COMMISSION

COMMISSION DECISION

of 2 February 1994

on Sicilian Regional Law No 23/1991 concerning extraordinary assistance for industry and Article 5 of Sicilian Regional Law No 8/1991 concerning, in particular, financing for Sitas

(Only the Italian text is authentic)

(Text with EEA relevance)

(94/374/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Communities and, in particular, the first subparagraph of Article 93 (2) thereof,

Having, in accordance with the abovementioned Article, given the interested parties notice to submit their comments,

Whereas :

I

When, by letter of 9 February 1993, the Italian Government was notified that the procedure initiated under Article 93 (2) of the EC Treaty, in respect of aid to the alkaline salts industry (C 35/91) was being terminated [1], the Commission reserved the right to decide on Article 5 of Sicilian Regional Law No 8/1991 concerning an allocation of Lit 20 billion to Sitas.

The Commission also informed the Italian Government, by letter of 6 May 1992, that it had decided to initiate the Article 93 (2) procedure in respect of Sicilian Regional Law No 23/1991 granting extraordinary assistance to industry.

As part of that procedure, the Commission gave the Italian Government notice to present its comments and, as it possessed very little information on the Law in question, to provide the information it needed to determine whether the provisions in question were compatible with Community law.

A notice published in the *Official Journal of the European Communities* [2] informed the other Member States and interested parties of the procedure. No comments were received from them.

II

The information requested was sent by the Office of the Italian Permanent Representative in letters dated 5 August 1992, 14 September 1992, 15 January 1993 and 2 February 1993. Further details were obtained at two meetings held in Brussels on 15 June 1992 and 19 February 1993 between the Commission departments and a delegation from the Italian administration.

III

Regional Law No 23/1991 comprises a package of various measures aimed at public-sector enterprises, private companies, regional public bodies and individuals. The measures may be summarized as follows :

Article 1 : The Law allocates a further Lit 125 billion (or some ECU 67,57 million) to a special fund managed by Resais, a service company which manages the redundant employees of the enterprises controlled by the regional holding company ESPI and by the two other regional holding companies Az.A.S. and EMS.

The Italian authorities state that Resais is not engaged in production. Its task is to manage workers made redundant by the regional holding companies with a view to integrating them, as far as possible and on a case-by-case basis,

[1] OJ No C 59, 2. 3. 1993, p. 4.

[2] OJ No C 137, 27. 5. 1992, p. 4.

into regional public-sector bodies. In practice, this means that their unemployed status is prolonged under special circumstances and subject to specific arrangements. The amounts allocated to Resais are intended to cover its operating costs.

Article 2: This Article allows Resais, under certain conditions, to take over responsibility for workers made redundant by Imesi and IMEA, companies controlled by ESPI, under the scheme provided for in Article 1.

Article 3: This Article concerns the transfer of redundant workers from an ESPI-controlled company to Resais.

Article 4: Provision is made here for the allocation to ESPL of Lit 4 billion (some ECU 2,16 million) to make good losses incurred by Sirap, an engineering firm controlled by ESPI.

Article 5: This Article provides for the allocation of Lit 65 billion (some ECU 35,14 million to EMS).

According to the information provided by the Italian authorities, this sum is earmarked to assist Sitas, which is controlled by EMS and another public body. Sitas owns four hotels in Sicily, two of which are managed under franchise by private individuals. Of the allocation, an amount of Lit 17 billion (some ECU 9,19 million) is earmarked for repurchasing the shares held by private partners, while the remaining Lit 48 billion (some ECU 25,95 million) is intended to cover a capital increase and to make good losses.

EMS had already been allocated Lit 20 billion (some ECU 10,8 million) under Article 5 of Regional Law No 8/1991 for the purpose of buying back enough shares to increase its holding to 95 %. When it adopted its aid decision concerning alkaline salts (C 35/91), the Commission reserved its position on the Article 5 aid in order to take account of the results of its examination of the present case. Sitas is not engaged in any activity other than its hotel business.

Article 6: This Article provides for cost-of-living adjustments in respect of early-retirement benefit for former sulphur miners managed by EMS, in the form of a contribution of Lit 2,5 billion (some ECU 1,35 million) for both 1992 and 1993 to a wage guarantee fund administered by EMS.

Article 7: An amount of Lit 5 billion (some ECU 2,7 million) is earmarked for Az.A.S. for the restructuring of the cement company IMAC, to be achieved through the early retirement of redundant workers.

Article 8: An amount of Lit 25 billion (some ECU 13,5 million) is intended to cover remuneration not benefiting from State assistance under arrangements such as the wage guarantee fund, for employees of Vetem (chemicals). This appropriation is managed directly by the regional administration.

Article 9: This Article increases to Lit 1 billion (some ECU 0,54 million) the regional contribution to the costs of managing the 'Ente autonomo per il porto di Messina', a public body responsible for port administration.

Article 10: This Article provides for the 'ente autonomo per il porto di Messina' to receive Lit 1,5 billion (some ECU 0,81 million) for 1991 and Lit 1 billion (some ECU 0,54 million) for both 1992 and 1993 in connection with extraordinary maintenance work on the dry dock.

Article 11: This Article adjusts the contribution provided for by Law No 27/1987 to the Syracuse port company San Sebastiano to compensate for the fact that delays in the payment of the sum earmarked for it resulted in additional costs of Lit 500 million (some ECU 0,27 million). Law No 27/1987 was approved by the Commission in 1988.

Article 12: This Article amends the miners' early retirement scheme (see Article 6 above) and extends early retirement to other redundant workers managed by Az.A.S., EMS and ESPI as well as to blind switchboard operators employed by EMS. The amounts allocated to EMS are Lit 3,5 billion (some ECU 1,9 million) for 1992 and Lit 5 billion (some ECU 2,7 million) for 1993.

Article 13: This Article amends an existing scheme of subsidized loans to industrial enterprises with up to 400 workers or fixed investments not exceeding. Lit 50 billion (some ECU 27,03 million) (net of depreciation and revaluation) in respect of the contract value of orders received by them. The conditions and detailed rules for applying this scheme were amended by Sicilian Regional Law No 25/1993, which is currently being examined by the Commission in connection with aid No NN 113/93.

The Italian authorities have stated orally that the petrochemical, electricity, cement, agricultural and textiles industries are not eligible under the scheme.

The conditions and detailed rules for applying the scheme are set out in Articles 30 and 31 of Regional Law No 25/1993.

Article 14: This Article amends an existing scheme providing aid to small and medium-sized enterprises offering factoring services and satisfying the definition given in the Community guidelines on State aid for small and medium-sized enterprises (hereinafter referred to as 'the Community guidelines' [1]). Under the scheme, 30 % of the interest charged on factoring contracts are borne by the region.

Article 15: This Article amends an aid scheme in respect of stockbuilding by firms with up to 300 employees or a capital of not more than Lit 500 million (some ECU 0,27 million).

The aid amounts to no more than 40 % of fixed investments after deduction of any aid already received for the same purpose over a five-year period.

The scheme was examined by the Commission and given temporary approval in 1982, all further approval being subject to compliance with certain conditions.

Article 16: This Article concerns possible utilization of appropriations already entered in the reginal budget with a view to the advance payment of 85 % of the amount of financing granted by the Cassa del Mezzogiorno to firms with up to Lit 10 billion (some ECU 5,4 million) of fixed investments, net of depreciation and revaluation, with a ceiling of Lit 800 million (some ECU 0,43 million).

Article 17: This Article provides for the allocation of Lit 25 billion (some ECU 13,5 million) for 1991 and Lit 17 billion (some ECU 9,19 million) for 1992 to the Ragusa industrial development consortium, a public non-profit-making body, for the setting up of a logistic supply base for oil exploration rigs in the Pozzallo Sea.

This is a regional development measure aimed at promoting the search for hydrocarbons at sea by fee-paying licence-holders. Fees will be charged for use of the supply base.

Article 18: Provision is made for several measures reorganizing the region's budget.

Article 19: This Article amends a scheme of regional advances to Sicilian enterprises undertaking repair and maintenance work, and providing services or supplies, for major petrochemical companies under administrative supervision.

[1] OJ No C 213, 19. 8. 1992, p. 2.

The recipients are creditors of Liquichimica, which suspended payment of debts when placed under extraordinary administration.

Earlier regional laws had authorized the payment of advances to be repaid by March 1993. Article 19 provides for refinancing of Lit 3 billion (some ECU 1,62 million) in this respect and repeals the deadline for repayment.

The original scheme was twice approved by the Commission in connection with aid for industry, commerce, crafts, fisheries and cooperation and industrial development in Sicily.

Articles 20 and 21: These Articles relate to the entry in the regional budget of the new expenditure introduced by the Law and to publication of the Law in the *Official Gazette* of the region.

IV

The first step is to determine whether each of the measures described under III constitutes State aid within the meaning of Article 92 (1) of the EC Treaty.

As stated under III, Resais, the company referred to in Articles 1, 2 and 3 of Regional Law No 23/1991, is not engaged in production and concerns persons who are no longer employed in production. The measures to assist former miners provided for in Articles 6 and 12 of that Law do not involve production activities either. Consequently, the measures do not constitute State aid within the meaning of Article 92 (1) of the Treaty as they do not favour certain undertakings or the production of certain goods.

The measure to assist Sirap, provided for in Article 4 of Regional Law No 23/1991, is intended to cover the firm's operating losses in so far as it finances management costs not covered by revenue (Article 4 (2) of Regional Law No 23/1991). The recipient company competes on the engineering market against domestic and Community private operators that cannot count on State aid to cover any losses.

As regards Article 5 of Regional Law No 23/1991 and Article 5 of Regional Law No 8/1991, it transpires from the information in the Commission's possession that Sitas is continuing to incur losses despite considerable investment by the region totallilng some Lit 270 billion (about ECU 146 million). The most recent data provided by the region indicate that losses amounted to Lit 2,536 billion in 1987, Lit 4,49 billion in 1988, Lit 38,645 billion in 1989, Lit 2,300 billion in 1990 and Lit 25,716 billion in 1991. Excluding any losses for 1992 and 1993, these figures add up to some ECU 40 million. There are no

prospects of a turnaround, as evidenced by the fact that the management of EMS is seeking to negotiate with the creditor banks and that liquidation proceedings were commenced but not completed, chiefly because of a lack of buyers.

No investor operating in a market economy would inject capital under such circumstances or take on the losses of a company without a future. In view of the Commission's position concerning the application of Articles 92 and 93 to holdings by public authorities in company capital (1), the sums in question must be regarded as State aid within the meaning of Article 92 (1) in so far as they allow a firm with no economic bases to remain artificially in operation.

It would also seem clear that Sitas, a company owning several hotels, could remain in business only with a steady flow of non-repayable State aid, thereby preventing competitors in Italy and in the other Member States from gaining access to the segment of the tourism market occupied by Sitas.

The measures concerning early-retirement benefit for redundant employees of IMAC provided for in Article 7 of Regional Law No 23/1991 and the financing of unemployment benefit for employees of the chemical company Vetem under Article 8 of that Law differ from the other employment-assistance measures provided for in Articles 1, 2, 3, 6 and 12 since, in the case of IMAC, the regional assistance forms part of a restructuring plan and, in the case of Vetem, the workers are still engaged in production activities. It follows that the measures benefit not only the workers as such but also the firms that employ them. The measures must accordingly be regarded as State aid within the meaning of Article 92 (1) of the Treaty.

The measure provided for in Article 9 relates to the management of regional infrastructures and does not therefore constitute State aid within the meaning of Article 92 (1).

Article 10 concerns the financing of extraordinary maintenance work on the dry dock at the port of Messina. The measures to assist ship-repair facilities at the Messina dry dock must be regarded as State aid within the meaning of Article 92 (1).

Article 11 of the Regional Law No 23/1991 concerns the financing of extra costs incurred as a result of the delays in payment by the regional authorities of aid for the Syracuse-based port company San Sebastiano, previously authorized by the Commission. The measure does not therefore contain any new aid elements in relation to the aid originally approved by the Commission.

Article 13 establishes a scheme of subsidized loans in respect of orders received by firms engaged almost exclusively in manufacturing. The scheme consists in the part-financing of interest charges and is based on available budgetary resources, determined by the competent authorities, amounting to Lit 50 billion (some ECU 27 million). The measure constitutes State aid. The same is true of the measure provided for in Article 14 concerning the reorganization of a scheme of aid for small and medium-sized Sicilian enterprises exercising factoring activities. The aid intensity is around 4,25 % gross. The scheme has already formed the subject-matter of a Commission decision.

Article 15 amends a scheme to assist stockbuilding in general which was approved by the Commission in 1982, subject to certain conditions.

Those conditions are no longer fulfilled by new Article 15 of Regional Law No 23/1991 as the aid is no longer tied solely to the initial investment.

Article 16 concerns the possible use of resources in the regional budget to grant advances of up to 85 % of the amount of financing granted within the framework of the extraordinary assistance for the Mezzogiorno approved by the Commission on 2 March 1988 and 9 December 1992.

Like Article 11 of Regional Law No 23/1991, this measure does not comprise any new aid elements in relation to the scheme for the Mezzogiorno and is not, therefore, covered by Article 92 (1).

Article 17 concerns the financing of infrastructures to be set up by a public body. Consequently, the measures cannot be regarded as State aid within the meaning of Article 92 (1).

The measures provided for in Articles 18, 20 and 21, which contain technical provisions relating to the regional budget and to publication of the Law, cannot be regarded either as State aid within the meaning of Article 92 (1).

(1) EC Bulletin 9-1984, p. 98 and Commission communication published in OJ No C 273, 18. 3. 1991, p. 2.

Finally, Article 19 repeals the deadline laid down in earlier legal provisions for the repayment of advances granted by the region to creditors of Liquichimica.

This scheme, approved by the Commission in connection with aid for industry, commerce, crafts, fisheries and cooperation and industrial development in Sicily would, as amended by Regional Law No 23/1991, entail the definitive payment to each of the recipients of a maximum amount of Lit 25 million (about ECU 13 500), any overlapping with other aid being prohibited.

The measure in question cannot be regarded as constituting State aid under either Article 92 (1) of the Treaty or point 3.2 of the Community guidelines.

The Commission therefore considers that the measures provided for in Articles 4, 5, 7, 8, 14 and 15 of Regional Law No 23/1991 and in Article 5 of Regional Law No 8/1991 are to be regarded as constituting State aid within the meaning of Article 92 (1).

V

The measures to be regarded as constituting State aid constitute assistance to firms operating in Sicily. They benefit those firms inasmuch as the assistance is not provided outside the region.

The aid has the effect of distorting competition since it improves the economic position of the recipients in relation to their competitors who do not receive such assistance.

The aid in question also affects trade between Member States. Although it is not possible to asses the full impact of the aid as not all the recipients are known, import and export statistics (Level III region of the nomenclature of territorial statistical units — NUTS) reveal that a significant proportion of Sicilian products and services is exported to other Member States. In addition, trade between Member States is also affected in cases where the aid favours domestic output and services to the detriment of imports and the provision of services from other Member States.

VI

It must be concluded that the aid in question is unlawful since the Italian authorities did not notify it to the Commission beforehand, as required by Article 93 (3) of the Treaty.

The situation resulting from this infringement of the Treaty is particularly serious since the aid in question has already been paid to the recipients. In view of the mandatory nature of the rules of procedure laid down in Article 93 (3), which are also important from the standpoint of public policy and the direct effect of which was recognized by the Court of Justice in its judgments in *Capolongo* v *Maya*,(1). *Lorenz* v *Germany*(2) and *Steinike und Weinlig* v *Germany*(3), the unlawful nature of the aid at issue cannot be rectified retrospectively.

None the less, the Commission is required to continue the procedure initial under Article 93 (2), in accordance with the Court of Justice's judgment of 14 February 1990 (4).

In view of the foregoing, the aid in question is liable to affect trade between Member States and to distort competition since, with the exception of Article 19, it satisfies the conditions of Article 92 (1) of the Treaty, in the light of point 3.2 of the Community guidelines.

VII

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

In the case at issue, the exceptions provided for in Article 92 (2) of the Treaty are not applicable because the aid is not directed towards the attainment of the objectives set out in that paragraph. Nor has such exemption been requested by the Italian authorities.

Article 92 (3) lists aid which may be considered compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in the context 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 (g) of the Treaty, the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or 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 guide the recipients towards partners of behaviour that would serve one of the objectives of the said exceptions.

(1) Case 77/72 [1973] ECR 611.
(2) Case 120/73 [1973] ECR 1471.
(3) Case 78/76 [1977] ECR 595.
(4) Case C-301/87, *France* v. *Commission* [1990] ECR I-307.

Applying the exceptions to aid which does not contribute to such an objective or in cases where the aid is not necessary for that purpose would be tantamount to conferring advantages on industries or firms of certain Member States whose financial position would be artificially strengthened and to affecting trade between Member States and distorting competition without any justification based on the common interest as required by Article 92 (3).

As regards the aid to Sirap, it has already been stated under point IV that this company is in competition with operators in Italy and in other Member States in the engineering sector.

The amount of the proposed aid (some ECU 2,16 million) is such that, taking account of the generally small size of engineering firms (there were 5 636 of them in the Community in 1988 employing on average some 29 persons each), it would have the effect either of impeding market access or of eliminating Sirap's competitors by unduly restoring its financial viability.

Article 93 (2) (a) exempts aid that promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. Although Sicily is eligible for regional aid under Article 92 (3) (a), the aid in question was not granted under a regional aid scheme but on the basis of discretionary *ad hoc* decisions by the competent authorities.

Even if the aid in question were to be regarded as regional aid, it could not qualify for exemption under Article 92 (3) (a) for that reason since such aid must contribute to the long-term development of the region ; that is not the case here as the aid is aimed only at covering the firm's losses, without any structural improvements.

With regard to the exceptions provided for in Article 92 (3) (b), the aiud at issue is not intended to promote the execution of an important project of common interest or to remedy a serious disturbance in the Italian economy, nor does it have any of the features of such projects. Furthermore, the Italian authorities have not requested exemption on these grounds in the comments sent to the Commission.

With regard to the exceptions provided for in Article 92 (3) (c) in respect of 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, the aid is not tied to any restructuring plan ensuring restoration of the firm's viability. It is therefore an operating aid which preserves the *status quo* by preventing normal market forces from taking effect.

The aid cannot, therefore, be considered compatible with the common market.

The same conclusion applies to the two amounts of aid granted to Sitas, particularly since, as stated under III, Sitas has been financial difficulties for many years.

With regard to the aid provided for in Article 7, in the form of unemployment benefit for IMAC employees, the Italian authorities have stated orally that the aid forms part of a restructuring plan intended to restore the firm's viability. Neither the restructuring plan nor any further details have been supplies on this point by the Italian authorities.

According to an oral statement by the Italian authorities, the measure set out in Article 8 consists of the part-financing by the region of the wages paid to Vetem employees following the termination of the payment of State aid to the wage guarantee fund.

The measures provided for in Articles 7 and 8 amount to aid for the recipients since the region assumes some of their operating costs. They therefore constitute operating aid prohibited under Community law and can be authorized only exceptionally and in cases where proper justification has been presented.

No other information was, in fact, supplied by the Italian authorities concerning the aims of the IMAC restructuring plan or of the partial relief for wage costs normally payable by Vetem. It follows that this aid too cannot be considered compatible with the common market.

The measure provided for in Article 10 of Regional Law No 23/1991 concerns the refinancing of an aid scheme for the Trapani and Messina dry docks already approved by the Commission under Article 6 (1) of Council Directive 87/167/EEC on aid to shipbuilding [1].

[1] OJ No L 69, 12. 3. 1987, p. 55.

As the circumstances of the original scheme have not changed, the Commission can but confirm its original approval.

As regards the measures referred to in Article 13, the Commission reserves its position in view of the fact that the scheme is covered in part by provisions it is currently examining; it will take an overall decision once its examination is completed.

Article 14 establishes a factoring aid scheme designed to reduce the cost of commercial invoice discounting by SMEs conforming to the definition given in the Community guidelines. While the scheme comprises operating aid, its effect on recipients' operating costs is only partial, amounting to 4,25 % gross of the amount benefiting from the aid.

Therefore, taking account of the socio-economic situation in Sicily and the fact that, under the Community guidelines in force, aid to productive investment by SMEs may amount to 65 % in Sicily and that aid for other purposes may be authorized in circumstances which justify it, the scheme in question qualifies for exemption under Article 92 (3) since the aid is intended to facilitate the development of certain activities without adversely affecting trading conditions to an extent contrary to the common interest.

Lastly, as regards the amendment, provided for in Article 15, of a general aid scheme for stockbuilding authorized by the Commission in 1982, certain conditions were, however, attached to the approval.

The Commission stated at the time that it would approve any future refinancing of the aid only on condition that the method of calculation was altered so that stocks were adjusted to the firm's initial productive investments. The new measure, however, adjusts the aid to investments already made and carried forward to the latest balance sheet, thereby increasing the amounts of aid and the lack of transparency which the condition imposed by the Commission was designed to rectify.

Since Article 15 cannot be approved in its present form, the Commission must conclude that it is incompatible with the common market.

VIII

In conclusion, the aid granted under Articles 4, 5, 7, 8 and 15 of Regional Law No 23/1991 and under Article 5 of Regional Law No 8/1991 is incompatible with the common market. It must therefore be abolished and any aid already paid recovered.

Where aid is incompatible with the common market, the Commission may, pursuant to the judgments given by the Court of Justice in Case 70/72, *Commission* v. *Germany*(1) and in Case 310/85, *Deufil* v. *Commission*(2), order Member States to repay any aid granted unlawfully.

The aid must be repaid in accordance with the procedures and provisions of Italian law, in particular those relating to interest on arrears on amounts owed to the State, with interest starting to run on the date on which the unlawful aid was granted. This measure is necessary in order to restore the *status quo* by removing all the financial benefits which the firms receiving the unlawful aid have improperly enjoyed since the date on which the aid was paid (see the Court of Justice's judgment in Case C-142/87, *Belgium* v. *Commission*(3)).

The Commission would also point out that the procedures and provisions of national law 'must be applied in such a way that the recovery required by Community law is not rendered practically impossible' (paragraph 12 of the Court's judgment in Case 94/87, *Commission* v. *Germany*(4)),

HAS ADOPTED THIS DECISION:

Article 1

1. The aid provided for in Article 4, 5, 7, 8, 14 and 15 of Regional Law No 23/1991 of the Region of Sicily and in Article 5 of Regional Law No 8/1991 of the Region of Sicily is unlawful since it was not notified in advance to the Commission by the Italian authorities in accordance with Article 93 (3) of the EC Treaty.

2. The aid provided for in Article 14 of Regional Law No 23/1991 is compatible with the common market within the meaning of Article 92 (3) (c) of the EC Treaty in so far as the recipients conform to the definition of small and medium-sized enterprises given in the relevant Community guidelines.

3. The aid granted under Articles 4, 5, 7, 8 and 15 of Regional Law No 23/1991 and under Article 5 of Regional Law No 8/1991 establishing, respectively, extraordinary measures for industry and aid to the alkaline salts industry, is incompatible with the common market pursuant to Article 92 (1) of the EC Treaty.

(1) [1973] ECR 813.
(2) [1987] ECR 901.
(3) [1990] ECR I-959.
(4) [1989] ECR 175, 192.

Article 2

Italy is hereby required to suspend implementation of the aid measures referred to in Article 1 (3) and to ensure that any aid already paid is recovered.

The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on arrears on amounts owed to the State, with interest starting to run on the date on which the unlawful aid was granted.

Article 3

Italy shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply herewith.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 February 1994.

For the Commission

Karel VAN MIERT

Member of the Commission