II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 9 June 1993**

**concerning State aid procedure C 32/92 (ex NN 67/92) — Italy (tax credit for professional road hauliers)**

**(Only the Italian text is authentic)**

(93/496/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, in accordance with the abovementioned Article, given notice to the parties concerned to submit their comments,

Whereas :

I

By letter dated 15 April 1992, the Commission asked the Italian Government for detailed information concerning the following scheme introducing a tax credit for the road haulage sector :

Ministero dei trasporti — Decreto 28 gennaio 1992

Determinazione dei criteri per la concessione di un credito di imposta a favore delle imprese esercenti l'autotrasporto di merci per conto di terzi [1].

On the basis of the information available to it, the Commission considered that the scheme was covered by Article 92 (1) of the EEC Treaty.

Since no reply was received to the letter of 15 April 1992 a reminder was sent on 6 May 1992. A reply was received by letter of 4 August 1992. This information could not remove the doubts about the incompatibility of the scheme with the common market.

Since the Italian Government did not comply with the prior notification requirement laid down in Article 93 (3), the scheme had been introduced unlawfully. Since the Commission also considered that the scheme cannot be considered compatible with the common market based on Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway [2], as last amended by Regulation (EEC) No 3578/92 [3], and that it does not qualify for any of the exemptions provided for in Article 93 (2) and (3), it has decided to initiate the procedure provided for in Article 93 (2).

By letter of 26 October 1992 it gave notice to the Italian Government to submit its comments and to provide the detailed information requested. A reminder was sent on 12 February 1993. The other Member States and interested third parties were given notice to submit comments by publication of the letter to the Italian Government [4].

II

Despite the Commission's request to the Italian authorities, both in its letter dated 26 October 1992 and its letter dated 12 February 1993, to provide detailed information concerning the scheme, no reaction was received.

[1] *Gazzetta ufficiale della Repubblica Italiana* of 3. 1. 1992, Serie Generale — No 25, p. 13.

[2] OJ No L 130, 15. 6. 1970, p. 1.
[3] OJ No L 364, 12. 12. 1992, p. 11.
[4] OJ No C 316, 3. 12. 1992, p. 7.

Under these circumstances, which stem from a lack of cooperation on the part of the Italian Government, the Commission is nevertheless obliged to close the present procedure by adopting its decision on the basis of the information available to it (see judgment of the Court of Justice of 14 February 1990 in Case C-301/87, France v. Commission [1]) and that of 10 July 1986 in Case 234/84, Belgium v. Commission [2]).

No other Member States or other interested parties submitted comments.

III

According to the Italian Decree of 28 January 1992, professional road hauliers regardless of their legal status, will benefit in 1992 from a tax or on municipal tax or on value added tax. The benefit of the scheme applies only to vehicles of 3 500 Kg or more in weight, provided that the hauliers were registered on 31 December 1991 in the national road haulage register established by Law No 298 of 6 June 1974.

The budget for 1992 amounts to Lit 275 000 million (ECU 179 million). It is understood that this amount was already provided for in 1990. It is further understood that another Lit 300 000 million (ECU 195 million) will be voted soon, which will lead to a total amount to be allocated of ECU 374 million. According to calculations made by the Commission, the first instalment of ECU 179 million will not cover all claims, but the total expected budget of ECU 374 million should show a surplus of about ECU 50 million.

The volume of aid allocated to a particular firm depends on the number and the size of its vehicles. The aid is limited to 13,5 % of real expenditure, VAT excluded, on fuel and lubricants, but the following ceilings would be observed with respect to the total weight (= Gross Vehicle Weight) of each vehicle with its payload:

| Vehicle class | Lit | ECU | G-VW |
|---|---|---|---|
| A | 364 000 | 237 | 3 500 Kg < GVW < 6 000 Kg |
| B | 776 000 | 505 | 6 000 Kg < GVW < 11 500 Kg |
| C | 2 180 000 | 1 420 | 11 500 Kg < GVW < 24 000 Kg |
| D | 3 760 000 | 2 450 | 24 000 Kg and over |

According to the Decree, these amounts are based on a fuel consumption of 8, 6, 3.5 and 2.2 kilometers per litre of gasoil respectively for the aforementioned vehicle classes. This means that given a gasoil price of Lit 941,176 per litre (ECU 0,613), VAT excluded, on 15 December 1991, the tax credit covers 3 100 km free for vehicles of class A; 4 900 km for class B; 8 100 for class C and 8 800 km for class D. These figures should be put against an average annual performance in international transport of between 70 000 and 120 000 km.

Furthermore, the aid in terms of the annual vehicle tax covers 88 % for class A vehicles, 132 % for class B, 293 % for class C and 505 % for class D vehicles. It is to be noted that the tax credit grows with the vehicle size in a non-linear way.

The effect of the scheme is a direct net cash flow increase in favour of the undertakings of a particular economic sector only.

According to Europa Transport, a Commission publication on inland transport statistics made available by the Member States [3]), intra-Community transport is sizeable and has the following structure (1989 = latest available data):

**Intra-Community transport** [1])

| | % share by Member State (EUR 12 = 100 %) (intra-Community + national) | % share of total transport |
|---|---|---|
| Belgium | 12,6 | 61,2 |
| Denmark | 3,1 | 34,7 |
| Germany | 14,4 | 16,4 |
| Greece | 1,7 | 16,1 |
| Spain | 9,7 | 13,7 |
| France | 17,5 | 21,5 |
| Ireland | 0,8 | 23,7 |
| Italy | 12,7 | 13,9 |
| Luxembourg | 1,5 | 89,1 |
| Netherland | 17,9 | 56,3 |
| Portugal | 2,6 | 28,4 |
| United Kingdom | 5,4 | 5,9 |
| EUR 12 | 100 | 19,6 |

[1]) Definitions. Intra-Community transport: sum of bilateral transport and cross-trade transport (national transport and cabotage are not included). Cross-trade transport: transport between Member States carried by vehicles from other Member States.

Furthermore, according to the same source, road transport to and from Italy has grown faster than transport by Italian hauliers in this market segment, and compared with other Member States, cross trade is high in relations with Italy.

[1]) [1990] ECR I 307.
[2]) [1986] ECR 2263.

[3]) Transport between Member State was not completely liberalized before 1 January 1993. The fact that transport between Member States is now liberalized (based on Council Regulation (EEC) No 881/92) will even lead to an increase in intra-Community transport.

According to a study carried out by Coopers & Lybrand for the Commission in October 1989, in all Member States other than Greece, national and international road haulage are closely related. Most international hauliers also operate in their own national market, which in most countries is considerably larger than the international market. The vehicles used for international road haulage are not substantially different from those used for national haulage. Thus it is easy for hauliers to move resources between national and international operations depending upon the state of the respective markets. The state of the international road haulage market will therefore reflect the state of the individual and larger national markets.

The aim of Article 92 of the Treaty is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.

It is understood that the benefits from the Decree will go to all professional road hauliers, and are not linked to the objectives of restructuring of the sector concerned nor is the aim orientated to a specific region. The only requirement for the recipients is to be included in the register introduced by Law No 298 of 6 June 1974, on 31 December 1991. Therefore, the Decree tends towards a general improvement of the financial situation of all undertakings of the sector concerned and affects the market. When a Member State, by means of financial aid, strengthens the position of undertakings in a particular sector involved in intra-Community trade, the latter must be considered as affected by that aid.

The aid introduced by the Decree is purely and simply an operating aid. It should also be noted that the Commission has always had a negative attitude towards such aid since it may force other Member States to take similar measures at a substantial cost or may transfer difficulties from one Member State to another.

It is also believed that the effects of the Decree will hinder an orderly adaptation of the Italian road haulage market to a new viable economic structure in the longer term and that preserving the status quo will serve only to delay the necessary adjustments in a sector which is characterized by an overcapacity, as is generally admitted. Therefore, it must be concluded that the aid scheme introduced by the Decree goes against the common interest.

In the light of the above, it is estimated that the Decree is liable to affect trade between Member States and to distort competition between transport undertakings established in Italy and other Member States, and between transported goods.

However this view is not shared by the Italian authorities as expressed in their reply from 4 August 1992. The Italian authorities consider that the Decree of 28 January 1992 does not constitute a State aid but a taxation plan. In support of their view, the Italian authorities also argue that the tax burden in Italy on diesel vehicles is particularly high and that this is a major cost factor for the undertakings in question. They also refer to the planned harmonization of taxes between Member States.

As regards the taxation argument and national sovereignty in this domain, it should be pointed out that the rules governing State aid and those governing taxation have different objectives. This means that a national measure may comply with taxation rules but conflict with other provisions such as Articles 92 and 93 of the Treaty. Furthermore, Article 92 does not distinguish between the measures of State intervenion concerned by reference to their causes or aims but defines them in relation to their effects. The effect of the scheme is a direct net cash flow increase in favour of the undertakings of a particular economic sector only. Indeed it should also be pointed out that only operators in the road haulage market registered in Italy can benefit from the measure. Those operators compete with operators in the other means of transport and operators from other Member States. The cash flow which results from the measure thus clearly leads to a distortion of competition in favour of those benefitting from the measure. Consequently, the alleged fiscal nature or social aim of the measure cannot suffice of itself to shield it from the application of Article 92. For this reason tax exemptions granted on a sectoral or regional basis have consistently been treated as constituting State aid.

In the light of the above, the Decree as it stands constitutes a State aid within the meaning of Article 92 (1) of the Treaty.

IV

Given the fact that the Decree covers road transport the aid should be assessed on the basis of Regulation (EEC) No 1107/70. That Regulation was introduced to eliminate disparities liable to distort the conditions of competition in the transport market, and allows the granting of aid only in certain circumstances. Article 2 lays down that Articles 92, 93 and 94 shall apply to aid granted for transport. Article 3 lays down the conditions under which aid could be granted.

The aid introduced by the Decree does not, however, comply with the provisions of Regulation (EEC) No 1107/70.

Article 3 of the Regulation states that 'Member States shall not take coordination measures which involve the granting of aids pursuant to Article 77 of the Treaty except in the following cases or circumstances :

(...)

(d) until the entry into force of Community rules on access to the transport market, where aid is granted as an exceptional aid and temporary measure, in order to eliminate, as part of a reorganization plan, excess capacity causing serious structural problems, and thus to contribute towards meeting more effectively the needs of the transport market.'

According to the Italian Government there exists a serious imbalance between supply and demand in the road transport market, as expressed in protocols between the Italian Government itself and the trade organizations concerned (1). However, the further conditions which must be satisfied under that Regulation cannot be said to exist since it requires concrete results, i.e. the preparation of a reorganization plan and the reduction of excess capacity, and since the system introduced by the Decree in question is designed to improve the financial position of all undertakings in the sector without requiring any *quid pro quo* on their part.

Based on what the Commission has pointed out in Decision 90/224/EEC (2), upheld by the Court in its judgment of 3 October 1991 in Case C-261/89, Italy v. Commission (3), it can be concluded that the breach is sufficiently clear to conclude that the Decree is incompatible with the common market. The Commission notes, as an additional argument, that the exceptions mentioned in Article 92 (2) and (3) do not apply.

Article 92 (1) of the EEC Treaty lays down the principle that aid having the characteristics which it specifies, is incompatible with the common market.

As far as the exceptions to that principle are concerned, those provided for in Article 92 (2) do not apply to the case in point, given the nature and objectives of the aid. Furthermore, the Italian authorities have not invoked these exceptions.

As regards aid which may be considered compatible with the common market under Article 92 (3), which paragraph is not invoked by the Italian authorities either, it should be noted, *inter alia*, that the objectives listed in that provision must be in the interest of the Community and not solely in that of the undertakings receiving the aid. The provisions of that provision must be interpreted strictly in an examination of any regional or sectoral aid programme. Exemptions to the principle of incompatibility of aid with the common market set out in Article 92 (1) apply only if the Commission can establish that, without the aid under consideration, the free interplay of market forces will not in itself ensure that the recipient undertakings take action to help attain one of the objectives of those exemptions.

Aid without any *quid pro quo* would also be tantamount to giving certain Member States undue advantages, affecting trade between Member States and distorting competition without the justification of being in the Community interest.

A system of aid which does not contribute to the attainment of the objectives of the exemptions provided for in Article 92 (3) and without a *quid pro quo*, by this very fact alone serves only to improve the financial position of the undertakings in question.

There is no evidence to suggest that undertakings which are beneficiaries under this system are expected to provide anything in return.

Consequently, it is considered that the aid system, by virtue of its scope, i.e. all national undertakings in a given economic sector, irrespective of their location, does not have regional development as an aim as defined in points (a) and (c) of Article 92 (3).

Nor does the system involve any major project of European interest or remedy a serious disturbance in the Italian economy within the meaning of point (b) of Article 92 (3).

As regards Article 92 (3), point (c), which also deals with aid to promote the development of certain economic activities, it should be noted that the aid in question for which all road hauliers are eligible, is nothing more than an operating aid which is generally acknowleged as not itself satisfying the conditions of point (c) ; the lack of any *quid pro quo* makes it impossible to conclude that the aid is to facilitate 'development'.

The fact that the subsidy differs with vehicle size does not affect the above reasoning.

(1) See protocols of 13 April 1990 and 15 November 1990 to which the Italian authorities drew the attention in their reply of 4 August 1992.
(2) OJ No L 118, 9. 5. 1990, p. 42.
(3) [1990] ECR I-4437.

V

The aid should have been notified to the Commission as required by Article 93 (3) of the Treaty. Since the Italian Government failed to do so, the Commission was unable to make its position known before the measure was implemented. Since the provisions of Article 93 (3) of the Treaty were not complied with, the aid must be considered to be illegal under Community law.

In this connection it must be pointed out that the imperative character of the procedural rules set out in Article 93 (3), compliance with which is important from the point of view of public order, and the direct effect of which has been recognized by the Court of Justice in its Judgments of 19 June 1973 in Case 77/72 [1], 11 December 1973 in Case 120/73 [2], 22 March 1977 in Case 78/76 [3] and 21 November 1991 in Case C-354/90 [4], is such that the illegality of the aid in question cannot be remedied by subsequent action.

Moreover, where aid is incompatible with the common market, the Commission can make use of the option afforded it by the Judgment of the Court of Justice of 12 July 1973 in Case 70/72 [5], confirmed by the Judgments of 24 February 1987 and 20 September 1990 in Cases 310/85 [6] and C-5/89 [7] and can require Member States to recover from recipients all aid illegally granted.

In view of the above, the aid introduced by the Decree must be abolished and sums paid reimbursed.

Repayment must be made in accordance with the procedures and provisions of Italian law, in particular those concerning interest on overdue payments owed to the State, the interest being calculated from the date the aid in question was paid. This apears necessary in order to restore the previous situation by abolishing all the financial advantages enjoyed by the companies receiving the illegal aid since the date on which it was paid (see the Judgment of the Court of Justice of 21 March 1990 in Case C-142/87, paragraph 66 [8]).

It should be recalled that recovery of aid which has been paid unlawfully is the logical consequence of the fact that its illegality has been established (see Case C-142/87),

HAS ADOPTED THIS DECISION:

*Article 1*

The aid in favour of professional road hauliers in Italy in the form of a tax credit on income tax or on municipal tax or on VAT which was introduced by the Ministerial Decree of 28 January 1992 is unlawful in so far as it is granted in breach of the procedural rules laid down in Article 93 (3) of the EEC Treaty. The aid is also incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty, in so far as it meets neither the conditions for the exemptions provided for in Article 92 (2) and (3) nor the conditions of Regulation (EEC) No 1107/70.

*Article 2*

The Italian Republic shall abolish the aid referred to in Article 1 and ensure that the aid granted is recovered within two months of the notification of this Decision. The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on overdue payments owed to the Government, with interest starting to run from the date on which the unlawful aid was granted.

*Article 3*

The Italian Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with it.

*Article 4*

This Decision is adressed to the Italian Republic.

Done at Brussels, 9 June 1993.

*For the Commission*

Abel MATUTES

*Member of the Commission*

(1) [1973] ECR 611.
(2) [1973] ECR 1471.
(3) [1977] ECR 595.
(4) [1991] ECR I-5505.
(5) [1973] ECR 813.
(6) [1987] ECR 901.
(7) [1990] ECR I-3437.
(8) [1990] ECR I-959.