II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 July 1990

concerning the State aid provided in for in Decree-Laws No 174 of 15 May 1989 and No 254 of 13 July 1989 and in draft Law No 4230 regularizing the effects produced by the abovementioned Decree-Laws

(Only the Italian text is authentic)

(92/389/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 the interested parties the opportunity to submit their comments pursuant to Article 93 and having regard to those comments,

Whereas :

I

By letter dated 23 December 1988, the Italian Government notified the Commission of draft Law No 3435 on tax measures to promote the reorganization of manufacturing industry.

The Commission requested the Italian authorities by letter dated 1 March 1989 for further information required for the assessment of the draft Law.

By letter dated 20 April 1989, the Italian Government replied in part to the questions.

By letter dated 26 May 1989, the Italian Government sent the Commission the text of Decree-Law No 174, published in the *Gazzetta Ufficiale della Repubblica Italiana* of 15 May 1989. By telex massage dated 14 June 1989, the Office of the Italian Permanent Representative answered the questions posed by the Commission which had not been answered before.

Decree-Law No 174 provided that the transfer to existing companies or companies to be created of businesses, business units relating to various branches of a company, and other depreciable tangible and intangible assets, as well as of shares and other participating interests, carried out by companies in existence at the time of the entry into force of this Decree is to be subject until 31 December 1990 to the system whereby 75 % of the difference between the value of the shares and other participating interests received and the final value of the assests transferred does not form part of the taxable income of the transferring company, provided that it is entered in the balance sheet and clearly shown under a separate heading or in the appropriate notes, until such time as it is realized, distributed to shareholders, used to increase capital or to cover operating losses, while the balance forms part of taxable income either, at the choice of the transferor, for the entire year in which the transaction takes place or in regular instalments in the same year or over the next four years.

Transfers must contribute to the in-depth restructuring of national industry and to the development of industrial production. The CIPE (Interministerial Economic Planning Committee) determines whether transfers satisfy those requirements. The increase in the capital of the company or the capital of the existing company to be set up must exceed Lit 50 000 million.

On 13 July 1989 the Italian Government adopted Decree-Law No 254, which is identical in content to Decree-Law No 174 and was published in the *Gazzetta Ufficiale* of 15 July 1989.

The measures in question constitute a derogation from the general principle of the Italian tax system whereby transfers are subject in full to taxation of the amount of value added.

The Italian measure, furthermore, is not intended as a permanent modification of the Italian tax system as it is limited to operations carried out by 31 December 1990, provided that the increase in the capital of the existing or the capital of the company to be set up exceeds LIT 50 000 million and that the CIPE has determined that the transfers comply with the requirements of the Decree-Law.

II

The Commission, having examined the information received in accordance with the case-law of the Court of Justice (Judgment of 20 March 1984 in Case 84/82 [1]), which requires it to initiate the Article 93 (2) procedure if it has doubts, after a preliminary examination, as to the compatibility of the proposed measure with the common market, initiated the procedure provided for in Article 93 (2) in respect of Decree-Law No 174. It had reason to believe that the tax measures provided for in the Law would be applied only to a very small number of firms, and perhaps only to Montedison for the Enimont operation.

It informed the Italian Government of its decision by letter dated 7 August 1989. The decision was published in the *Official Journal of the European Communities* [2]. In the decision, the Commission also asked the other Member States and interested parties to submit their comments on the measures in question.

By telex message dated 12 September 1989, the Italian Government informed the Commission that it had decided to adopt a new Decree-Law which would take account of the objections set out by the Commission in this letter of 7 August 1989.

By letter dated 18 September 1989, the Italian Government sent the Commission the text of Decree-law No 318 of 13 September 1989 on urgent fiscal measures to promote the reorganization of industrial production structures and rules on the interpretation of Articles 14 and 21 of Decree-law No 69 March 1989, as ratified and amended by Law No 154 of 27 April 1989.

By letter dated 24 October 1989, the Commission informed the Italian Government that it has learnt that the Italian Parliament had, on 27 September 1989, refused to ratify Decree-Law No 318 and that, following this refusal, the Italian Government had tabled draft Law No 4230 on the regularization of the effects produced by Decree-Laws No 174 and No 254.

The Commission also informed the Italian Government that, for the same reasons which had prompted it to initiate the Article 93 (2) procedure in respect of Decree-Law No 174, it would be extending the procedure to include the new draft Law.

The Italian Government, by letter dated 3 November 1989, did not challenge the Commission's findings and assured it at the same time that, within a short period, and not later than the end of the year, it would be tabling a general law on the tax measures applicable to the reorganization of industrial structures. The law would comply with the Treaty rules on competition and would be modelled on the proposal for a Community directive on the common system of taxation applying to mergers, divisions and contributions of assets, which was currently before the Council.

The Italian Government also stated it would not be contradicting its position, as described above, by immediately tabling draft Law No 4230 on the regularization of the effects produced by Decree-Laws No 174 and No 254 since, in accordance with settled constitutional procedure, this was mandatory, the two Decree-Laws not having been ratified.

By letter dated 21 November 1989, the Commission informed the Italian Government that it had decided to extend the Article 93 (2) procedure initiated on 7 August 1989 to draft Law No 4230, which had been presented to Parliament on 4 October and was essentially designed to safeguard the provisions adopted and the effects produced by Decree-Laws No 174 and No 254 (decision published in the *Official Journal of the European Communities* [3]).

The Commission gave notice to the other Member States and interested parties to submit their comments on the measures in question.

As part of the two sets of proceedings initiated in respect of Decree-Law No 174 and draft Law No 4230, the United Kingdom Government, Montedison and the CID-ITAL-Business group submitted comments, copies of which were forwarded to the Italian Government.

By letter dated 14 May 1990, the Commission informed the Italian Government that no comments had been submitted by the Italian Government in response to its letter of 21 November 1989. It therefore invited the Italian authorities to submit any comments they might have to make before it adopted a final decision pursuant to Article 93 (2).

By telex message dated 18 June 1990, the Italian Government informed the Commission that draft Law No 4230 would not be placed before Parliament for the time being

(1) Germany v. Commission [1984] ECR 1451.
(2) OJ No C 281, 7. 11. 1989, p. 9.
(3) OJ No C 48, 28. 2. 1990, p. 6.

and would not, therefore, be approved by Parliament in time for it to affect the Enimont operation, since the company concerned, Montedison, was in the process of adopting its balance sheet and would then be preparing its IRPEG (income tax on legal persons) tax return.

The Commission notes that, as Decree-Law No 174 and subsequent Decree-Law No 254 were not ratified by Parliament within the time-limits set, they have lapsed and cannot, therefore, produce legal effects beneficial to potential recipients. As regards those Decree-Laws, the Commission considers that the procedure can be terminated as the aid scheme they introduced is no longer in force.

The Commission considers it necessary, however, to take a decision on draft Law No 4230 aimed at safeguarding the effects of Decree-Laws No 174 and No 254 in respect of the transactions carried out in the short time they were in force, i. e. from 15 May 1989 to 12 September 1989. When the draft Law is adopted by Parliament and brought into force, the firms benefiting from the measures introduced by the two Decree-Laws will enjoy an undue advantage.

III

Draft Law No 4230 of 4 October 1989 has no justification and does not pursue any purpose other than to safeguard the effects of Decree-Laws No 174 and No 254. The tax measures in question constitute aid within the meaning of Article 92 (1) for the following reasons.

The tax measures can be regarded as State aid within the meaning of Article 92 (1) of the EEC Treaty. This principle was laid down by the Court of Justice in its judgment of 23 February 1961 in Case 30/59 [1] and confirmed in its Judgment of 10 December 1969 in Joined Cases 6 and 11/69 [2].

The tax measures introduced by the Decree-Laws in question, which would undoubtedly confer considerable advantages on recipient enterprises, are structured in such a way as to apply only to a very small number of operations, if not just to a single operation, viz. Enimont. This conclusion is based on the information in the Commission's possession and on the fact that it has never been denied by the Italian Government. The Commission also notes that the CIPE had ascertained that the transfer made by Montedison to set up Enimont satisfied the requirements laid down. It is not aware of any CIPE decisions concerning other firms and the Italian Government has not provided any information in this respect.

The measures introduced by Decree-Law No 174 are limited in time. They concern only transfers carried out before 31 December 1990 and do not, therefore, constitute a permanent modification of the Italian tax system.

A second limitation provided for by the Decree-Law concerns the size of the new company. The increase in the capital of the existing company or the capital of the company to be set up must exceed Lit 50 000 million. The tax relief envisaged would thus apply to only a few enterprises.

The Commission notes that the two restrictions referred to above greatly reduce the scope of the legislation, undermining the claim that the measure is general and permanent. It should be recalled that, in its Judgment of 2 July 1974 in Case 173/73 [3], the Court of Justice found that the partial reduction of public charges devolving upon undertakings in a particular sector of industry — textiles in that particular case — constituted an aid within the meaning of Article 92 of the EEC Treaty. A third feature indicates that the Italian measure does not have the general characteristics of the systems in the other Member States. The Italian provisions are not automatically applicable as the CIPE has the discretionary power to ensure, on the one hand, that the objective of the transfer is the in-depth restructuring of national industry and the development of industrial production and, on the other, that sufficient account has been taken of industrial development in the Mezzogiorno, of employment aspects and of questions of environmental protection. In the opinion of the Commission, the fact that the CIPE has such extremely delicate responsibilities shows unequivocally that this high-level body has extensive discretionary powers that are incompatible with the principles of aid transparency and equal treatment of the enterprises concerned.

The Commission is, in principle, in favour of mergers, especially transnational mergers, and it would have no objections whatsoever if the Italian measures were amended in order to bring them into line with the laws of the other Member States, which, to a greater or lesser extent, enable mergers to take place under more favourable conditions than those provided for in Italian legislation.

[1] Gezamenlijke Steenkolenmijnen v. A. Autorità, [1961] ECR 40.

[2] Commission v. France, [1969] ECR 523.

[3] Italy v. Commission, [1974] ECR 709.

It is not, however, for the Commission to take the place of the Italian legislator or to investigate the reasons why the latter has adopted laws which would be unfavourable to mergers.

Furthermore, the Commission does not intend to express an opinion concerning the merger operation resulting in the creation of Enimont but rather to assess the aid that would be granted in the form of tax reliefs to Montedison in the course of setting up Enimont.

Montedison, as the sole recipient of the tax reliefs, which constitute operating aid, could improve its cash position appreciably and thereby strengthen its financial position and influence competition both on the domestic market, in relation to Italian competitors in the same industrial sector, and more generally on the Community market.

In this way, Montedison would improve the structure of its balance sheet and the return on assets while, at the same time, also adding artificially to its assets. The financial gain consists in particular in suspension of payment of value added tax. Since this amounted in 1989 to Lit 1 647 000 million, the advance tax not paid would be Lit 774 000 million. It should again be said that these conclusions have not been contested by the Italian Government and should, therefore, be regarded as well founded.

In Commission's opinion, there is no justification for either the argument that the value added is purely theoretical as the tax would become payable the moment the value added generates a return or the argument that the tax measure in question does not improve the firm's liquidity since it would merely enable the firm to avoid being subject to what is essentially a tax on assets. The Commission considers that the distortion of competition stems from the fact that Montedison will avoid paying a tax which, irrespective of its nature, other competing enterprises in Italy are required to pay.

Lastly, the Commission does not agree with the comment of the Italian Government that draft Law No 4230 is a mandatory act following the failure by Parliament to ratify Decree-Laws No 174 and No 254. Article 77 of the Italian Constitution provides that decrees no longer have force of law if they are not converted into law within sixty days of their publication although the Chambers of Parliament may enact laws which regulate legal relationships established by decrees which have not been ratified.

The Chambers of Parliament thus have discretionary powers in this respect and are not bound to legislate in order to consolidate the provisional effects of decree-laws which have not been ratified. As mentioned above, the case at issue also concerns legal relationships regulated by decree-laws which provide for aid that is unlawful since it was granted in breach of Article 93 (3) of the EEC Treaty and incompatible with the common market since it does not qualify for any of the exemptions under Article 92 (3). The discretionary powers of the Chambers of Parliament cannot, therefore, be exercised in a particular case in order to render permanent an infringement of the EEC Treaty.

Lastly, the fact that a mandatory act is not involved is implicitly acknowledged by the Italian Government in its telex message dated 18 June 1990, in which it states that the draft Law would not be ratified by Parliament in time for it to benefit Montedison. However, there is no guarantee that this will not happen since Parliament could at any time decide to approve the draft Law. Furthermore, if the draft Law is no longer of any practical value, it should be definitively withdrawn by the Government.

In view of the above considerations, the Commission considers that the measure introduced by Decree-Law No 174 cannot be regarded as a general measure but rather as granting aid within the meaning of Article 92 (1) to a very small number of enterprises, if not just to Montedison, the only firm, according to the information available to the Commission, to carry out a transfer — approved by the CIPE — in the short time Decree-Laws No 174 and No 254 were in force.

It should also be noted, for the purposes of Article 92 (1), that Montedison operates in the chemicals sector through Montefluos, which produces fluorides, elastomers, chlorofluorine derivatives, peroxides, etc., through Himont, which manufactures polypropylenes and other polymers, and through SIR, which produces resins, polyesters, etc.

It is the main shareholder in Enimont, which is present in virtually all sectors of the chemical industry. In these sectors, intra-Community competition is intense and substantial overcapacity is a frequent feature at Community level.

The Commission notes that, in 1987, Italy's exports of chemical products to other Member States were worth ECU 4 234 million while exports to third countries were valued at ECU 3 813 million, the respective figures for 1988 being ECU 5 074 million and ECU 4 151 million.

Italian imports from other Member States in 1987 and 1988 were worth ECU 9 633 million and 10 974 million, while those from third countries amounted to ECU 3 085 million and 3 472 million respectively.

In 1988, Montedison achieved a turnover of Lit 14 122 000 million, of which Lit 7 412 000 million (52,5 %) represented sales in Italy and Lit 2 964 000 million, (21 %) sales elsewhere in western Europe. Thus, it is clear that Montedison holds a substantial share of the Italian market and has a significant presence on the markets in the other Member States.

Even if the turnover of the companies subsequently transferred to Enimont were to be deducted from the total turnover, Montedison's remaining turnover, i. e. Lit 5 446 000 million, would still be considerable.

The Commission is of the opinion that, as the Court ruled on 17 September 1980 in Case 730/79 (1), when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

Under the circumstances, there is no doubt that the tax relief amounting to Lit 774 000 million would considerably strenghten Montedison's financial position. Article 92 (1) embodies the principle of a general prohibition on aid having the characteristics which are set out in that Article and present in the case in question.

IV

The exceptions to the above principle provided for in Article 92 (2) are inapplicable to the aid at issue because of its nature and objectives.

Article 92 (3) lists the aid which can be considered compatible with the common market. Compatibility with the Treaty should be considered within the Community context and not within the context of a single Member State. In order to maintain a properly functioning common market and to observe the principle laid down in Article 3 (f) of the Treaty, the exceptions provided for in Article 92 (3) must be construed in a restrictive manner.

In particular, the exceptions are applicable only when the Commission is satisfied that, without the aid, the interplay of market forces would alone be insufficient to prompt potential recipients to adopt patterns of behaviour that would serve one of the objectives of common interest pursued by those exceptions.

To apply the exceptions in the case of aid that did not serve such an objective or in cases where aid was not necessary for that purpose would be to confer an unfair advantage on the enterprises or industries of certain Member States, thereby strengthening their financial position, and to affect trade between Member States and distort competition without any justification on grounds of common interest within the meaning of Article 92 (3).

In the case in point, the Italian Government has been unable to provide, and the Commission to find, any reason for classifying the planned aid in any of the categories of exemption under Article 92 (3).

Since the aid is operating aid and is not designed to finance productive investments, the exceptions provided for in Article 92 (3) (a) and (c) in respect of aid to promote or facilitate the development of certain areas are not applicable.

As regards the exceptions provided for in Article 92 (3) (b), it is clear that the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Italian economy.

As for the exception provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities, it is clear, as stated above, that the aid in question is operating aid and is not aimed at financing productive investments. Market conditions in the relevant sector seem likely to ensure a normal development without State aid. Such aid cannot, therefore, be justified on grounds of common interest,

(1) *Philip Morris v. Commission,* [1980] ECR 2671.

HAS ADOPTED THIS DECISION:

Article 1

The tax incentive scheme provided for in draft Law No 4230 of 4 October 1989 is incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty.

Italy shall not implement the scheme in question and, in particular, shall not grant any tax relief in respect of transfers by Montedison or by any other firms under Decree-Laws No 174 of 15 May 1989 and No 254 of 13 July 1989.

Article 2

Italy shall inform the Commission, within two months of the date of notification of this Decision, of the measures it has taken to comply with Article 1.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 25 July 1990.

For the Commission

Leon BRITTAN

Vice-President