The Commission opens investigation procedure regarding aid to Polish car producer FSO (ex DAEWOO)

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Background context

The case was notified under the so-called interim mechanism pursuant to Annex IV.3 of the Accession Treaty. This mechanism allows the Commission to assess aid measures 'granted before accession' and 'applicable after accession' and either put them on the existing aid list or open the formal investigation procedure in case of objections. The Commission's preliminary assessment in the FSO case focused in a first step on determining under which of the following three categories the proposed aid measures would fall:

(a) Granted before accession (2) but not applicable after accession (3): These measures, which have already been finally and unconditionally granted for a given amount before accession, cannot be examined by the Commission either under the procedures laid down in Article 88 EC Treaty or under the Accession Treaty (Annex VI.3). Given that the interim mechanism only determines whether a given measure constitutes existing aid for the purpose of State aid procedures taking place after accession, it neither requires nor empowers the Commission to review aid measures which are not applicable after accession.

(b) Granted before accession and applicable after accession: These measures which can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, are subject, if they fulfil the relevant conditions, to a lighter assessment under the interim mechanism provided for in Annex IV.3 of the Accession Treaty and can become 'existing aid' if found compatible with the common market.

(c) Not granted before accession and constituting new aid: The relevant criterion for determining whether this is the case is the legally binding act by which the competent national authorities undertake to grant the aid. Measures not granted before accession constitute new aid and the Commission assesses their compatibility with EC Treaty State aid rules.

The facts

FSO is a large Polish producer of passenger cars and other mechanical vehicles, trailers, spare parts and accessories located in Warsaw and employing more than 3000 people. It has been in difficulties since 2000, when its biggest shareholder Daewoo Motor Corporation Ltd. went bankrupt. Its sales dropped heavily, it had significant losses and its market share in Poland fell from around 30% in 1999 to 2.2% in 2004.

The restructuring plan (end 2003 to end 2006) was based on the assumption that a strategic investor for FSO would be found and was approved by the Polish Office for Competition and Consumers Protection on 31 March 2004. According to the latest information, the Polish government started exclusive negotiations with an investor for the sale of FSO, who purchased already a large amount of FSO's debts from its biggest creditors and presented to the government an investment offer including a revised five-year business plan and a restructuring plan. The plan is focussing on the reduction of manufacturing capacity and on product, technical and technological, financial, employment, organisational, purchasing and management restructuring activities. Financial restructuring measures of private and public liabilities include an under-

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(1) OJ C 100, 26.4.2005, p. 3.
(2) The Commission considers aid to be put into effect before accession when the date of entry into force prior to accession has been unconditionally set, so that no further action is required for the measure's entry into force.
(3) The following types of aid are considered to be 'applicable after':
— Aid schemes on the basis of which aid awards can still be made after the date of accession without further implementing measures being required.
— Aid that is not linked to a specific project and that is awarded before accession to one or several undertakings for an indefinite period of time and/or an indefinite amount.
— Individual aid measures for which the precise economic exposure of the State is not known on the date the aid is granted nor on the date of accession. In these cases, the maximum amount of aid may be capped, but the real liability of the State may still vary. This category of measures covers for example tax measures and (guarantees covering) credit lines with drawing facilities that extend beyond the date of accession.
standing with FSO’s main creditors regarding the restructuring of some of its debts, a settlement agreement with 621 other mainly private creditors and 41 State aid measures such as a guarantee, write-offs, deferrals of payment, division into installments, loans guaranteed by the State Treasury and assistance in the form of subsidies and additional capitalisation. Overall restructuring costs are estimated at around EUR 1.1 billion. According to the Polish authorities, the total amount of the planned State aid is EUR 172.4 million, which corresponds to 15% of the total restructuring costs.

The assessment

On the basis of the information provided, the Commission has found that certain one-off measures (of about EUR 35 million) — in particular deferrals and arrangements into instalments of FSO’s debts deriving from tax and social security payments obligations, a tax waiver on the income of certain banks which had concluded an understanding with FSO, grants to finance the employees severance pay and a capital injection — were granted between 22 January and 30 April 2004 and therefore before accession. These measures are not applicable after accession as the total liability of the State was known at the time when the measure was adopted. The Polish authorities provided copies of the agreements between the relevant public institutions and FSO, of the decisions of the relevant public institutions or of final acts which were legally binding the public authorities to grant a determined amount of aid before accession. These documents included the State aid amounts and all other details concerning the granting of the aid and the final exposure of the public institution. On the basis of this evidence, the Commission decided not to analyse these measures as they neither fall under the interim mechanism nor constitute new aid.

The Commission further found that the remaining measures of about EUR 138 million have not been granted before accession and therefore constitute new State Aid within the meaning of Article 87(1) EC Treaty. The Commission came to this conclusion as the Polish authorities either did not provide evidence as to whether and when the measures were granted claiming that there were only oral agreements or provided only generic or written declarations of the public institutions to the Polish Office for Competition and Consumers Protection, not entailing a legal obligation towards FSO.

The Commission assessed these new aid measures in the light of the 1999 restructuring guidelines (1), applicable at the time of the notification. As the information provided was not sufficient to ascertain whether the acquisition of FSO by the investor was taking place at market value, the Commission did not at this stage exclude that the agreement between the State Treasury and the investor might contain additional aid elements. On the basis of a preliminary assessment of the restructuring plan of FSO, the Commission had doubts that all these measures would be in line with the guidelines and therefore decided to initiate the investigation procedure in respect of the part of the aid measures which seem to constitute new aid (2). The Commission expressed its doubts that the current restructuring plan meets all conditions of the restructuring guidelines and in particular that:

— the investor’s plan sets out the necessary means for restoring the long-term viability, in particular as the planned production of cars in 2005 and in 2006 is lower than the level indicated as the break-even point for profitability;

— undue distortion of competition is avoided as the Polish authorities have not provided sufficient information on the market and on possible compensatory measures;

— the aid is strictly limited to the level necessary for the restructuring of FSO because certain aid measures seem to be more an incentive for the investor than restructuring aid limited to the minimum necessary; and

— the one time — last time principle is respected.

To clarify these doubts, interested parties were requested to comment on these doubts. Poland was requested to provide more detailed information on a number of issues, mainly concerning the events following the bankruptcy of Daewoo Motor Corporation Ltd, the agreements for debt restructuring, the updated restructuring plan, market information and FSO’s production capacity, return to viability and own contribution.

Conclusions

This is the first time that the Commission has opened the formal investigation procedure on State aid measures notified by a new Member State


(2) In order to assess the compatibility of the new restructuring aid measures, the Commission looked at the whole restructuring plan and at all aid measures endorsed by the authorities.
as having been granted before accession, but considered by the Commission as not having been granted yet. Although this case was notified on 30 April 2004 under the interim mechanism, by letter of 6 January 2005 the Polish authorities accepted that the Commission would treat the notification also as a notification under Article 88(3) EC Treaty with regard to any measures which would be found to constitute new aid. This case is of interest for the Commission's in-depth analysis of the moment at which an aid is granted and might constitute a precedent for pending new Member States' cases and for future cases notified by the actual candidate countries.