

COMMISSION DECISION

of 14 July 1998

on State aid in favour of Fabricantes Vascos de Herramientas SA (Favahe SA) and its successors*(notified under document number C(1998) 2362)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

(1999/143/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 given the parties concerned the opportunity to submit their comments, in accordance with Article 93,

Whereas:

I

By letter dated 19 November 1996 (SG(96) D/9851), the Commission informed the Spanish Government of its decision to initiate Article 93(2) proceedings against aid in favour of the group Fabricantes Vascos de Herramientas SA (Favahe), a Basque manufacturer of hand tools.

Favahe's headquarters and production plants were located in the Basque Country (Vitoria and Irún), which is an area eligible for regional aid within the meaning of Article 92(3)(c).

The group was created in 1982 with a view to rationalising the supply of various hand tool producers in the Basque Country and adapting it to demand. However, the expected positive results did not materialise. The group undertook various restructuring measures up to 1991, but failed to improve the financial situation. In 1990 the enterprise made losses of ESP 457 million and in 1991 the losses rose to ESP 686 million.

In 1992 a new strategic plan was drafted, envisaging positive results for the group by 1994. The plan included, among other measures, the optimisation of the supply of the various companies in the group, coordination of the companies' administrative structures, the reorganisation and rationalisation of production activities (with each company concentrating on only one sector of the market), and a reduction of the workforce, from 1 153 in 1992 to 714 in 1994.

In order to finance the restructuring measures, Favahe applied for a guarantee from the Basque Autonomous Government under Decree No 628/91, to cover bank loans totalling ESP 825 million, which would be used to implement the restructuring plan.

Decree No 628/91 established an aid scheme under which restructuring aid could be granted to firms located in the region. The aid was to be given in the form of guarantees covering an amount proportionate to the firm's difficulties. By letter dated 28 April 1992, the Commission informed the Spanish authorities that it had decided to raise no objections to the aid scheme, but that the Commission would have to be notified of guarantees given to firms with more than 250 employees.

The guarantee in favour of Favahe was granted in December 1992 for a period of seven years with a two-year grace period. The Spanish Government, however, had failed to notify the granting of the aid, despite the fact that the Favahe companies had more than 250 employees.

Since the restructuring plan did not have the expected results, and the company went on making losses of some ESP 580 million in 1994, Favahe filed for voluntary bankruptcy on 7 April 1995.

The Commission received several complaints regarding possible aid in the context of the bankruptcy procedure. According to the complainants, Favahe's assets had been transferred to a newly created company, Herramientas Eurotools SA, which had several Favahe executives on its Board of Directors. The new firm, Herramientas Eurotools SA, was later acquired by the American multinational Snap-on, which paid ESP 1 200 million to the Basque Regional Government and to the Guipúzcoa and Alava provincial councils. This company marketed hand tools under the brand names originally used by Favahe, namely 'Acesa', 'Irimo' and 'Palmera'.

The Commission considered that the guarantee given by the Basque Government constituted aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement, and that it was unlawful, since in granting it the Spanish Government did not comply with the obligation, imposed by the Commission in its authorisation of 28 April 1992, of notifying the granting of guarantees to firms with more than 250 employees, in accordance with Article 93(3) of the Treaty.

At the time, the Commission had been unable to obtain information from the Spanish Government enabling it to determine whether, after the conditions of the approved scheme had not been satisfied, any action was taken in relation to the aid, and whether the guarantee was mobilised at the time of the firm's bankruptcy. Neither could the Commission, on the basis of the information available, determine the existence of any possible new aid involved in the bankruptcy of Favahe, the creation of Herramientas Eurotools and its acquisition by Snap-on.

The Commission therefore felt that it was necessary to carry out an in-depth analysis, pursuant to Article 93(2) of the Treaty, of the guarantee given to Favahe, and of any possible new aid element that might have been present in subsequent events, in order to determine whether the aid could be considered compatible with the common market, on the basis of the derogations contained in Article 92(3) of the Treaty and Article 61(3) of the EEA Agreement.

II

The letter to the Spanish Government was published in the *Official Journal of the European Communities*⁽¹⁾ and invited the other Member States and interested parties to submit their comments on the measures. The Commission received comments from two of Favahe's competitors (one German, one British) as well as from the Italian and the French hand tool manufacturers' associations. Those comments stated that the aid received by the companies had given them an unfair competitive advantage which helped them to sell their products at lower-than-market prices.

The British competitor considered that Favahe had received aid from the regional authorities which had enabled it to sell its products cheaply and to consolidate its supply on the market. According to this competitor, this had given the acquirer Snap-on, an unfair competitive advantage in comparison with other European and British hand tool manufacturers.

The German competitor mentioned its offer to acquire Herramientas Eurotools, which never obtained an answer.

According to the Italian association Assoutensili (Associazione Nazionale Industrie degli Utensili a Mano e Strumenti di Misura), its members, the leading Italian manufacturers of the same type of products as Favahe, had had to face aggressive competition from Favahe, which was probably due to the aid it had received. The association also mentioned that there had been no invitation to bid for the purchase of Favahe and that a 'selected' purchaser had been able to benefit from a 'favour' which distorted competition.

The French Federation of Mechanical Engineering argued that the creation of Herramientas Eurotools had been an 'artificial' operation aimed at transferring Favahe's assets to Eurotools while the company's tax and social debts were not included in the transfer. Hence Eurotools was able to compete aggressively in various Member States, distorting competition and selling at prices lower than those of the rest of the market.

It also provided information on the prices of various competitors located in several Member States (e.g. Spain, Italy, Germany, France and the United Kingdom), in comparison with Palmera and Acesa prices, as well as the quantities (in tonnes) of various types of 'standard' hand tool exported and imported in 1995 from and to Germany, France, Italy, the United Kingdom and Spain.

III

The Spanish authorities sent their comments on the proceedings by letters dated 24 July 1997, 9 October 1997, 20 October 1997 and 30 October 1997.

In those letters they again emphasised the difficult financial situation that Favahe had had to face in the early 1990s.

The 'Strategic Plan' was drafted in 1992 with the object of resolving that situation. That plan, a copy of which was submitted to the Commission included, among other measures, an overhaul of all production lines, a strategy for improving marketing, the introduction of a total quality system and continuation of the search for a partner to strengthen the group's strategic position in the medium and the long term. On the other hand, however, the plan contained no information on the market situation within the specific industrial sector in which the firm was operating, nor on the foreseeable development of supply and demand on that market on the basis of different scenarios using optimistic, pessimistic and average assumptions.

Favahe did not manage to finance the restructuring on its own, and therefore requested a guarantee from the Basque Government under Decree No 628/91, to cover loans totalling ESP 825 million to finance the implementation of the strategic plan.

⁽¹⁾ OJ C 71, 7. 3. 1997, p. 2.

The Basque Government studied the plan and concluded that it fulfilled the requirement of restoring the viability of the enterprise in the long term, and re-establishing its solvency within a reasonable period. For that reason, it decided to grant the guarantees in December 1992.

As regards the possibility that the aid granted was considered unlawful, the Spanish authorities admitted that they failed to fulfil their obligation to notify the measure, but stated that this was because the strategic plan required the measures to be implemented immediately, as a year had passed since aid had been requested and the plan presented.

The Spanish authorities also acknowledged that the restoration of viability had failed because the market had weakened more than foreseen in the plan, and the overall economic developments since 1991 had had negative effects on Favahe. The group's sales plummeted and losses increased. Subsequently, on 27 April 1995, the courts declared the group bankrupt.

The Spanish authorities then pointed out that Herramientas Eurotools was created before the bankruptcy proceedings and in accordance with normal commercial practice. The companies in the Favahe group contributed some of their assets but also their liabilities of the time to Eurotools' expansion; the company's capital was increased to make up for the difference between the two. All this was reflected in the accounts of the companies in the Favahe group. The charges on the assets were maintained. After the bankruptcy, holdings in Eurotools were included in the bankruptcy assets, just like any other asset, to meet the company's debts.

The courts declared the bankruptcy voluntary (under Spanish law, this happens when the court concludes that no fraud has occurred).

When Favahe's bankruptcy became known, the American company Snap-on expressed its interest in acquiring Eurotools shares which were included in the assets of the bankruptcy as well as any other assets. Snap-on made a bid to the receivers of the various companies to purchase all the shares at a combined price of ESP 1 200 million.

Snap-on also offered to finance the financial reconstruction of Eurotools and the agreement existing with the companies' trade union representatives with the purpose of paying the amounts owing in respect of reduction of the workforce, amounts which in any case have the nature of privileged and preferential debts with an independent right of execution under Spanish law. The additional

financial contributions offered by Snap-on amounted to ESP 1 800 million, bringing its total contribution to some ESP 3 000 million. This reduced the increase in the liabilities of the bankrupt companies, without which it would have been impossible for the creditors, which included the Basque Government itself, to recover anything.

Once the receivers had approved Snap-on's bid, it was submitted to the courts which, after ruling that the bankruptcies had been involuntary, formalised the sale of the shares. In accordance with the applicable legislation, the companies forming part of the group were later dissolved.

As to the existence or otherwise of other definite documented bids presented by other possible buyers apart from Snap-on, the Spanish Government maintains that the shares were sold in accordance with the bankruptcy procedure, with no intervention by the bankrupt companies. At the time, the Favahe receivers told the courts that other companies, in addition to Snap-on, had shown interest. One firm had expressed its initial interest but did not make a definitive offer. Talks also took place with other companies, but they did not end in a definite proposal. Most of these companies wanted to pay only a token price for the assets i.e. ESP 1. The receivers chose the Snap-on offer as the most advantageous.

IV

The Article 93(2) proceedings have clarified Favahe's situation and the circumstances in which the firm received public financial assistance. As regards the measures which gave rise to the initiation of Article 93(2) proceedings, the following conclusions may accordingly be drawn.

- (a) The information provided by the Spanish authorities shows that the bankruptcy took place in accordance with the legislation in force and that the sale of the company's assets was the solution which enabled Favahe's creditors to recover the greatest amount possible. The Basque Government included its debt in the assets of the bankruptcy and recovered the maximum possible under the bankruptcy proceedings. There was no scaling down of debts and a national court ruled that the bankruptcy proceedings were completely lawful and the Basque authorities had received no special treatment.
- (b) The Spanish authorities have given their written assurance that Eurotools received no aid of any kind.

(c) The ESP 825 million guarantee which was granted in 1992 undoubtedly constitutes aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement. The aid element deriving from such a guarantee is generally equal to the difference between the interest rate on a loan raised on normal market terms and the actual interest rate secured by virtue of the guarantee. The Commission has consistently taken the view that whenever, because of an undertaking's severe financial circumstances, no credit institution would be prepared to lend to it without a State guarantee, the whole amount of the loan is to be regarded as aid (see Commission Decision 94/696/EC, Olympic Airways ⁽²⁾).

Since the guarantee was a precondition for the banks' financial involvement in Favahe (they provided the loans to finance its restructuring), it contains an obvious aid element which, because of the very high risk of the guarantee, fully matches the banks' financial involvement.

The aid could distort competition and affect trade between Member States. Goods in the hand tool industry are traded between Spain and other Member States. According to the information provided by Eurostat ⁽³⁾, in 1996 Spain exported 11 262 tonnes of hand tool products worth ECU 10,2 million to other Member States and imported 263 tonnes of hand tools worth ECU 0,9 million. In 1997, Spanish exports rose to 17 345 tonnes worth ECU 14,5 million and imports totalled 277 tonnes worth ECU 0,8 million. Favahe participated in this market, as the third parties' observations demonstrate and as the Spanish authorities admit. Thus, any aid could improve Favahe's position in the common market in comparison with other competitors, which received no State aid of any kind.

The guarantee was awarded unlawfully, as the Spanish Government did not notify that it was being granted despite the fact that the regional scheme under which the guarantees were granted to Favahe in 1992 required individual notification for guarantees to companies with more than 250 employees.

The guarantee cannot be considered compatible with the derogations set out in Article 92(2) and (3) of the Treaty.

⁽²⁾ OJ L 273, 25. 10. 1994, p. 22.

⁽³⁾ Product No 4417; Declarant: Spain.

As regards the possibility that the aid may conform to the derogations in Article 92(2) of the Treaty, it must be pointed out that these do not apply in this case in view of its characteristics and the fact that it does not claim to satisfy the conditions required for these derogations to apply.

It must also be noted that Favahe is not situated in an area eligible for regional aid under Article 92(3)(a) of the Treaty.

Moreover, even though the Favahe headquarters and production plants were located in a declining area within the meaning of Article 92(3)(c) of the Treaty, the objective of the aid was to assist a firm in economic difficulties to continue its activities on the market rather than to facilitate the economic development of a declining area.

Finally, the guarantee does not conform to the derogation provided for in Article 92(3)(c) of the Treaty in relation to the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽⁴⁾.

When Favahe obtained the loan in 1992, it was undoubtedly a firm in difficulties within the meaning of the guidelines (point 2.1), unable to recover through its own resources.

The objective of the guarantee granted by the Basque authorities was to help finance the restructuring plan devised by the group. However, according to point 3.2.2(i) of the guidelines, the *sine qua non* for the approval of such restructuring aid is the existence of a suitable restructuring plan, presented to the Commission, which enables the restoration of viability within a reasonable time-scale and, in particular, on the basis of realistic assumptions as to its future operating conditions. Thus, the restructuring plan must take account of:

- (a) the circumstances giving rise to the firm's difficulties;
- (b) the market situation within the specific industrial sector in which the firm operates;
- (c) the expected development of market supply and demand, comprising different scenarios based on optimistic, pessimistic and average assumptions;
- (d) the specific strengths and weaknesses of the firm.

⁽⁴⁾ OJ C 368, 23. 12. 1994, p. 12.

The Favahe restructuring plan presented to the Commission in particular made no reference to the market situation in the hand tool sector, nor to its development on the basis of different scenarios. If this had been the case, the plan would have had to take account of the steady deterioration in the hand tool market. According to the information available to the Commission⁽⁵⁾, this deterioration consisted in a 10 % fall in annual production in the Community hand tool industry in 1990 and 1994, compared with a 9,1 % increase in annual production from 1985 to 1990.

This economic development in the hand tool market was foreseeable when the restructuring plan was designed in 1992, and thus in the middle of the market's recession. With the short period, in the very near future, on which the plan had to base its assumptions (1992 to 1994), the prospects for an industrial market can be developed fairly accurately.

However, neither the restructuring plan itself nor the Basque authorities, in examining the possibilities of restoring Favahe's viability, took these circumstances in the industry into account.

The Commission, in its turn, and in applying the rules for approving restructuring aid, would have done so if it had had the opportunity of examining the guarantee before it was granted, and would not have approved the proposed guarantee without a detailed analysis of how the firm could survive in a declining market with steadily declining prospects.

In any case, bearing in mind that the Commission would not have approved the restructuring plan and the proposed guarantee in 1992, it could not do so now, in 1998, under the Community guidelines for rescuing and restructuring firms in difficulty.

The Commission must therefore conclude that the ESP 825 million guarantee granted to Favahe does not comply with any of the derogations in Article 92(2) and (3) of the Treaty and that this guarantee is incompatible with the Community rules on State aid.

V

In cases where aid is deemed incompatible with the common market, the Commission requires the Member State to reclaim the aid from the recipient (Commission

communication of 24 November 1983⁽⁶⁾; see also judgments of the Court of Justice of the European Communities in Case 70/72 Commission v. Germany⁽⁷⁾ and Case 310/85 Deufil v. Commission⁽⁸⁾. Since this applies to the measures in favour of Favahe SA which are the subject of the present Decision, the aid must be recovered. Nor does the fact that Favahe SA went bankrupt and disappeared from the market make any difference to this assessment.

The recovery of the aid must take place in accordance with Spanish law, including the rules on interest due for late payment of amounts owing to the State; interest runs from the date on which the aid was granted (Letter from the Commission to the Member States SG(91) D/4577 of 4 March 91; see also Case C-142/87 Belgium v. Commission⁽⁹⁾). In accordance with the case-law of the Court of Justice, the provisions relevant for the recovery of aid are to be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure cannot have any influence on its lawfulness⁽¹⁰⁾,

HAS ADOPTED THIS DECISION:

Article 1

The ESP 825 million guarantee granted by the Basque Government to Fabricantes Vascos de Herramientas SA and its successors is unlawful since it was granted by the Basque Government in breach of the Spanish authorities' obligation to inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid, as set out in Article 93(3) of the Treaty.

In accordance with Article 92(1) of the Treaty, the aid is incompatible with the common market, since it meets none of the conditions under which derogations can be granted contained in Article 92(2) and (3) of the Treaty.

Article 2

Spain shall ensure that the aid referred to in Article 1 is abolished and recovered in full within two months of the date of notification of this Decision.

The aid shall be recovered in accordance with the procedures and provisions of Spanish law, and include interest, from the date on which the aid was granted until the date it is actually repaid, with the rate applied being the reference rate used to calculate the net grant equivalent of regional aid in Spain.

⁽⁶⁾ OJ C 318, 24. 11. 1983, p. 3.

⁽⁷⁾ [1973] ECR 813.

⁽⁸⁾ [1987] ECR 901.

⁽⁹⁾ [1990] ECR I-959.

⁽¹⁰⁾ Cited in note 9, paragraphs 58 to 63.

⁽⁵⁾ *Panorama of EU Industry 1997*, Chapter 12.26.

These provisions shall be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure shall not have any influence on its lawfulness.

Article 3

The Spanish Government shall inform the Commission within two months of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 14 July 1998.

For the Commission

Karel VAN MIERT

Member of the Commission
