JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
15 September 1998 *

In Joined Cases T-126/96 and T-127/96,

Breda Fucine Meridionali SpA (BFM) in liquidation, a company incorporated under Italian law, established in Bari, Italy,

Ente Partecipazioni e Finanziamento Industria Manifatturiera (EFIM) in liquidation, a company incorporated under Italian law, established in Rome,

represented by Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, 36 Place du Grand Sablon, Brussels,

applicants,

v

Commission of the European Communities, represented initially by Paul Nemitz and Lucio Gussetti, of its Legal Service, and Enrico Altieri, a national civil servant on secondment to the Commission, and subsequently by Paul Nemitz and Paolo Stancanelli, also of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

supported by

French Republic, represented by Catherine de Salins, Head of Subdirectorate in the Legal Directorate, Ministry of Foreign Affairs, and Kareen Rispal-Bellanger, Head of Sub-directorate in the same Directorate, Jean-Marc Belorgey and Frédérik Million, *chargés de mission* in the same Directorate, and Gautier Mignot, Foreign Affairs Secretary in the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

and

Manoir Industries SA, a company incorporated under French law, established in Paris, represented by Bernard van de Walle de Ghelcke, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

interveners,

APPLICATION for annulment of Commission Decision 96/614/EC of 29 May 1996 concerning certain measures granted by Italy in favour of Breda Fucine Meridionali SpA (OJ 1996 L 272, p. 46), declaring the State aid granted by the Italian Government to Breda Fucine Meridionali SpA incompatible with the common market and illegal,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of: V. Tiili, President, C. P. Briët, K. Lenaerts, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 26 May 1998,

gives the following

Judgment

Facts

1 Breda Fucine Meridionali (hereinafter 'BFM'), founded in 1961, is a remelt foundry. It specialises *inter alia* in the supply of railway equipment, and in particular crossing frogs. It is established in Bari, in the Italian Mezzogiorno, one of the regions eligible for regional aid under Article 92(3)(a) of the EC Treaty.

2 Until the end of 1986 BFM was controlled by two companies (Oto Melara SpA and Breda Meccanica Bresciana SpA) which, it claims, were active in the defence sector. At the time it made a series of investments *inter alia* in the defence, nuclear and energy sectors. The defendant, however, does not accept that BFM is in the defence sector. Since 1987 BFM has been owned by Finanziaria Ernesto Breda (hereinafter 'FEB'), itself the proprietor of the State holding Ente Partecipazioni e Finanziamento Industria Manifatturiera (hereinafter 'EFIM').

3 By Decree-Law No 340 of 18 July 1992, confirmed by Decree-Law No 362/92 of 14 August 1992, the Italian Government put EFIM into liquidation with effect from that date. The process of winding up was governed by several Decree-Laws, including Decree-Law No 414/92 of 20 October 1992 and Decree-Law No 487/92 of 19 December 1992, which was converted, with certain amendments, into Law No 33/1993 of 17 February 1993. This winding-up procedure was accompanied by aid measures which had not been notified by the Italian authorities. By decision of 23 December 1992, notified to the Italian authorities on 24 February 1993, the Commission therefore initiated the procedure provided for in Article 93(2) of the Treaty in respect *inter alia* of Decree-Laws Nos 362/92 and 414/92 (Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and other parties concerned regarding aid which Italy has decided to grant to EFIM (OJ 1993 C 75, p. 2)). That procedure was extended, by decision of 26 January 1993 notified to the Italian Government on 10 March 1993, to cover Decree-Law No 487/92 (Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties regarding aid which Italy has decided to grant to EFIM (OJ 1993 C 78, p. 4)). EFIM was placed in compulsory liquidation by order of the Italian Treasury Minister of 21 January 1995. That procedure was finally closed by decision of 27 December 1996. FEB, for its part, was placed in compulsory liquidation by decree of the Italian Treasury Minister of 11 March 1994.

4 On 5 October 1994, a French competitor of BFM, Manoir Industries (hereinafter 'Manoir'), lodged a complaint with the Commission concerning the aid given by

the Italian State to BFM. By letter of 17 October 1994 the Commission asked the Italian authorities for information concerning that aid.

5 In the light of the information received, the Commission concluded *inter alia* that from 1985 to 1994 FEB and EFIM rescued BFM several times by providing recapitalisation funds, making good its losses and granting loans, and that BFM had managed to remain on the market and avoid being wound up partly as a result of an ad hoc provision contained in Law No 33/1993.

6 As it encountered serious difficulties in determining whether the measures in question were compatible with the common market, the Commission informed the Italian Government, by letter of 10 March 1995, that it had decided to initiate the procedure provided for in Article 93(2) of the EC Treaty in respect of those measures, and asked that government to submit its observations. The Italian Government gave its views on that letter on 3 May 1995, pointing out that the observations made by the Commission were vague and imprecise in that they did not provide any indication of the amount of aid in question. At the same time it challenged the findings of the Commission.

7 By letter of 12 September 1995 the Commission asked the Italian authorities to forward to it BFM's balance sheets for the years 1985 to 1994.

8 By its notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid granted by the Italian Government to BFM (OJ 1995 C 293, p. 8, hereinafter 'the notice of initiation'), the Commission informed Member States and interested third parties that the procedure had been initiated under that provision.

9 In the sixth paragraph of the notice of initiation, the Commission argues *inter alia* as follows:

'The case file shows BFM to have received LIT 52 billion from EFIM and also that it received from the banks State-guaranteed loans totalling LIT 10 billion. Under the special Law governing the liquidation of EFIM, BFM itself was not liquidated, although liquidation of a parent company normally always entails that of its subsidiaries. A second *ad hoc* provision, contained in Article 7(2) of [Law No 33/1993] and applicable only to EFIM-controlled firms, enabled BFM to remain on the market and avoid being wound up. It derogates from the mandatory rules applicable under Article 2448 of the Italian Civil Code which stipulate that a company is to be dissolved if losses reduce its capital to less than the legal minimum (LIT 200 million).'

10 In the 10th paragraph of the notice of initiation it also observes:

'... BFM has recorded sizeable losses in the last three years and ... its debts are currently five times its share capital. Indeed, there are grounds for believing that it is only thanks to the public measures from which it benefited, i. e. the funding granted by EFIM and [FEB] and the guarantees BFM's suppliers and creditors received from the State, that BFM has been able to remain on the market concerned.'

11 On the basis of the information which it obtained, the Commission assessed BFM's total debts at LIT 88.7 billion for 1993, compared with share capital of LIT 17 billion.

12 Having analysed the situation, the Commission came to the provisional conclusion that 'the measures in favour of BFM adopted by the Italian Government, in particular non-application of general rules on the liquidation and winding-up of companies, the guarantee in respect of BFM's debts, and the measures (in particular in the form of funding and guarantees) adopted by [EFIM] and [FEB], have enabled BFM to remain on the market artificially and must therefore be regarded as State aid which distorts competition on the market concerned' (14th paragraph of the notice of initiation). It further pointed out that it found it difficult to determine 'whether the aid in question, in particular the guarantee given by the State in respect of BFM's debts, the funding and guarantees given to BFM by EFIM and [FEB], the failure to apply to BFM the provisions of the Italian Civil Code regarding the liquidation and winding up of companies, and any other public measure BFM may have benefited from, are compatible with the common market' (18th paragraph of the notice of initiation).

13 The observations sent to the Commission by Manoir and the German Government, by letters of 21 November and 6 November 1995 respectively, were forwarded to the Italian Government by letter of 31 January 1996. The latter did not reply to those observations.

14 A meeting took place on 27 February 1996, at which BFM explained its position to representatives from the Commission's Directorate-General for Competition. They requested an auditor's report on the economic and financial position of BFM giving more details of the information which had been provided. On 4 April 1996 the Italian authorities forwarded the requested report to the Commission.

15 On 29 May 1996 the Commission adopted Decision 96/614/EC concerning certain measures granted by Italy in favour of BFM (OJ 1996 L 272, p. 46, hereinafter 'the contested decision').

16 Article 1 of the contested decision reads as follows:

'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 [FEB] 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.'

17 Article 2 of the decision provides that Italy is required to recover the aid paid to BFM, together with interest to be charged on the amount of aid, as from the date of its award and until the date of its repayment. Finally, under Article 3, Italy is required forthwith to suspend, as regards BFM, the application of the provisions relating to the extension of the derogation from ordinary law relating to the debts due to public authorities and public enterprises and those relating to the suspension of the repayment of loans granted by the public financial institutions.

18 BFM was placed in compulsory liquidation on 21 August 1996. A sale by public auction was held and the property of BFM was released to the purchaser, Finmeccanica, by the liquidator.

Procedure

19 It is against that background that, by applications lodged at the Registry of the Court of First Instance on 12 August 1996, BFM and EFIM brought these actions, registered as Case T-126/96 and Case T-127/96 respectively.

20 By applications lodged at the Registry of the Court of First Instance on 18 December 1996 and 30 January 1997 respectively, Manoir and the French Republic sought leave to intervene in support of the forms of order sought by the defendant in both cases.

21 By fax received by the Registry of the Court of First Instance on 6 February 1997, the Italian Republic sought leave to intervene in support of the forms of order sought by the applicants in both cases.

22 By letters lodged at the Registry of the Court of First Instance on 20 February 1997, the applicants in both cases requested confidential treatment, vis-à-vis the French Republic and Manoir, of certain information on the files.

23 By orders of 11 March 1997, the President of the Court of First Instance rejected the requests for leave to intervene by the Italian Republic on the ground that they were submitted out of time.

24 By orders of 16 July 1997, the President of the Court of First Instance granted the requests by the French Republic and Manoir for leave to intervene in support of the forms of order sought by the defendant in both cases and partially granted the requests by the applicants for confidential treatment.

25 By order of 30 September 1997, having heard the parties, the President of the Court of First Instance decided to join Cases T-126/96 and T-127/96 for the purposes of the oral procedure and the judgment.

26 The intervening parties lodged their statements in intervention on 15 October 1997.

27 By letter lodged at the Registry of the Court of First Instance on 5 December 1997, the Commission declined to submit observations on those statements. The applicants submitted their observations on the statements in intervention on 16 February 1998. The oral procedure was closed on that date.

28 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) opened the oral procedure. The oral arguments of the parties and their replies to the oral questions of the Court of First Instance were heard at the hearing on 26 May 1998. As a measure of organisation of procedure, the Court asked the parties to provide it with certain information.

Forms of order sought

29 BFM claims that the Court should:

— annul the contested decision in full, or in the alternative, in part;

— order the Commission to pay the costs.

30 EFIM claims that the Court should:

— annul the contested decision in full, or in the alternative, in part;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

32 The French Government, intervening in support of the forms of order sought by the Commission, further contends that the Court should reject the second plea of the applicants.

33 Manoir contends that the Court should:

— dismiss the applications as unfounded;

— order the applicants to pay the costs, including those of the intervening parties.

Substance

34 The applicants put forward five pleas in law in support of their claims. The first plea, which falls into two parts, alleges, first, infringement of the procedural rights of the applicants, in that the contested decision declares incompatible with the common market measures not referred to in the notice of initiation, and, second, infringement of the obligation to state reasons. The second plea alleges infringement of the principles of legal certainty and protection of legitimate expectations and failure to respect a five-year limitation period. The third plea alleges infringement of Article 92(1) of the Treaty, in that the Commission did not establish that

the contested measures constituted State aid. The fourth plea alleges an error in the application of Article 92(3)(a) and (c) of the Treaty. The fifth plea, finally, challenges the legality of Article 2 of the contested decision. As the second and fifth pleas essentially raise the issue of the time which elapsed between the granting of the aid in issue and its condemnation by the Commission in the contested decision, they will be considered together.

The first part of the first plea, alleging infringement of procedural rights

Arguments of the parties

35 The applicants observe that the Commission confined itself, in its notice of initiation, to stating that BFM had received LIT 52 billion from EFIM and State-guaranteed loans totalling LIT 10 billion, without making any reference to any other alleged contributions of funds or the dates on which they were alleged to have been made. They submit that the Commission thus did not mention in that notice most of the aid in issue in the contested decision.

36 They argue that in taking issue for the first time in the final decision with aid which it had not previously criticised, the Commission both infringed the right of the applicants to a fair hearing and disregarded the spirit of the procedure provided for in Article 93(2) of the Treaty, the purpose of which is *inter alia* to give the Member State and the businesses concerned the opportunity to air their views.

37 They go on to argue that the prohibition on amending, in the final decision, the complaints formulated in the notice initiating the procedure, or indeed adding new ones, is common to all similar procedures provided for by Community law.

38 The contested decision should therefore be annulled, if only as regards the alleged aid which was not expressly criticised in the notice of initiation.

39 The Commission contends, first, that the complaints relating to the notice of initiation are inadmissible because the applicants did not bring an action challenging this actionable measure ruling definitively on the nature of the aid (see Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117).

40 The Commission points out that it defined the inquiry in the 18th paragraph of the notice of initiation in such a way as to cover all public sector aid from which BFM benefited (see above, paragraph 12 *in fine*).

41 It submits further that, in any event, it made the subject-matter of its inquiry clear by requesting by fax of 1 December 1994 that the liquidator of EFIM produce 'all the evidence necessary to shed light on this matter' and that the Italian authorities provide balance sheets for the last 10 years, and by sending to the Italian authorities a copy of the observations of Manoir and the German Government and by calling upon them for their conclusions on this subject. Moreover, BFM and EFIM knew perfectly well what aid they had received.

42 The applicants reply that an action challenging a notice initiating the procedure provided for in Article 93(2) of the Treaty is permissible only where the Commission has wrongly categorised existing aid as new. As this is not the case here, the complaints regarding the notice of initiation in this action are admissible.

Findings of the Court

43 As regards, first, the admissibility of this plea, it is true that a decision initiating the procedure under Article 93(2) of the Treaty has legal effects and is thus an actionable measure if it involves the designation of the aid as existing or new and a choice of the applicable rules of procedure (*Spain* v *Commission*, cited above, paragraphs 17, 20 and 24). However, it can constitute an actionable measure within the meaning of Article 173 of the Treaty in that event alone. In the judgment in question the Court explained that its review did not concern the Commission's assessment, in the notice of initiation, of the compatibility of the aid with the Treaty (paragraph 10 of the judgment). The plea is therefore admissible.

44 The Court has consistently held that if the initial examination leads the Commission to conclude that aid is incompatible with the Treaty or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2) (see *inter alia* Case C-367/95 P *Commission* v *Sytraval and Others* [1998] ECR I-1719, paragraph 39).

45 Under Article 93(2) of the Treaty, the Commission decides 'after giving notice to the parties concerned to submit their comments'. The Court has held that the sole aim of the notice of initiation is to obtain from persons concerned all information

required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19).

46 It must be acknowledged, at this juncture, that the measures contested in this case were not notified to the Commission before they were put into effect, contrary to the requirements of Article 93(3) of the Treaty. It must be remembered, in that connection, that the purpose of the obligation to notify is to provide the Commission with the opportunity to review, in sufficient time and in the general interest of the Communities, any plan to grant or alter aid (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 17).

47 The argument put forward by the applicants that a measure having exactly the same effects on the legal and financial position of BFM as Article 7(2) of Law No 33/1993, in this case Decree-Law No 414/92, had already been notified to the Commission and tacitly approved by it must be rejected: during the course of the inquiry concerning the aid which Italy had decided to grant to EFIM, the Commission found that the communication by the Italian authorities of a copy of Decree-Law No 414/92 could not be accepted as a valid notification as it did not explicitly mention Article 93(3) of the Treaty and was not presented to the Secretariat-General, and that the measures in question had therefore to be considered as non-notified (see the Commission notice, cited above, Section 1, eighth to tenth paragraphs).

48 Moreover, the Italian authorities failed to provide the information which the Commission asked it for on 17 October 1994 before initiating the procedure under Article 93(2) of the Treaty (see above, paragraph 4). The Commission was thus obliged to rely solely on the information provided by the complainant at this stage.

49 The Court of First Instance takes the view that, under the circumstances and in the absence of any prior notification, the Commission could not, at the stage when the procedure was initiated, have a clear view of the State aid from which BFM benefited. It could not, therefore, be criticised for generally calling in question, in its notice of initiation, as well as Article 7(2) of Law No 33/1993, 'the funding granted by EFIM and [FEB] and the guarantees BFM's suppliers and creditors received from the State' (see above, paragraph 10) and 'the measures (in particular in the form of funding and guarantees) adopted by [EFIM] and [FEB]' (see above, paragraph 12). Moreover, the reference to the recurring nature of the measures (see *inter alia* the 12th paragraph of the notice of intitiation) must have made those concerned aware that the Commission's inquiry covered all the aid which had been given over the previous years.

50 In any event, since Article 7(2) of Law No 33/1993 enabled BFM to postpone repayment of its debts to public enterprises and public financial institutions, the aid referred to in the contested decision (see above, paragraph 16), that is to say, the capital contributions, the making good of losses and the financing granted to BFM by FEB and EFIM, as well as 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, are undeniably of the same nature as the measures called in question in the notice of initiation, as mentioned in the previous paragraph.

51 In the particular circumstances of the case, including, in particular, the failure to notify the aid and the absence of any restructuring plan (paragraphs 46 above and 87 and 88 below), the fact that the exact amount of aid was specified only in the final decision is irrelevant as the establishment of the exact amount was necessary primarily to determine the amounts to be reimbursed. Similarly, as it was only on reading BFM's accounts, produced at the Commission's request during the inquiry, that it was able to ascertain when the measures were taken, the Commission was entitled to specify the years concerned in the final decision.

52 In any event, BFM could certainly not have been unaware of the State aid it received over the years in question.

53 Finally, since the notice of initiation contained a sufficiently informative description of the aid subsequently deemed illegal and incompatible with the common market in the final decision, the Court of First Instance concludes that the notice of initiation duly put those concerned, including BFM and EFIM, on notice that they should submit their observations in good time.

54 It follows that the first part of the first plea must be rejected.

The second part of the first plea, alleging infringement of the obligation to state reasons

Arguments of the parties

55 The applicants submit that the contested decision is vitiated by serious inadequacies in the statement of reasons, particularly as regards the nature of the State aid in question and its compatibility with the common market, which, it is submitted, had a direct effect on the development of the Commission's reasoning and the logical coherence of the decision, with the result that the applicant was unable to ascertain the reasons on which it was based.

56 The Commission considers that this complaint must also be rejected.

Findings of the Court

57 The Community institutions' obligation under Article 190 of the Treaty to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the legality of the decision and the person concerned to know the reasons for the measure adopted so that he can defend his rights and ascertain whether or not the decision is well founded (see, for example, Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 161).

58 Taken overall, the contested decision contains an adequate statement of reasons to justify Article 1 of that decision, according to which the aid in issue is illegal State aid incompatible with the common market. The decision is coherent since the Commission explained adequately that every contribution of funds enabled BFM to remain on the market despite its obvious lack of viability since its creation and despite the fact that its initial capital had long since been absorbed by its losses. Similarly, the Commission explained adequately why it considered the special arrangements to be without justification. Finally, it explained that Community law required the recovery of the aid and thus gave reasons for Articles 2 and 3, which required the effects of the aid to be annulled.

59 In those circumstances, the second part of the first plea cannot be upheld.

60 Accordingly, the first plea must be rejected as unfounded in its entirety.

The second and fifth pleas, alleging respectively infringement of the principles of legal certainty and the protection of legitimate expectations and failure to respect a five-year limitation period and the illegal nature of Article 2 of the contested decision

Arguments of the parties

61 In their second plea, the applicants argue, first, that in extending its review after 1995 to acts and relationships some of which go back to 1985, the Commission has infringed the principles of legal certainty and the protection of legitimate expectations. A decision alleging that measures taken so long ago are illegal and incompatible with the common market is likely to have a serious and unwarranted effect on the certainty of legal and economic relationships. Second, it is submitted, the Commission disregarded a limitation period which, by analogy with that allowed in other areas, should be five years.

62 In the fifth plea, alleging that Article 2 of the contested decision is unlawful, the applicants submit that the requirement in that article to recover the aid paid is likewise contrary to the principles of legal certainty, the protection of legitimate expectations and observance of limitation periods, and to the principles of proportionality and non-discrimination.

63 Accordingly, the applicants take the view that the contested decision should be annulled, if only as regards the aid allegedly granted more than five years before the notice of initiation.

64 The Commission points out that there is no rule establishing a limitation period for its activities in the area of State aid. It submits that the applicants cannot rely on the principles they invoke on this point, either.

65 Recovery of unlawful aid is, moreover, the logical consequence of the finding that the aid concerned is unlawful (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66). More specifically, the restoration of the situation as it was beforehand in pursuance of an order for recovery necessarily also requires interest to be recovered on the sums granted from the date of payment (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 96 to 103).

66 The French Government acknowledges that the requirements of legal certainty and the protection of legitimate expectations may, under certain circumstances, preclude the adoption of a decision that aid is illegal or incompatible with the common market after a certain period has elapsed. In the absence of a limitation period adopted by the Community legislature, it is preferable to consider on a case-by-case basis whether the principle of legal certainty has been respected. The application of that principle should not, in any event, lead those concerned to disregard the provisions of Article 93 of the Treaty. In the present case it takes the view that the applicants cannot rely on a limitation period.

Findings of the Court

67 To date, no limitation period has been established by the Community legislature as regards action by the Commission in respect of non-notified State aid. In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature (see, for example, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 19 and 20; Case 48/69 *ICI* v

Commission [1972] ECR 619, paragraphs 47 and 48, and Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraph 68).

68 Moreover, neither the period prescribed by Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), nor that laid down by Article 43 of the EC Statute of the Court of Justice fixing a period of limitation of five years for actions in non-contractual liability against the Community can be applied by analogy.

69 Second, it should be borne in mind that the measures in issue were not notified to the Commission. As the French Government submitted, save in exceptional circumstances, a recipient cannot have a legitimate expectation that aid was properly granted unless it was granted in accordance with the provisions of Article 93 of the Treaty (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 48). Moreover, a Member State may not benefit in any way from its failure to comply with its obligation to notify under Article 93(3) of the Treaty (*France* v *Commission*, cited above, paragraph 11).

70 On those grounds and because the existence of exceptional circumstances has not been established in this case, these two pleas must be rejected.

The third plea, alleging infringement of Article 92(1) of the Treaty, in that the Commission did not establish the nature of the aid in issue

Arguments of the parties

71 The applicants submit that the measures in issue do not constitute aid within the meaning of Article 92(1) of the Treaty. They represent an investment which a private investor might have made and, at the same time, are justified under the restructuring plan and intended to enable the company to return to viability and be sold under optimum conditions.

72 They criticise the Commission for not having assessed the measures in issue in the light of the situation as it was when they were taken. They submit that if the Commission had taken account of the possible explanation for the aid and the position of BFM at the time the State measures were taken, its decision would have been different and in their favour.

73 On that point, they state, first, that the debt arising from the running costs of the activities developed by BFM in the defence sector prior to 1987 had considerable influence on the results for the following period. Moreover, the measures taken during the period when BFM was active in the defence sector did not fall within Article 92 but within the derogation provided for by Article 223(1)(b) of the Treaty.

74 As for the measures after 1987, they could be explained by the 'group policy' pursued by the parent company, dictated by the desire to safeguard the reputation and credibility of the group and the value of earlier investment. Finally, the arrangements provided for in Article 7(2) of Law No 33/1993 (see above, in particular

paragraph 5) were necessary for the reorganisation and restructuring of BFM and enabled it to become economically viable again.

75 The applicants point out that in its judgment in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 39, the Court held that an operation amounting to 'the settlement of an undertaking's existing debts in order to ensure its survival does not necessarily adversely affect trading conditions to an extent contrary to the common interest, as provided in Article 92(3), where such an operation is, for example, accompanied by a restructuring plan'.

76 They state that BFM adopted a restructuring plan as early as September 1984 and that the process of reorganisation had proceeded according to plan since 1985. In 1988 the company almost broke even. Whilst the upward trend was halted in 1989 because of 'unusual circumstances', since 1992 a new phase of restructuring has led to radical curtailment of capacity and workforce and an expert's report showed a clear improvement in management indicators. BFM was in fact viable, they maintain, when the Commission adopted the contested decision.

77 The Commission considers that this plea is unfounded. It was not notified of any restructuring plan. The addressee of a decision declaring aid incompatible with the common market bears the burden of proving that the measures complained of are for the purpose of solving the structural problems of the company receiving the aid in question. In any event, the duration — more than four years — of the derogations allowed in this case, provided for by Law No 33/1993, was excessively long.

78 It goes on to note that BFM has not recorded any profit since it was set up. Under the circumstances, the conduct of EFIM and FEB with regard to BFM could not be regarded as that of an ordinary investor, even as part of a bid to save the group,

because the company offered no genuine prospect of viability. The arguments of the applicants regarding the causes of the debts are, moreover, wholly irrelevant. There is no moral censure implicit in the Commission's assessment, which is merely intended to ascertain the likelihood of the company's coming to operate successfully in a market economy in the short term, with the help of support measures.

Findings of the Court

79 The Court has consistently held that investment by the public authorities in the capital of an undertaking, in whatever form, may constitute State aid where the conditions set out in Article 92 of the Treaty are fulfilled. In order to determine whether this is the case, it is necessary to consider whether in similar circumstances a private investor might have provided injections of capital of such an amount. The Court has stated in that regard that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term (see *inter alia* Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraphs 20 to 22).

80 The Court has also held that 'a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. ... However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid

within the meaning of Article 92 of the Treaty' (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 21 and 22).

81 Before analysing the present case, it should be noted that the consideration by the Commission of the question as to whether a particular measure may be regarded as aid within the meaning of Article 92(1) of the Treaty where the State had allegedly not acted 'as an ordinary economic agent' involves a complex economic appraisal (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11). It is settled law that the Commission has a discretion when adopting a measure involving such appraisals and that judicial review must be restricted to determining whether the Commission complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based are accurate and whether there was any manifest error of assessment or misuse of powers (*Belgium* v *Commission*, cited above, paragraph 11, and *Air France* v *Commission*, cited above, paragraphs 71 and 72). In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56).

82 The first point to make is that there is no evidence on the file that BFM has registered any profit since it was set up. However, the applicants submit that in 1988 BFM was close to breaking even and that, after a difficult period, there was evidence of a clear improvement in management indicators and that BFM had become viable, structurally sound and capable of producing a profit. The Commission stated in the contested decision, however, without being contradicted by the applicants, that:

— in 1990 BFM's losses amounted to LIT 18 billion on turnover of LIT 14.6 billion,

— in 1991 BFM's losses amounted to LIT 14 billion on turnover of LIT 18.4 billion,

— in 1992 BFM's losses amounted to LIT 27.6 billion on turnover of LIT 19.9 billion,

— in 1993 BFM's losses amounted to LIT 36.1 billion on turnover of LIT 14.7 billion,

— in 1994 BFM's losses amounted to LIT 13.8 billion on turnover of LIT 20.6 billion,

— in 1995 its losses amounted to LIT 15 billion on turnover of LIT 28.1 billion,

— at the end of 1994, BFM's debts exceeded LIT 85 billion and, at the time the contested decision was adopted, represented five times the company's capital of LIT 17 billion.

83 Furthermore, whilst it is true that, as the applicants allege, BFM's accounts were 'adversely affected by extraordinary items inherited from previous management', the fact remains that the corresponding debts must be taken into account in assessing its economic and financial situation, which according to the expert's report they produced themselves was 'undeniably precarious', if no distinction was made between 'ordinary' and 'extraordinary' management. As the Commission pointed out in the contested decision, account must also be taken not only of trading results but also of the financial burdens which the company normally has to bear. On that point, the applicants acknowledged, in their reply to a written question by the Court of First Instance, that the level of BFM's debts and charges was abnormally high and that the 'extraordinary' charges had to be disregarded for the company to be considered viable.

84 Finally, under the circumstances, when exercising the wide discretionary powers it enjoys in such matters the Commission was not obliged to mitigate the negative conclusion which it had reached, by taking into account the few signs and prospects of an improvement to which the applicants refer, since they could be regarded as insignificant, or even artificially created through the establishment of separate accounts for 'ordinary management', in comparison with the general financial and economic situation of BFM at the time the aid was granted (see Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 14, and *Air France* v *Commission*, cited above, paragraph 98).

85 Consequently, the Commission was entitled to conclude that a private investor would not have undertaken the capital contributions made or the other financing measures adopted by the Italian authorities in this case.

86 As the Commission concluded in the contested decision, a private investor contemplating such large-scale financing and recapitalisation as that in this case would have required a restructuring plan capable of making the company viable.

87 The applicants acknowledged at the hearing that there was no real and detailed restructuring plan for the period after 1987.

88 As regards the period before 1987, it is common ground between the parties that the document which the applicants produced at the request of the Court of First Instance, entitled 'Five-Year Plan 1983-1987', was not notified to the Commission under the administrative procedure. The applicants cannot rely in court on a document which was not submitted to the Commission during the pre-litigation procedure, as the legality of a decision concerning aid must be assessed in the light of the information available to the Commission when the decision was adopted (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33). Even if it were possible to take account of this document, it could not, in view of its contents,

have been considered to be a genuine restructuring plan. There is no provision for any particular measure to remedy the specific problems experienced by BFM. The aid from public funds was thus not linked to actual restructuring measures provided for in a programme drawn up for that purpose, those being essential conditions for a plan to be considered to be a restructuring plan.

89 Finally, as regards the argument that the aid granted during the period when BFM was allegedly active in the defence sector, that is to say before 1986, did not fall within Article 92 but within the derogation provided for in Article 223(1)(b) of the Treaty, the Court notes, first, that the Italian State has at no time sought to rely on that article. Moreover, it is clear from the replies of the applicants to the written and oral questions of the Court that none of the aid called in question by the Commission was specifically linked with military projects forming part of the national defence policy. The applicants stated that some of the aid was 'connected with the imbalances' arising from BFM's activities in the defence sector, but acknowledged that it was 'impossible to establish a causal link between the contribution of fresh capital and its destination'. It follows that, even if BFM was active in the defence sector, the aid dating from that period cannot, in any event, be considered as falling within the derogation provided for in Article 223(1)(b) of the Treaty rather than within Article 92.

90 For those reasons, the Commission did not commit a manifest error of assessment in classifying the aid in issue as State aid within the meaning of Article 92(1) of the Treaty.

91 The third plea must accordingly be rejected.

The fourth plea, alleging incorrect application of Article 92(3)(a) and (c) of the Treaty

Arguments of the parties

92 The applicants submit that the Commission infringed Article 92(3)(a) and (c) of the Treaty by failing to make a correct appraisal of either the reorganisation and restructuring measures carried out by BFM, or the fact that the company was located in a particularly disadvantaged region. If the Commission had applied those provisions correctly, the applicants submit, it would have found that the aid in issue was compatible with the common market.

93 In any event, the contested measures should have been considered compatible with the common market because they serve to adapt BFM's structures as part of a programme of restoring the viability of the company, because they concern a company located in an assisted region where priority is given to the maintenance of production and because they concern a small company in respect of which provisions regarding State aid should be applied flexibly.

94 The Commission contends, first, that the exception provided for by Article 92(3)(a) and (c) of the Treaty requires the existence of a genuine restructuring plan, so that the positive effects of the aid on regional development can be of a lasting nature and thereby offset any distortion of competition (Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 36).

95 It points out that in this case there was no restructuring plan and that no derogation was applicable.

96 The intervening party, Manoir, argues further that recurrent aid to an assisted region cannot be considered more favourably than in the case of non-assisted regions. Following restructuring a company should always be economically viable and make a genuine contribution to the development of the region without continually requiring aid.

Findings of the Court

97 Article 92(3) of the Treaty allows the Commission, by way of derogation from the prohibition on State aid affecting trade between Member States and likely to distort competition, to declare compatible with the common market:

'(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

98 As the Commission has observed, in order to be declared compatible with Article 92(3)(c) of the Treaty, aid to undertakings in difficulty must be linked with a restructuring programme designed to reduce or redirect their activities (*Spain* v *Commission*, cited above, paragraph 67). Consequently, State aid granted to an undertaking which is used to offset losses and does not form part of a satisfactory

restructuring programme is of such a nature as to preclude the application to it of the derogation from the prohibition on aid laid down in that provision (Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraphs 26 to 29).

99 Moreover, the applicants could and should reasonably have been aware of the requirement that aid measures should be linked to a restructuring plan. The Commission stressed in its *Eighth Report on Competition Policy* of 1978 (paragraph 228) that it required notification in advance of a restructuring plan in an individual significant case. That rule was confirmed and made more explicit in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), which both expressly require that a viable restructuring/recovery programme be submitted with all relevant detail to the Commission (paragraph 3.2.2.(i)) and that the company fully implement the restructuring plan accepted by the Commission (paragraph 3.2.2.(iv)). The guidelines also provide for the implementation, progress and success of the restructuring plan to be monitored by requiring the submission of detailed annual reports to the Commission (paragraph 3.2.2.(v)).

100 In this case it is common ground that no restructuring plan for BFM was notified to the Commission during the administrative procedure (see above, paragraphs 81 and 82). The possibility of applying Article 92(3)(c) of the Treaty in favour of BFM was, thus, in any event, ruled out.

101 Finally, it should be borne in mind that the derogations from free competition in favour of regional aid under Article 92(3)(a) and (c) are based on the aim of Community solidarity, a fundamental objective of the Treaty, as may be seen from the preamble. In exercising its discretion, the Commission has to ensure that the aims of free competition and Community solidarity are reconciled, whilst complying with the principle of proportionality. In this context, the Commission is under a duty to evaluate the sectoral effects of the planned regional aid, even where regions likely to fall within paragraph 3(a) are concerned, in order to avoid a situation in

which, as a result of an aid measure, a sectoral problem is created at Community level which is more serious than the initial regional problem. Thus, the criterion of viability is relevant even in this analysis (see *AIUFFASS and AKT* v *Commission*, cited above, paragraphs 54 and 120). Furthermore, the Court has stressed that the difference in wording between Article 92(3)(a) and Article 92(3)(c) cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 92(3)(a), and that it must confine itself to verifying the regional specificity of the measures involved without assessing their impact on the relevant market or markets in the Community as a whole (Case C-169/95 *Spain* v *Commission*, cited above, paragraph 17).

102 There is no doubt that BFM is established in one of the regions eligible for regional aid under Article 92(3)(a) of the Treaty. However, there was enormous overcapacity in the sector (see the statement, which has not been challenged, in the contested decision, Section VI). Having regard to the case-law cited above, the Commission has not committed a manifest error in refusing to apply the derogation in question, in the light of the situation on the market together with the fact that the company was obviously not viable. Thus, in the circumstances of the case, in which all the evidence showed that the company receiving illegal aid was only able to remain on the market because of that aid, purported regional considerations under Article 92(3)(a) cannot justify a derogation from the prohibition in principle of aid likely to distort competition. Indeed, such aid cannot be regarded as being 'to promote the economic development' of the region within the meaning of Article 92(3)(a) of the Treaty.

103 Accordingly, the Commission did not commit a manifest error of assessment in taking the view that none of the derogations from the prohibition of aid laid down in Article 92(3)(a) and (c) of the Treaty was applicable in this case.

104 In those circumstances, this plea must also be rejected.

105 As none of the pleas put forward by the applicants can be upheld, the application must be dismissed.

Costs

106 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay jointly and severally the costs of the Commission and of the intervening party, Manoir, in accordance with the forms of order sought by them. Pursuant to the first paragraph of Article 87(4) of those Rules, the French Government is to bear the costs of its own intervention.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Dismisses the applications;

2. Orders the applicants to pay jointly and severally the costs incurred by the Commission and by Manoir Industries SA;

3. Orders the French Republic to pay its own costs.

Tiili Briët Lenaerts

Potocki Cooke

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung V. Tiili

Registrar President