II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 May 1989

relating to Ministerial Decision No E 3789/128 of the Greek Government establishing a special single tax on undertakings

(Only the Greek text is authentic)

(89/659/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 abovementioned Article to interested parties to submit their comments and having regard to these comments,

Whereas:

I

On learning that the Greek Government was planning to introduce a special single tax on undertakings, the Commission requested the Greek authorities to inform it about the scheme. On 16 May 1988, the Greek Government notified the Commission of Ministerial Decision No E 3789/128 establishing the tax scheme, which had already been in force since 15 March 1988.

The tax in question is calculated of the basis of the net profits earned by undertakings in a 12-month accounting period (i.e. the financial year 1986 which is the period between 1 July 1986 and 30 June 1987), after deduction of the profits corresponding to gross export earnings during the accounting period in question.

The percentage of the tax varies according to the profits earned by the undertaking:

— for the first tranche, up to Dr 500 000 (ECU 2 873): 0%,

— for the second tranche, up to Dr 1 000 000 (ECU 5 747): 5%,

— for the third tranche, up to Dr 2 000 000 (ECU 11 494): 7%,

— for the last tranche, in excess of Dr 2 000 000 (ECU 11 494): 10%.

The tax was payable in eight monthly tranches from May to December 1988.

II

The Ministerial Decision establishing the tax was scrutinized in the light of Article 92 of the Treaty.

After examining the Decision, and taking account of the information supplied by the Greek authorities, the Commission decided to initiate the procedure provided for in Article 93 (2) of the Treaty in respect of the aid elements it contained, chiefly on the ground that it constituted an aid to exports to other Member States that is incompatible with Article 92 (1) of the Treaty and is ineligible for any of the exceptions provided for in paragraphs 2 and 3 of that Article.

By letter dated 5 October 1988, the Commission gave the Greek Government notice to submit its comments.

The Commission informed the other Member States by letter dated 3 January 1989, and other interested parties by a notice in the *Official Journal of the European Communities* (1), of the opening of the procedure.

No further observations were sent by the Greek authorities in response to the opening of the procedure, despite the fact that the Commission, by letter dated 22 November 1988, had extended the deadline for a reply to 5 December 1988. However, observations were received from three Member States, 10 trade associations and four undertakings.

III

The special single tax on undertakings in Greece is a measure which affects undertakings according to their export earnings in as much as they are exempted from the tax in respect of profits made on exports in 1986. Its effects, in respect of the beneficiary undertakings, is equivalent to an export aid, and the exemption in question must therefore be regarded as constituting such aid. The Commission has always considered that aid for exports to other Member States, in so far as it is caught by the prohibition in Article 92 (1) of the Treaty, is incompatible with the common market because it affects trade to an extent contrary to the common interest.

The Greek aid in question directly affects trade between Member States since tax exemption is granted in respect of profits from exports to other Member States.

In 1986, the value of total Greek exports was ECU 5 749 million, of which ECU 3 949 million, i.e. over two-thirds, resulted from export to other Member States. A comparison of exports in relation to production, according to the statistics available, shows a significant number of such exports. Thus in the cement, aluminium processing and cotton sectors, exports represent approximately 50 % of production, with a value in 1986 of about ECU 274 million for cement, ECU 142 million for aluminium and ECU 373 million for cotton.

The aid in question is therefore liable to affect trade between Member States and between Greece and the other Community countries in particular.

As the exemption in question facilitates exports by Greek undertakings to other Member States, it also distorts competition within the common market. By enabling these undertakings to avoid paying part of the tax on their profits, it has the effect of increasing the undertakings' own financial resources. The financial aid thus granted strengthens their position in relation to competitors in other Member States; the competitive position of the latter must be considered to be affected by the aid.

The actual nature of the aid and the reason for its award are in themselves already sufficient reason for arriving at such a conclusion. The Court has also confirmed this point of view in Cases 296/82 and 318/82 Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission (2), where it stated that 'in certain cases the very circumstances in which aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition'.

IV

In view of the above considerations, the exemption in question has the same effect as an aid granted through State resources and favouring certain undertakings and is therefore covered by Article 92 (1) of the Treaty.

However, this Decision does not cover aid granted for production of or trade in certain goods listed in Annex II to the Treaty in respect of which paragraph 1 and the first sentence of paragraph 3 of Article 93 of the Treaty are alone applicable pursuant to Article 4 of Council Regulation No 26 (3).

Article 92 (1) of the Treaty provides that aid meeting the criteria laid down therein is in primciple incompatible with the common market.

The exceptions to this principle provided for in paragraph 2 of that Article are applicable in this case because of the nature of the aid measures, which are not directed towards attainment of such objectives.

Article 92 (3) of the Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in that of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (f) of the Treaty, the exceptions provided for in Article 92 (1) of the Treaty must be construed narrowly when any aid scheme or any individual aid award is scrutinized. In particular, they may be invoked only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to

(1) OJ No C 336, 31. 12. 1988, p. 3.

(2) [1985] ECR, p. 809.

(3) OJ No 30, 20. 4. 1962, p. 993/62.

guide the recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

With regard to the exceptions provided for in Article 92 (3) (a) for aid that promotes the economic development of regions where the standard of living is abnormally low or where there is serious under-employment, Greece may be regarded as meeting these definitions. The Commission, however, approves the award of such aid on condition that it is for new investment, or major expansion or conversion operations requiring massive investment owning to the considerable cost involved.

The aid measure in question cannot be considered to satisfy the conditions for exemption.

As to the first exception provided for in Article 93 (3) (b), it is obvious that the measure in question is not intended to promote the execution of an important project of common European interest.

As regards the second exception provided for in Article 92 (3) (b) which refers to aid intended to remedy a serious disturbance in the economy of a Member State, it should be noted that the Commission has in the past, by Decision 85/594/EEC [1] and 86/614/EEC [2], authorized the Greek authorities, and will continue to do so until 1990, to adopt specific aid measures to offset the very serious balance of payments difficulties and exchange rate pressures. It therefore authorized the award of certain export subsidies for a specific period, pursuant to Article 108 of the Treaty. A Community loan of ECU 1 750 million was also granted to Greece for that purpose.

As the measure in question was not taken within the framework of the above authorizations, it cannot qualify for exemption under the second part of Article 92 (3) (b) of the Treaty.

Lastly, as regards the exception provided for in Article 92 (3) (c), the Commission must first point out that aid for exports to other Member States are, by their very nature, in breach of the fundamental principles of a unified market.

In reaffirming its will to achieve a single market by 1992, the Commission considers that such aids, regardless of their intensity, form, motivation or purpose are liable to jeopardize the objectives of that market to which it attaches the greatest importance.

The Greek measure is not a regional aid and cannot be regarded as an aid to facilitate the development of certain regions within the meaning of Article 92 (3) (c).

It is clear that as the purpose of the Greek aid is general and not specifically directed towards the development of certain activities, and as it has a direct effect on the selling prices of the recipients' products, it does not qualify for the exception in Article 92 (3) (c) for aid to facilitate the development of certains activities as it manifestly adversely affects trade to an extent contrary to the common interest.

The Commission, in accordance with the case law of the Court of Justice, notably its judgments of 12 July 1973 in Case 70/72 [3] and of 24 February 1987 in Case 310/85 [4], can require that incompatible aid be recovered.

In the case in question, the Greek Government should be required to modify the scheme for a special single tax on undertakings' profits establishing by Ministerial Decision No E 3789/128 of 15 March 1988 in order to abolish the tax exemption for the share of profits relating to export earnings, and to recover from firms having already benefited from the exemption the corresponding amount of tax since 15 March 1988,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid — with the exception of aid granted for production of, or trade in, the products listed in Annex II to the EEC Treaty to which the provisions of Article 93 (1) and (3) of the EEC Treaty are alone applicable — granted to exporting undertakings in the form of exemption from a special single tax, established by Ministerial Decision No E 3789/128 of 15 March 1988, on the share of profits corresponding to export earnings is illegal as it was granted in breach of Article 93 (3) of the Treaty; the aid is also incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty.

2. The special single tax scheme must be modified without delay and the incompatible aid referred to in this paragraph 1 abolished.

Article 2

The Greek Government is hereby required to recover from the recipient undertakings the aid referred to in Article 1 granted illegally to them under Ministerial Decision No E 3789/128.

(1) OJ No L 373, 31. 12. 1985, p. 9.
(2) OJ No L 357, 18. 12. 1986, p. 28.
(3) [1973] ECR, p. 813.
(4) [1987] ECR, p. 901.

Recovery shall take the form of payment of the part of the tax which was not levied.

Article 3

The Greek Government shall inform the Commission, within two month of the notification of this Decision, of the measures it has taken to comply therewith and shall forward a detailed report on the amount of the aid and the undertakings concerned by repayments.

Article 4

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 3 May 1989.

For the Commission
Sir Leon BRITTAN
Vice-President