

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 2 May 1990

on aid granted by the Greek Government to a cement manufacturer (Halkis Cement Company)

(Only the Greek text is authentic)

(91/144/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice in accordance with the above Article to interested parties to submit their comments, and having regard to those comments,

Whereas :

I

In the summer of 1988 reports appeared in the Greek press, according to which the Greek Government had decided to grant aid to the Halkis Cement Company, hereinafter referred to as 'Halkis'. The aid would take the form of a conversion of debt into capital on the basis of Decision No 1270 of the Governor of the Bank of Greece dated 1 April 1988, amended by Decision No 1330 dated 14 July 1988.

By letter dated 5 August 1988 the Commission informed the Greek Government that any capitalization of Halkis' debts by public institutions was likely to constitute State aid, which cannot be put into effect without prior notification to and approval by the Commission, in accordance with Article 93 (3) of the EEC Treaty.

The Greek Government replied by letter dated 17 October 1988 that a conversion of Halkis' debts into

capital had not yet taken place. A shareholders' meeting was to take place shortly and this meeting was expected to decide to increase Halkis' capital. The Greek Government did not indicate whether it agreed with the Commission that a conversion of Halkis' debts should be notified pursuant to Article 93 (3).

The Commission thereupon reminded the Greek Government, as well as Halkis, by letters dated 28 November 1988, of the necessity of an early notification of such conversion of debt into capital and of the dangers of aid granted unlawfully, as such aid may be subject to a recovery order.

Halkis replied by letter dated 16 December 1988, stating that its shareholders' meeting had decided on 22 November 1988 to increase the company's capital by Dr 42 300 million; the shareholders' preferential rights to participate in this share issue would expire on 24 December 1988.

No reply or notification was received from the Greek Government.

On the basis of the little information available at the time, the Commission took the view that the transformation into capital of Halkis' debts — or part of these — was likely to constitute State aid, in view of the grave financial situation of this company. The Commission noted that Halkis' net worth had dropped to *minus* Dr 24 512 million by the end of 1987, due to losses sustained every year since 1982. The Commission also

considered that Halkis' increasing debts owed to public enterprises as such constituted State aid, as these companies were apparently showing a leniency towards Halkis, which could no longer be considered to be in conformity with normal market behaviour.

The Commission therefore decided on 3 April 1989 to initiate the procedure provided for in Article 93 (2) of the EEC Treaty and, by letter dated 13 April 1989, gave notice to the Greek Government to submit its observations.

II

The Greek Government submitted its observations under the procedure by letter dated 2 August 1989. It stated that by Decision No 2017 dated 5 April 1989 Halkis was made subject to the provisions of Law 1386/83 which provide for liquidation; liquidation of the company was expected to take place by the end of 1989.

By letter dated 10 October 1989 the Commission reminded the Greek Government that the latter had not yet commented on the alleged aid elements in Halkis' outstanding debts owed to public creditors. Not having received any reply or confirmation that Halkis had been liquidated, as had been envisaged in the letter dated 2 August 1989, the Commission, by letter dated 12 February 1990, requested all necessary information in order to be able to terminate the procedure. This information should notably concern Halkis' liquidation as envisaged in August 1989, its debts to public enterprises, its production, and its exports to other Member States. The Greek Government was also warned that any debt write-off by public creditors, for example in order to facilitate the take-over by other companies, would be likely to constitute State aid, for which the Commission's prior approval is necessary.

Again the Greek Government failed to reply.

In the context of the consultation of other interested parties, five governments of other Member States, four sectoral federations and seven cement manufacturers submitted observations, all of them in support of the Commission's action. These observations were submitted to the Greek Government by letter dated 10 October 1989 inviting its comments. No such comments were received.

III

Whenever public services and authorities show an abnormal leniency towards a certain company in collecting their claims, such action — or rather the lack of it — is likely to constitute State aid.

On the basis of information provided by the Greek Government within the framework of another Article 93 (2) procedure concerning aid granted to Heracles General

Cement Company, the Commission notes that Halkis has been loss-making for several years. Its losses amounted to Dr 5 billion in 1985, Dr 7 billion in 1986, Dr 9,2 billion in 1987 and Dr 11,2 billion in 1988. With a turnover of Dr 8,4 billion in 1985, such heavy losses would normally have forced the company into bankruptcy.

In reality, Halkis was able to continue its operations because its creditors failed to collect their claims. Halkis' long- and short-term debts increased from Dr 23,5 billion in 1985 to Dr 29,4 billion in 1986, to Dr 39 billion in 1987 and to Dr 47,8 billion by the end of 1988.

In its letter dated 13 April 1989, by which the Greek Government was invited to submit its observations within the framework of the procedure, the Commission noted that it was not in possession of a breakdown of Halkis' liabilities. On the basis of the information available at the time, the Commission drew the conclusion that public banks and energy companies were showing a leniency towards Halkis, which was not in conformity with normal market behaviour; consequently Halkis' increasing debts owed to public enterprises constituted State aid.

Despite specific reminders, sent on 10 October 1989 and 12 February 1990, the Greek Government has failed to provide any information on Halkis' debts, or any statement against the Commission's reasoning in its letter dated 13 April 1989.

In the absence of any statement or information to the contrary, the Commission draws the conclusion that its assumption set out in its letter to the Greek Government dated 13 April 1989 was correct, that is to say that public enterprises and agencies such as banks and energy companies have shown a leniency towards Halkis which is not in conformity with normal market behaviour and that Halkis' increasing debts owed to public enterprises constitute State aid. Halkis is allowed to operate under more favourable conditions than its competitors at the cost of — ultimately — the Greek Government.

Furthermore, the plan to transform Halkis' debts into capital must also be considered to constitute State aid, in view of this company's financial difficulties described above.

The fact that Halkis was made subject, by Decision No 2017 of 5 April 1989, to the provisions of Law 1386/83 concerning liquidation, does not alter this appraisal. The more so as this liquidation, which the Greek Government in August 1989 expected to take place by the end of that year, has still not taken place.

Due to a lack of information, the Commission is unable to calculate or estimate the aid element in Halkis' outstanding and increasing debts. Under these circumstances, which stem from the lack of cooperation shown

by the Greek Government, the Commission is nevertheless obliged to close the present procedure by adopting a decision on the basis of the information at its disposal (see the Judgment of the Court of Justice of 10 July 1986 in Case 234/84, (Belgium v. Commission) (1)).

IV

The aids in question are incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty.

Cement is a tradeable goods, although its very low price to weight ratio makes it competitive only at short distances from its production site when transported by land. Consequently, practically all international trade of cement is either cross-border over a small radius, or seaborne in large vessels at much larger distances.

Production of cement in the Community reached 153 million tonnes in 1986, 155 million tonnes in 1987 and 165 million tonnes in 1988. Greek production accounted for 8,6 % of Community production in 1986, 8,4 % in 1987 and 7,8 % in 1988.

Greece exports approximately half of its production of cement, traditionally mainly to countries in the Middle East and Northern Africa. Due, *inter alia*, to increasing local production in their traditional export markets, Greek cement companies have been diverting an increasing portion of their production to other Member States and to the United States of America.

In 1986 Greece exported 7,3 million tonnes to third countries and only 5 524 tonnes to other Member States. In 1987 it exported 6 million tonnes to third countries and 0,5 million tonnes to other Member States. In 1988 Greece exported 4,5 million tonnes to third countries and 1,8 million to other Member States.

Halkis is the third largest Greek manufacturer of cement after Heracles General Cement Company and Titan Cement Company. Halkis' share of sales on the domestic market was 8,8 % in 1985, 9,3 % in 1986, 8,4 % in 1987 and 9,0 % in 1988. Halkis participates in Greek cement exports to other Member States as is shown in several submissions made by other interested parties within the framework of the procedure. As the Greek Government failed to provide the information the Commission requested on Halkis' exports to other Member States, the Commission is unable to give an indication of the size of these exports.

Where financial assistance from the State strengthens the position of certain enterprises compared with that of others competing with them in the Community, it must be deemed to affect those other enterprises.

(1) European Court Reports [1986], p. 2263.

Consequently, the aids which the Greek Government has granted to Halkis or intends to grant to this company affect trade between Member States and distort or threaten to distort competition within the meaning of Article 92 (1) of the EEC Treaty.

V

By not notifying its decision to grant aid as a draft to the Commission, the Greek Government failed to fulfil its obligations pursuant to Article 93 (3) of the EEC Treaty.

In the case of aid granted without prior notification and where such aid is found to be incompatible with the common market, the Commission can require Member States to recover these aids from recipients.

As the Greek Government failed to provide any information within the framework of the procedure on the aid measures or the beneficiary thereof, apart from its decision to make Halkis subject to the liquidation provisions of Law 1386/83, the Commission is obliged to verify, on the basis of the little information it possesses, whether any of the derogations provided for in Article 92 can apply to these aids.

VI

The exceptions to the general incompatibility of aid set out in Article 92 (2) of the EEC Treaty are inapplicable in this case in view of the nature of these aids, which are not directed towards attainment of the objectives of Article 92 (2).

Article 92 (3) of the Treaty lists those aids which may be considered compatible with the common market. Compatibility with the Treaty must be viewed in the context of the Community as a whole and not of that of a single Member State. In order to ensure the proper functioning of the common market and to take into account the principles laid down in Article 3 (f) of the EEC Treaty, the exceptions to the principle of Article 92 (1) set out in paragraph 3 of that Article must be interpreted strictly when any aid scheme or any individual aid award is examined.

In particular, they may be invoked only where the Commission establishes that, without the aid, the free play of market forces would not by itself induce potential recipients to act in such a manner as to contribute to the attainment of one of the objectives sought.

To apply the exceptions to cases which do not contribute to the attainment of such an objective, or where the aid is not essential to that end, would be tantamount to granting undue advantages to the industries or firms of certain Member States, the financial position of which would be bolstered, and might affect trade between Member States and distort competition without this being justified in any way within the meaning of Article 92 (3).

In view of the above, the aids to Halkis do not fall within any of the categories of exception provided for in Article 92 (3).

With regard to the exceptions provided for in Article 92 (3) (a), aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, whilst Greece may be regarded as meeting these definitions, the concept of regional development to which this exception is linked is based essentially on the provision of aid for new investment or expansion or conversion of undertakings involving investments of a physical nature and the costs associated with them. Aid in the form of uncollected claims or transformation of these claims into capital without any restructuring in order to restore Halkis' viability cannot be said to fall within the requirements of this derogation; nor has the Greek Government claimed that this might be the case.

As regards the exception provided for in the first part of Article 92 (3) (b), the aids to Halkis do not promote the execution of an important project of common European interest, nor has the Greek Government claimed that this might be the case.

As regards the application of the second part of Article 92 (3) (b) concerning aid to remedy a serious disturbance in the economy of a Member State, the Commission decided in Decision 88/167/EEC⁽¹⁾ that there was a serious disturbance in the Greek economy given its constantly deteriorating economic situation up to October 1985 and the subsequent austerity programme set up by the Greek Government. The Commission stated that it could regard Law 1386/83 and its operations as an integral part of such a programme. The Commission noted that of the 45 companies in which individual interventions had taken place, 22 had been put into liquidation. Of the remaining 23 the Commission decided that the Greek Government must ensure that all necessary measures of restructuring be taken to ensure the viability of the firms in question.

Regarding Halkis, which was only made subject to Law 1386/83 in April 1989, the Commission notes that the Greek Government has neither liquidated this company nor communicated to the Commission any form of restructuring measures taken. Consequently, the conditions under which Law 1386/83 can be applied are not fulfilled, nor can the aids to Halkis be said to remedy a

serious disturbance in the Greek economy within the meaning of Article 92 (3) (b).

With respect to the exemptions provided for in Article 92 (3) (c), operating aids in the form of claims by public enterprises which are not collected or the transformation of such claims into capital do not facilitate the development of certain economic activities or of certain economic areas. To the contrary, by allowing public enterprises not to collect their claims on Halkis, by letting these claims increase even further or by allowing public enterprises to waive these claims without any restructuring of the company, the Greek Government preserves the status quo regarding Halkis, thus permitting it to postpone necessary adaptations which would have allowed it to compete on equal terms with cement manufacturers in Greece and in other Member States or to postpone its liquidation or bankruptcy.

As is shown in Part IV of this Decision, Greek exports to other Member States have increased markedly over the last years. Within the framework of the procedure, Italian competitors of Halkis noted that this company had increased its exports of cement to Italy from 4 000 tonnes in 1987 to 63 000 tonnes in 1988 and to a probable 200 000 tonnes in 1989. These figures were not rejected by the Greek Government, as it failed to comment on the observations of other interested parties submitted to it by letter dated 10 October 1989 as described above.

The Commission therefore considers that operating aids such as these do adversely affect trading conditions in the Community cement sector to an extent contrary to the common interest. The aids therefore do not meet the conditions set out in Article 92 (3) (c) and are hence incompatible with the common market. This conclusion is not altered by the fact that, without these aids, the company in question would have ceased or would have been forced to cease its activities; the Greek authorities envisage the liquidation of Halkis.

VII

As mentioned in Part V above, the Commission can demand that the beneficiaries of aid refund that aid if it was granted without the Commission's prior approval and where such aid is found to be incompatible with the common market. For the reasons given in Part III, the Commission has been unable to quantify the aid element in Halkis' outstanding debts. It is therefore the duty of the Greek Government, when implementing the measures to comply with this Decision, to determine itself the amount of aid to be abolished on the basis of general business practice.

⁽¹⁾ OJ No L 76, 22. 3. 1988, p. 18.

The amount will thus be equal to the difference between the volume of Halkis' present debts to public enterprises and agencies and the volume of debts such public enterprises and agencies would normally regard acceptable for a company of Halkis' size and creditworthiness. The measures adopted, as well as the calculation of the amount of aid abolished, must be communicated to the Commission within three months to enable it to verify that they are in conformity.

HAS ADOPTED THIS DECISION :

Article 1

The aids awarded by the Greek Government to Halkis Cement Company, by allowing its public enterprises and agencies not to collect their claims on this company and by allowing these claims to increase even further, are illegal, given that they have been awarded in breach of the rules set out in Article 93 (3) of the EEC Treaty. They are furthermore incompatible with the common market, as they do not fulfil the criteria for exemption provided for in Article 92 (2) or (3) of the EEC Treaty and must therefore be abolished.

The Greek Government shall on the other hand refrain from implementing its proposal to grant aid by transforming debts of this company into capital.

Article 2

The Greek Government shall, by recovery, abolish the aid referred to in the first sentence of Article 1.

Article 3

The Greek Government shall inform the Commission within three months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 2 May 1990.

For the Commission

Leon BRITTAN

Vice-President