaser for BFM during all this time is further evidence of the deplorable financial situation in which BFM currently finds itself. It is so precarious that it has been impossible to sell the firm within a reasonable period.

Consequently, even the extension in respect of BFM of the effects of the provisions of the Law in question, namely Article 7 (2) of Law No 33/1993, extended by the Decree of 24 January 1996, should be regarded as State aid since, by artifially enabling BFM to remain on the market and hence giving it an edge over its competitors, it distorted competition on the relevant market.

The Commission also notes that the derogation provided for in Law No 33 enabled BFM to:

— benefit from a grant of Lit 2 710 million from the liquidator of EFIM to pay the wages of surplus workers,

— freeze the amount owed to suppliers, totalling Lit 9 941 million,

— suspend repayment of loans totalling Lit 6 609 million granted by the financial establishments Isveimer and IMI,

— suspend interest payments, totalling Lit 4 478 million, to banks from 17 July 1992.

It is clear that the specific measures adopted by Italy in derogation from ordinary law had the sole purpose of maintaining BFM artificially on the market from July 1992, enabling it to operate without meeting its financial obligations towards public enterprises.

VI

Article 92 (1) of the EC Treaty provides that any aid granted by Member States which affects trade between Member States is incompatible with the common market.

The geographical market for railway crossing frogs may be defined as the Community market. All the leading Community producers of crossing frogs are present throughout the Community and tender competitively for contracts awarded by the appropriate bodies in the Member States, thus exporting a large proportion of their output to other Member States.

Furthermore, according to the information available to the Commission, competition is intensified by the huge overcapacity on the market (1).

The Italian authorities have referred to the marginal nature of BFM's exports. In Case C-305/89, the Court stated in this connection that 'where an undertaking operates in a sector in which there is surplus production capacity and producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share and reduces their chances of increasing exports.' (2).

VII

Having concluded that the public measures which benefited BFM constitute State aid and that they adversely affected intra-Community trade, it must be decided whether the aid is compatible with the common market, even though it is unlawful for not having been notified to the Commission.

(1) The market for crossing frogs in Europe continues to suffer from overcapacity. In 1996 total estimated capacity in the Community (Manoir, BFM, Jadot, Jez Amurrio) is 8 400 crossing frogs, whereas maximum demand will probably total only 5 615 units.

(2) Paragraph 26.

Article 92 (2) and (3) refer to several types of aid which are or could be compatible with the common market. Article 92 (2) provides that aid having a social character, granted to individual consumers, and aid to make good the damage caused by natural disasters or exceptional occurrences are compatible with the common market.

That provision is not applicable to the aid in question as it is not aid of a social character granted to individual consumers and is not intended to make good the damage caused by natural disasters.

Among the possibly relevant provisions of Article 92 (3) invoked by the Italian authorities are subparagraphs (a) — aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and (c) — aid to facilitate the development of certain economic activities or of certain economic areas, where it does not adversely affect trading conditions to an extent contrary to the common interest.

As regards Article 92 (3) (a), it is clear that the aid in question was not granted under a public regional programme. Nor do the documents in the case indicate that the aid was granted to create jobs in an assisted area. On the contrary, close scrutiny reveals that the measures were specifically intended to facilitate the industrial survival of BFM, irrespective of the cost.

With regard to Article 92 (3) (c), the Italian authorities state that the measures in question allowed BFM to restructure and hence to return to profitability in the future. The Commission notes that the Italian authorities have not furnished any evidence in support of the claim that the aid was granted in connection with a restructuring plan. Furthermore, even if the public shareholders had considered adopting a restructuring plan, the fact is that any such plan would have been wrong and ill-advised. The documents in the case show that there was never any question of restructuring BFM and that a hypothetical restructuring was not the reason for the State aid grants, the latter having clearly been *ad hoc* measures designed to allow an enterprise to survive without reference to any economic logic or any form of restructuring.

It should also be pointed out that, contrary to the statements of the Italian authorities to the effect that the enteprise is profitable, BFM recorded losses in 1995 amounting to Lit 15 billion on turnover of Lit 28,1 billion; losses totalled Lit 27,6 billion in 1992, Lit 36,1 billion in 1993 and Lit 13,8 billion in 1994. At the same time, the profit-and-loss account, which does not take account of income and financial charges, showed negative balances of Lit 1 994 million in 1995, Lit 4 217 million in 1992, Lit 5 103 million in 1993 and a positive balance of Lit 87 million in 1994. In view of the foregoing, the Commission must conclude that the Italian statements relating to the viability of BFM are unfounded.

Lastly, it is hard to understand how the alleged viability of the firm constitutes, as the Italian authorities claim, a reason on a strictly operational level for the claim that the aid is compatible, without taking account of the financial burden which the firm would normally have to bear.

Nor does it seem compatible with Community law that an enterprise which would have disappeared without the aid grants and the special derogations from Italian law benefits from favourable treatment on the ground that its operating results are improving, and is kept on the market solely by virtue of illegal aid. This line of reasoning would give an illegal advantage to Member States that delay the abolition of aid measures as much as possible.

The Commission consequently concludes that the measures in question do not qualify for exemption pursuant to Article 92 (2) or (3) of the Treaty.

Lastly, the fact that a Commission decision to prohibit illegal aid and require its repayment could entail the liquidation of BFM, as the Italian authorities assert, should be examined in the specific context of the case in question. The BFM case is covered by the liquidation plan submitted to the Commission by EFIM. According to that plan, at the end of a transitional period, firms that have not found buyers will be wound up. Italy has twice extended the special liquidation arrangements, without the authorization of the Commission — on the second occasion by Decree of 24 January 1996.

In view of the failure to find a purchaser, BFM should already have been wound up at the end of 1994, the original date provided for in the law on the liquidation of EFIM. Thus the liquidation of BFM would be a logical consequence of the plan drawn up by the Italian legislator for the liquidation of the EFIM group rather than an excessively inflexible application of the Community rules.

VIII

In view of the foregoing, it must be concluded that the public measures from which BFM benefited, namely:

(a) capital injections amounting to Lit 12 billion, or Lit 7 billion in 1986 and Lit 5 billion in 1987;

(b) making good of losses totalling Lit 50,8 billion, of which Lit 7,1 billion in 1985, Lit 11,2 billion in 1987, Lit 3,9 billion 1988, Lit 11,6 billion in 1990, and Lit 17 billion in 1991;

(c) financing granted to BFM by Finanziaria Ernesto Breda and by EFIM, resulting in a debt towards the two parent companies of Lit 63 billion;

(d) Article 7 (2) of Law No 33/1993, extended by Decree of 24 January 1996, which enabled BFM to halt repayments of public debts and debts to public enterprises, including amounts owed by it to public financial institutions, and to remain operational without repaying State aid declared incompatible and without being wound up;

(e) the provisions of Law No 33/1993 to the extent that they enabled BFM to suspend repayments of loans granted by the public financial institutions Isveimer and IMI totalling Lit 6 609 million;

constitute illegal State aid, in so far as they were not notified to the Commission and are incompatible with the common market, as they do not qualify for any of the exceptions provided for in Article 92 (2) and (3) of the Treaty.

According to the case-law of the Court of Justice, in particular the judgment of 2 February 1989 in Case 94/87, Commission v. Germany, the relevant provisions of national law must be applied in such a way that the recovery required by Community law is not rendered practically impossible (1),

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted to BFM, namely:

(a) the capital contributions totalling Lit 12 billion, consisting of Lit 7 billion in 1986 and Lit 5 billion in 1987;

(b) the making good of losses totalling Lit 50,8 billion, consisting of Lit 7,1 billion in 1985, Lit 11,2 billion in 1987, Lit 3,9 billion in 1988, Lit 11,6 billion in 1990, and Lit 17 billion in 1991;

(c) the financing granted to BFM by Finanziaria Ernesto Breda and by EFIM, the amount owed by BFM to its two parent companies totalling Lit 63 billion;

(d) Article 7 (2) of Law No 33/1993, as extended by the Decree of 24 January 1996, inasmuch as it enabled BFM to postpone repayment of its public debts, its debts to public enterprises and its debts toward public financial institutions, and to remain in business without repaying State aid declared incompatible and without being wound up;

(e) the provisions of Law No 33/1993 inasmuch as they allowed BFM to suspend repayments of loans granted by the public financial institutions Isveimer and IMI totalling Lit 6 609 million;

is illegal as it was not notified in advance to the Commission in accordance with Article 93 (3) of the EC Treaty.

The aid is also incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 2

Italy shall recover the aid paid to BFM in accordance with the provisions of Italian law relating to the recovery of amounts owed to State.

In order to abolish the effects of the aid, interest shall be charged on the amount of aid, as from the date of its award and until the date of its repayment. The rate shall be that used by the Commission to calculate the net grant equivalent of regional aid in the period in question.

Article 3

Italy shall forthwith suspend, with regard to BFM, the application of the provisions relating to the extension of the derogation from ordinary law with regard to the public debts and the debts to public enterprises. Furthermore, Italy shall, solely with regard to BFM, forthwith suspend the application of the provisions relating to the suspension of the repayment of loans granted by the public financial institutions.

Article 4

Italy shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply herewith.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 29 May 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

(1) [1989] ECR, p. 175.