II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 April 1991

on aid granted by the Italian Government to the forestry, pulp, paper and board industry and financed by means of levies on paper, board and cellulose

(Only the Italian text is authentic)

(92/129/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

The Ente nazionale per la cellulose e per la carta (ENCC) is a corporation under public law consisting of all producers of paper and cellulose as well as undertakings using cellulose in Italy. It was founded by Law No 1453 of 13 June 1935.

The ENCC has the statutory task of promoting the development of cellulose production in Italy ; of facilitating the production and use of indigenous raw materials for the production of cellulose ; of organizing the production and sale of paper ; of collecting and providing information concerning the production of cellulose and paper. The ENCC also channels aid linked, *inter alia,* to their consumption of newsprint, to publishers, notably to the press.

The ENCC's activities are financed partly by means of levies charged on home-produced cellulose and on certain types of paper and board, as well as on similar imported products, and partly by means of funds provided directly by the Italian Government and earmarked for publishers.

The conditions on which aid is granted through ENCC have repeatedly been altered. The Commission accepted these alterations only after verifying their compatibility with the common market.

Thus, in November 1974, the Commission closed the procedure provided for in Article 93 (2) in respect of the ENCC's activities after being assured by the Italian Government that aid to consumers of Italian newsprint and newsprint imported by the ENCC would also be granted to publishers who import newsprint directly from other Member States ; that no aid would be granted for publications in languages other than Italian if such publications were to be exported ; that research into paper-making would no longer be financed by the levy on imports from other Member States. In its letter to the Italian Government dated 20 November 1974, the Commission stated that, through these modifications, the aid had become compatible with the provisions in the Treaty concerning State aid.

On 16 June 1976 the Commission adopted Decision 76/574/EEC [1] on a new aid scheme for the press (Law No 172 of 6 June 1975), requiring the Italian Government to publish a notice stating that the aid would be

[1] OJ No L 185, 9. 7. 1976, p. 32.

granted without distinction for paper purchased from the ENCC or imported directly.

In November 1983 the Commission decided to close the Article 93 (2) procedure which it had opened in April 1982 in respect of yet a further aid scheme in favour of publishers operated via the ENCC (Law No 416 of 5 August 1981). The procedure was closed following the Italian Government's statement that aid measures for newsprint production in southern Italy had not been included in the Law and that aid measures in favour of cultural publications were subject to restrictions which would prevent any alteration of trading conditions in the Community to an extent contrary to the common interest.

On 3 May 1989 the Commission adopted Decision 90/215/EEC (1) on aid granted by the Italian Government to the newsprint industry. In its Decision the Commission demanded that this aid be abolished immediately. The Decision was communicated to the Italian Government by letter dated 7 June 1989.

The activities of the ENCC have led to several legal actions that allowed the Court of Justice to rule on the compatibility with the common market of various aspects of these activities : see Judgment 77/72 of 19 June 1973 (Capolongo) (2), Judgment 94/74 of 18 June 1975 (IGAV) (3) and Judgment 74/76 of 22 March 1977 (Ianelli and Volpi) (4).

II

When the Commission was investigating the misuse of aid schemes by the ENCC, which led to Decision 90/215/EEC, it also requested information by letter dated 7 July 1988 on the levies on cellulose, paper and cardboard and the use of the proceeds of these levies by the ENCC.

The Italian Government submitted this information to the Commission by letter dated 24 November 1988. The information enabled the Commission to consider that the aid to the forestry, pulp, paper and board industry and the measures to promote certain activities in the timber industry, including research into paper-making, could still be considered eligible for exemption under Article 92 (3) (c) of the Treaty, were it not that the levies which financed the aid also applied to imports from other Member States. This created additional and unnecessary protection which rendered the aid incompatible with the common market. The Commission furthermore noted that cellulose, paper and board intended for export are exempted from the levy; when paper products are exported, the levy paid on their paper input is refunded. The Commission considered that such exemptions and refunds constitute production aid for exporting companies, which is incompatible with the common market.

By letter dated 14 March 1990, the Commission therefore proposed the following appropriate measures to the Italian Government, pursuant to Article 93 (1):

— goods imported from other Member States should no longer be subject to the levies with which the operations of the ENCC are financed,

— no aid should be awarded to the Italian cellulose, paper and board industry in the form of an exemption from the levy on exports to other Member States of cellulose, paper and board and a refund on exports to other Member States of paper products.

In this letter the Commission also stressed that its position regarding the Italian aid and levies was identical to the one it had previously taken with respect to French aids financed by means of parafiscal levies in the paper, foundry and mechanical engineering industries.

The Italian Government replied to the Commission's proposal by letter of 15 June 1990 containing various legal and economic observations and arguments as to why the measures proposed by the Commission had not been implemented.

The Commission was not convinced by the Italian Government's arguments. It maintained its view that the aid awarded to the Italian cellulose, paper and cardboard industry in the form of an exemption from the levy on exports to other Member States of cellulose, paper and board and a refund on exports to other Member States of paper products is incompatible with the common market. The Commission also maintained its view that ENCC aid, which is financed partly by means of levies on goods imported from other Member States, is for that reason incompatible with the common market. The Commission therefore decided to initiate the procedure provided for in Article 93 (2) of the EEC Treaty. The Italian Government was informed of this decision by letter dated 16 October 1990 and invited to submit its observations (5).

(1) OJ No L 114, 5. 5. 1990, p. 25.
(2) [1973] ECR 611.
(3) [1975] ECR 699.
(4) [1977] ECR 557.

(5) This procedure does not concern the exceptional assistance granted by the ENCC to Nuova cartiera di arbatax, which is the subject of a separate investigation.

The Italian Government submitted its observations by telex on 21 November 1990 and 14 January 1991, and by letters dated 8 February 1991 and 13 April 1991. The matter was also discussed at bilateral meetings on 26 November 1990 and 17 February 1991.

The Italian Government did not contest the Commission's appraisal, and even communicated its intention to reform the ENCC and to phase out the levies with which its activities are financed. A draft law to that effect was endorsed by the Italian Government on 10 January 1991 for presentation to Parliament. It provided for a transitional period ending on 1 January 1994 for the abolition of the aid in question.

In response to the Commission's concern as to the duration of the transitional period, the Italian authorities proposed, by letter dated 13 April 1991, to reduce it by 12 months, with 31 December 1992 as the deadline. In the opinion of the authorities, the transitional period is necessary to allow the adoption of laws modifying the existing scheme.

No observations were received from other interested parties further to the publication of the Commission's letter to the Italian Government dated 16 October 1990 in the *Official Journal of the European Communities*(1).

III

The use of public funds in a Member State to finance an agency which promotes the development of cellulose production there, facilitates the production and use of indigenous materials for the domestic cellulose, paper and board industry and which provides information and advice to that industry, constitutes State aid to the manufacturers of cellulose, paper and board in that Member State. Public funds include the proceeds of levies, when these are instituted by law.

Where a Member State charges levies on home-produced cellulose and on certain types of paper and board, as well as on similar imported products, and where this Member State exempts from these levies cellulose, paper and board intended for export or refunds the levies on the paper input of paper products when these products are exported, such exemptions or refunds constitute State aid to exporting companies in the cellulose, paper, board and paper products industries.

Consequently, the Italian Government grants aid to the domestic cellulose, paper and board industry by financing the activities of the ENCC. It also grants aid to exporting companies in these industries and in the paper products industry by granting exemption from and refunds of the levy on cellulose, paper and board.

In order to quantify the aid, it should be noted that, according to the information provided by the Italian Government, the levies amount to Lit 1/kg for cellulose and 3 % for paper and board. In 1987, the last year for which the Commission has the annual report of the ENCC, the levies on cellulose, paper and board amounted to Lit 140 billion (ECU 93 million), this being the sum of the following elements : levy on domestic cellulose : Lit 74 million ; levy on imported cellulose : Lit 1 776 million ; levy on domestic paper and board : Lit 91 724 million ; levy on imported paper and board, Lit 45 949 million.

As for the export aid in the form of exemptions and refunds, the Commission estimated in its letter dated 14 March 1990 that these amounted to between Lit 15 billion and Lit 20 billion a year. The Italian Government did not contest this estimate in its reply dated 15 June 1990 or in its observations submitted in the course of the procedure. In its letter the Italian Government did, however, claim that the Commission had recognized in 1974 that aid to forestry and paper-making research did not fulfil the conditions set out in Article 92 (1) of the Treaty. The Commission replied to this statement by letter dated 16 October 1990, explaining why it could not subscribe to the Italian Government's interpretation. The Commission's point of view in 1974, laid down in its letter to the Italian Government dated 20 November 1974, excluded only the aid to the press from the general incompatibility criterion set out in Article 92 (1), and not the other aid granted by the ENCC. The Italian Government did not return to this subject in its observations within the framework of the Article 93 (2) procedure.

There is competition between manufacturers of paper, board and pulp in the Community and there is trade in these products between Member States, even though the Community as a whole is a net importer of pulp and most types of paper and board.

In 1986, Italy imported 606 200 tonnes of paper and board from other Member States and 984 600 tonnes from third countries ; in 1987, these figures were 715 000 and 1 169 000 tonnes, in 1988, 774 000 and 1 244 000 tonnes, and in 1989, 892 700 and 1 436 800 tonnes. In these four years total Italian imports of paper and board represented around one third of domestic consumption of these products.

(1) OJ No C 304, 4. 12. 1990, p. 3.

Total intra-Community trade in paper and board amounted to 6 663 700 tonnes in 1986, 7 250 700 tonnes in 1987, 8 559 200 tonnes in 1988 and 9 388 500 tonnes in 1989. In these years imports from third countries rose from 12 441 700 tonnes in 1986 to 13 221 600 tonnes in 1987, 14 428 300 tonnes in 1988 and 15 246 100 tonnes in 1989.

Italy exported 575 600 tonnes of paper and board to other Member States and 247 400 tonnes to third countries in 1986, 617 000 tonnes to other Member States and 262 000 tonnes to third countries in 1987, 801 900 to other Member States and 313 400 tonnes to third countries in 1988 and 862 300 tonnes to other Member States and 293 900 tonnes to third countries in 1989.

There is less trade in pulp than in paper and board, given that part of pulp production takes place in integrated companies for their own production of paper and board.

In 1986, Italy imported 355 800 tonnes of pulp from other Member States and 1 479 100 tonnes from third countries; in 1987, it imported 403 000 tonnes from other Member States and 1 696 000 tonnes from third countries; in 1988, it imported 433 600 tonnes from other Member States and 1 812 600 tonnes from third countries; in 1989, it imported 376 000 tonnes from other Member States and 1 735 100 tonnes from third countries. In these four years total Italian imports of pulp represented some 75 % of domestic consumption of pulp in paper-making.

Total intra-Community trade in pulp amounted to 1 891 100 tonnes in 1986, 1 963 900 tonnes in 1987, 2 139 900 tonnes in 1988 and 2 064 700 tonnes in 1989. In these years imports from third countries rose from 8 282 900 tonnes in 1986 to 8 670 900 tonnes in 1987, 8 793 100 tonnes in 1988 and 8 934 900 tonnes in 1989.

Italy exported only 33 900 tonnes of pulp to other Member States and 17 800 tonnes to third countries in 1986; it exported 27 000 tonnes to other Member States and 15 000 tonnes to third countries in 1987; it exported 37 100 tonnes to other Member States and 21 900 tonnes to third countries in 1988, and it exported 42 500 tonnes to other Member States and 24 500 tonnes to third countries in 1989.

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

Consequently, the aid which the Italian Government grants to domestic manufacturers and exporters of cellulose, paper, board and paper products affects trade between Member States and distorts or threatens to distort competition within the meaning of Article 92 (1) of the Treaty.

IV

Article 92 (1) provides that, in principle, any aid fulfilling the criteria set out therein is incompatible with the common market.

The exceptions to this principle, set out in Article 92 (2) of the Treaty, are inapplicable in this case in view of the nature and objectives of the proposed aid.

Article 92 (3) of the Treaty lists the aid 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 in that of a single Member State. In order to ensure the proper functioning of the common market and taking into account the principles laid down in Article 3 (f) of the 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 applied only where the Commission establishes that, without the aid, market forces alone would be insufficient to 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 whose financial position would be bolstered and might affect trade between Member States and distort competition without this being justified in any way by the common interest within the meaning of Article 92 (3) of the EEC Treaty.

With regard to the exceptions provided for in Article 92 (3) (a) and (c) for aid that promotes or facilitates the development of certain areas, the Italian Government has been unable to give, or the Commission to discover, any regional consideration in the award of the aid to the Italian cellulose, paper and board industry and the aid to exporting companies in the industry and in the paper products industry.

As regards the exceptions provided for in Article 92 (3) (b), the aid to the Italian cellulose, paper, board and paper products industry is intended neither to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the Italian economy; neither has the Italian Government advanced any arguments in favour of a possible application of these exceptions.

As regards the exceptions provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, a distinction must be made between ENCC expenditure on afforestation and collective activities in the domestic cellulose, paper and board industry, on the one hand, and exemption from and refunding of export levies, on the other.

The Commission considers that the latter type of aid does not facilitate the development of the cellulose, paper board and paper products industry and that it adversely affects trading conditions to an extent contrary to the common interest, whenever exports to other Member States are concerned. It is the Commission's well-established policy to consider that aid for exports to other Member States is by its very nature ineligible for one of the exemptions in Article 92. This aid must, therefore, be abolished without delay.

As regards the compatibility of this type of aid with the common market when it is applied to exports to third countries, the Commission informed the Italian Government, by letter dated 16 October 1990, that it was examining aid schemes in all Member States in support of exports to third countries. The results of this work will be discussed in due course with all Member States in order to assess the compatibility of such schemes with Article 92.

By contrast, aid to afforestation and collective activities in the cellulose, paper and board industry can well be said to facilitate the development of the industry. In this connection, the Commission also considers that aid to such activities that are relatively far from the market is unlikely to adversely affect trading conditions to an extent contrary to the common interest. This aid can, therefore, be considered compatible with the common market, when viewed in isolation from the way it is financed.

V

According to the judgment of the Court of Justice on 26 June 1970 in Case 47/69 Government of the French Republic v. Commission (1), the fact that aid is financed by means of an obligatory levy constitutes an essential element of the aid; when the compatibility of such aid is assessed, the aid, as well as the way it is financed, must be examined with respect to Community law.

Consequently, even if the aid to afforestation and collective activities in the cellulose, paper and board industry were compatible as regards its form and objective, the fact that they are financed partly by levies on products imported from other Member States has an additional and unnecessary protective effect which exceeds that of the aid itself.

The Commission considers that, taking into account the ruling of the Court in Case 47/69, the more Community undertakings succeed in increasing sales of cellulose, paper and board in Italy by marketing efforts and by price-cutting, the more they have to contribute under the system of levies to the ENCC and, consequently, to aid essentially intended for Italian competitors who have not made such efforts.

In this context, the Commission notes that intra-Community trade in paper and board has increased in the last 10 years. According to statistics published by the European Confederation of Pulp, Paper and Board Industries (Cepac), intra-Community imports represented 12,5 % of apparent consumption of paper and board in the Community in 1980; this percentage gradually increased to 15,1 % in 1984 and to 19,3 % in 1989. In Italy, imports from other Member States represented only 5 % of apparent consumption of paper and board in 1980; this rose to 9,1 % in 1984 and to 13,3 % in 1989.

Intra-Community trade in pulp has increased as well, mainly on account of the accession of Portugal and Spain. Intra-Community imports of pulp represented only 3,3 % of apparent consumption in the Community in 1980; this percentage increased to 4 % in 1984 and to 11,8 % in 1989. In Italy, imports from other Member States represented 5,2 % of apparent domestic consumption of pulp in 1980; this percentage increased to 7,4 % in 1984 and to 14,8 % in 1989.

Accordingly, the Commission considers that aid to the cellulose, paper and board industry partly financed by levies on imports from other Member States cannot be considered compatible with the common market. As the Commission explained in its letter dated 14 March 1990 (see point II), this appraisal cannot be altered by the Italian Government's commitment in 1974 not to use the proceeds of the levy on imports from other Member States to assist research in the paper industry for two reasons. Firstly, because the activities in the timber industry as described in the ENCC's statute are linked to each other and cannot be separated artificially. Secondly, because the ENCC can easily switch funds from one activity to another, and this commitment consequently has no real significance. Neither in its reply to this letter, nor in its observations within the framework of the procedure laid down in Article 93 (2) of the Treaty, did the Italian Government contest these two reasons.

In its letter dated 15 June 1990 (see point III), the Italian Government did claim that ENCC's activities were of interest to pulp and paper manufacturers in other Member States as well. It also claimed that the bulk of the levy was, in reality, passed on to the consumer. It finally claimed that abolishing the levy on imports from other Member States would create disproportionate damage compared to the objective pursued.

(1) [1970] ECR 487.

In its reply dated 16 October 1990, the Commission rejected these claims. It notably pointed out that, already in its judgment in Case 47/69, the Court of Justice had discarded the argument of accessibility of the aided activities to foreign undertakings. Such accessibility is not the same thing as effective participation, as the aided activities are based on national targets, specializations and needs. The Commission also noted that the Italian Government's view that the levy is, in reality, passed on to the consumer had also been put by the French Government in Case 47/69, to no avail. The Commission finally disagreed that the effects of its proposals would create disproportionate damage compared to the objective pursued; painful adjustments in ENCC's activities would clearly by outweighed by the elimination of aid which is incompatible with the common market when seen from a Community point of view.

The Italian authorities finally agreed with this assessment and, within the framework of the procedure, informed the Commission of the draft law that had been presented to Parliament with a view to transforming ENCC into the Ente nazionale per la forestazione ed il recupero della carta (Enfor). Article 15 of the draft law provides for the phasing-out by 1 January 1994 of the levies with which the activities of ENCC and Enfor are financed. In the letter dated 14 April 1991, however, this deadline was brought forward to 31 December 1992 in order to allow the existing scheme to be amended by legislation. The aid to be abolished also includes the exemption from and refund of the levies on exports of pulp, paper and board.

By virtue of the powers conferred on it by the first subparagraph of Article 93 (2), the Commission considers that the deadline of 31 December 1992 is too long and cannot be justified; it also considers that a distinction should be made between aid that is incompatible under the case-law resulting from the judgment in Case 47/69, referred to above, and aid for the export of certain products to other Member States. On the basis of the criteria hitherto applied for the application of Articles 92 and 93 (2), the Commission considers that, for aid in the first category, a transitional period of 12 months from the date of adoption of this Decision may be envisaged. On the other hand, the export aid should, given its direct and immediate impact on trade between Member States and on the conditions of competition, be abolished without delay, i.e. within the two months Member States are usually given to comply with decisions on State aid.

These arrangements should give the Italian authorities reasonable time to comply with the Commission decision since they need only instruct the competent departments (e.g. by circular or any other form of internal memo) to refrain from granting the aid in question as from the dates stipulated in this Decision.

It should be borne in mind here that, even if the appropriate measures proposed by the Commission in March 1990 have the force only of recommendations, the Italian authorities have, nevertheless, already had 11 months in which to bring their legislation into line with the appropriate measures.

Secondly, it should be stressed that Commission decisions pursuant to Article 93 (2) are directly applicable [1] and that their implementation does not, therefore, necessitate any legislative measures on the part of the Member States. Such decisions take precedence over national provisions that might conflict with the obligations arising out of such decisions. Since the obligation to abolish the aid referred to in this Decision within the periods stipulated is clear and unconditional, the Decision must have full effect in the Italian legal system [2] without it being necessary to modify the scheme through legislative channels. Furthermore, according to a judgment of the Court, administrative authorities, including municipal or regional authorities, are under the same obligation as national courts to apply Community provisions in the place of any conflicting national provisions [3]. That being so, if the Italian Republic were to consider it expedient to modify the aid scheme in question through legislative channels (as regards the incompatible aid) solely in order to satisfy the need for additional legal certainty, it must bear in mind the rule that a Member State cannot rely on procedures, practices or provisions of its national legal system for the purpose of justifying a failure to comply with Community obligations [4] such as those resulting from a decision on State aid pursuant to Article 93 (2) of the Treaty [5].

The first sentence of Article 93 (2) of the Treaty provides that, where the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, it must decide that the State concerned has to abolish or alter

(1) Judgment of 19 June 1973 in Case 77/72 Capolongo [1973] ECR 611.

(2) See, *inter alia*, judgment of 6 February 1963 in Case 26/62 Van Gend en Loos [1963] ECR 1, and Judgment of 9 March 1978 in Case 106/77 Simmenthal [1978] ECR 629.

(3) Judgment of 22 June 1989 in Case 103/88 Costanzo [1989] ECR 1839.

(4) See, *inter alia*, judgment of 11 April 1978 in Case 100/77 Commission v. Italian Republic [1978] ECR 879, judgment of 2 February 1982 in Case 71/81 Commission v. Kingdom of Belgium [1982] ECR 175, and judgment of 21 February 1990 in Case C-79/89 Commission v. Kingdom of Belgium [1990] ECR 491.

(5) The Commission adopted the same approach in its Decision of 21 February 1990 on German aid schemes for the motor vehicle industry (OJ No L 188, 20. 7. 1990, p. 55).

such aid within a period of time to be determined by the Commission. In the present case, it considers that the aid granted to exports to other Member States must be abolished without delay. As regards the aid to ENCC financed out of a levy on imports from other Member States, the Commission considers a period of one year to be reasonable and quite sufficient for the Italian Government to modify its system of levies,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by Italy to the Italian cellulose, paper, board and paper products industry in the form of an exemption from or a refund of the levies imposed on exports to other Member States and used to finance activities of the ENCC is incompatible with the common market. The aid shall be abolished within the shortest possible time, and not later than two months after the date of notification of this Decision.

Article 2

The aid which Italy grants to the Italian cellulose, paper and board industry by financing the activities of the ENCC is incompatible with the common market, in so far as these activities are financed partly out of the proceeds of levies on cellulose, paper and board imported from other Member States. The levies on imported products shall, therefore, be abolished by 24 April 1992 at the latest.

Article 3

Italy shall inform the Commission within two months from the date of notification of this Decision on the steps taken to comply herewith.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 April 1991.

For the Commission

Leon BRITTAN

Vice-President