II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 October 1996

on a tax credit scheme introduced by Italy for professional road hauliers

(C 45/95 ex NN 48/95)

(Only the Italian text is authentic)

(Text with EEA relevance)

(97/270/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 5, 92 and 93 thereof,

Having regard to the Agreement on the European Economic Area, and in particular Articles 61 and 62 thereof,

Whereas:

I

The Italian authorities have introduced a tax credit scheme for Italian road hauliers relating to tax for 1993 and 1994, accompanied by compensatory payments for non-Italian Community hauliers to refund part of their fuel costs. This scheme was instituted by the following legal framework:

As regards 1993:

— Decree Law No 82 of 29 March 1993 *(Gazzetta Ufficiale della Repubblica Italiana* (GURI) No 134, 10. 6. 1993), as amended and converted by Law No 162 of 27 May 1993 (GURI No 123, 28. 5. 1993),

— Decrees of 27 April 1993 (GURI No 100, 30. 4. 1993) and of 23 September 1993 (GURI No 228, 28. 9. 1993),

— Decree Law No 309 of 23 May 1994 (GURI No 119, 24. 5. 1994), as converted into Law No 459 of 22 July 1994,

— Decree of 23 April 1993 (GURI No 100, 30. 4. 1993);

As regards 1994:

— Decree Law No 642 of 22 November 1994 (GURI No 273, 22. 11. 1994),

— Decree Law No 21 of 21 January 1995 (GURI No 17, 21. 1. 1995), as converted into Law No 84 of 22 March 1995 (GURI No 68, 22. 3. 1995),

— Decree of 28 November 1994 (GURI No 280, 30. 11. 1994),

— Decree Law No 92 of 29 March 1995 (GURI No 75, 30. 3. 1995),

— Decree Law No 205 of 30 May 1995 (GURI No 124, 30. 5. 1995),

— Decree Law No 311 of 28 July 1995 (GURI No 176, 29. 7. 1995),

— Decree Law No 402 of 26 September 1995 (GURI No 226, 27. 9. 1995) (Not converted into Law within two months),

— Implementing Decree of 30 March 1995 (GURI No 78, 3. 4. 1995).

In June 1993 a similar tax credit scheme relating to 1992, examined under State aid procedure C/32/92, was declared incompatible with the common market by Commission Decision 93/496/EEC of 9 June 1993 [1].

In addition, given that the Italian authorities had failed to comply with this Decision, on 21 December 1994 the Commission decided to refer the matter to the Court of Justice pursuant to the second subparagraph of Article 93 (2) of the Treaty for failure to implement the Decision [2].

In the course of the correspondence which followed this Decision to initiate proceedings the Italian authorities and the Commission exchanged information on the tax credit scheme for 1993. The Italian authorities argued that the 1993 scheme differed from the 1992 scheme by introducing compensatory payments for non-Italian Community carriers with a specific budget allocated for this purpose.

In February 1995 the Commission learned of the actual introduction of the scheme for the first half of 1994 as well, through the publication in the Italian Official Gazette of the Decree Law of 21 January 1995 [3].

In the subsequent correspondence the Italian authorities submitted the text of a new Decree Law extending the same tax credit scheme to the second half of 1994.

Following a further exchange of correspondence, by letter dated 4 December 1995 (SG(95) D/15427) the Commission informed the Italian authorities that it had decided to initiate the procedure provided for by Article 93 (2) of the Treaty against the Italian aid scheme in the form of tax credit for professional road hauliers for 1993 and 1994. By the same letter, the Commission requested Italy to supply all the documents, information and data necessary to examine whether this aid was compatible with the common market and to suspend immediately payment of any further aid in the same form of tax credit. This obligation includes not only the requirement to abstain from paying aid for which arrangements have already been made but also to refrain from adopting new legislative acts aiming at introducing the same types of aid scheme.

In accordance with the procedure, the Commission invited the Italian authorities to submit their comments on the decisions outlined above and informed the other Member States and interested parties by publishing the letter in the *Official Journal of the European Communities* [4].

Following this publication, the Commission received comments from the Italian association of large and medium-sized transport undertakings, *Coordinamento,* and from the Vienna and Brussels representatives of the Austrian Chamber of Commerce. These comments primarily agreed with the reasoning followed by the Commission in its letter initiating the procedure. On 4 April 1996 the Commission sent the Italian Government copies of the comments which it had received from third parties and requested it to submit any replies it wished to make.

By letter dated 26 March 1996, registered by the Commission on 1 April 1996, the Italian authorities gave their response to the initiation of the procedure. By letter dated 31 May 1996 the Commission made certain comments on the arguments in this response and invited the Italian authorities to a meeting which was held in Brussels on 21 June 1996.

II

The legislation in question introduces, for the 1993 and 1994 tax years, a tax credit scheme for Italian road hauliers and compensatory payments for non-Italian Community hauliers based on fuel consumption over the distance covered on Italian territory.

The tax credit for Italian road hauliers relates to income tax on natural persons, income tax on legal persons, municipal income tax, value added tax and to deductions at source on the incomes of dependents and compensation for self-employed work. The tax credit scheme covers Italian road hauliers entered in the register provided for by Law No 298 of 6 June 1974.

The amounts of aid are fixed as a percentage of the actual cost, less VAT, of fuels and lubricants but may not exceed certain ceilings according to the weight of the vehicle and its load. For the second half of 1994, the Italian authorities also limited the aid to the amounts corresponding to 100 vehicles per firm. The budget set aside for this tax credit and the maximum percentages and ceilings for each period of application are indicated in the table below:

[1] OJ No L 233, 16. 9. 1993, p. 10.
[2] See minutes of the 1228th meeting of the Commission held in Brussels on 21 December 1994 (morning).
[3] Decree Law No 20 of 21 January 1995 published in the *Gazzetta Ufficiale della Repubblica Italiana* on 21 January 1995.
[4] OJ No C 3, 6. 1. 1996, p. 2.

Tax credit for Italian road hauliers		1993	1994	
			first half	second half
Budget		Lit 340 + 200 000 million (ECU 247 million)	Lit 270 000 million (ECU 123,5 million)	Lit 210 000 million (ECU 96 million)
% of expenditure on diesel and lubricants		24,30 %	10,43 %	9,7 %
Maximum ceilings per vehicle according to weight	< 6 000 kg	Lit 650 000 (ECU 297)	Lit 295 000 (ECU 134)	Lit 280 000 (ECU 127)
	between 6 000 and 11 500 kg	Lit 1 375 000 (ECU 629)	Lit 625 000 (ECU 285)	Lit 580 000 (ECU 265)
	between 11 500 and 24 000 kg	Lit 3 915 000 (ECU 1 791)	Lit 1 790 000 (ECU 819)	Lit 1 670 000 (ECU 764)
	> 24 000 kg	Lit 6 650 000 (ECU 3 035)	Lit 3 045 000 (ECU 1 389)	Lit 2 850 000 (ECU 1 300)
Corresponding Ministerial Decree		Decree of 23 September 1993	Decree of 28 November 1994	Decree of 30 March 1995

The Decrees lay down that these maximum amounts are calculated on the basis of the hypothesis that the four categories of vehicles can cover 8, 6, 3,5 and 2,2 km per litre of diesel consumed respectively.

For each period of application, moreover, the scheme provides for compensatory payments to road hauliers from EC Member States on the basis of the consumption of fuel over the distance covered on Italian territory. The budgets set aside for this are Lit 30 000 million for 1993, Lit 15 000 million for the first half of 1994 and Lit 8 000 million for the second half of 1994.

The arrangements for granting such compensatory payments should have been laid down by Ministerial Decree (see Article 15 (4) of Decree Law No 82 of 29 March 1993, as amended and converted by Law No 162 of 27 May 1993, Article 1 (4) of Decree Law No 21 of 21 January 1995, as converted into Law No 84 of 22 March 1995 and Article 1 (4) of Decree Law No 92 of 29 March 1995). By letter dated 26 March 1996, the Italian authorities stated that the Decrees were still not finalized but would not be introduced to comply with the suspension of payments ordered by the Commission. The drafts would nevertheless be forwarded to the Commission to obtain a possible derogation from this suspension.

Moreover, the Italian authorities admitted by letter dated 19 May 1995 that the scheme introduced for the first half of 1994 was a six-month extension of the scheme which had been introduced for 1993 and examined under State aid procedure C/32/92, giving rise to the Decision of 9 June 1993 declaring the aid incompatible with the common market under Article 93 (1) of the Treaty, since it met none of the requirements for exemptions laid down in Article 92 (2) and (3), nor any of the conditions laid down in Council Regulation (EEC) No 1107/70 [1].

III

Under Article 92 of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. This concept of aid therefore calls for analysis of three fundamental aspects: use of State resources, distortion of competition and effect on trade.

IV

Article 92 makes no distinction as to the form, causes or objectives of the measures in question, but defines them in terms of their effects. The fact that the measure is fiscal in nature is not therefore sufficient to exclude it from the scope of Article 92.

[1] OJ No L 130, 15. 6. 1970, p. 1.

In this case, the effect of the tax credit scheme is to increase the cash flow of a single sector of the economy - Italian road hauliers operating for hire or reward - by favouring them as compared with own-account hauliers through a temporary exemption from a general system of taxation and therefore constitutes an exemption which is not justified on the basis of the nature or general scheme of the system, in the terms of the judgment of the Court of Justice in Case 173/73 [1], and is not, therefore, a general measure.

In their letter of 26 March 1996 the Italian authorities defended the tax credit scheme in question as a mechanism specific to an 'industrial' policy of differentiation of the selling prices of fuels depending on whether they are for domestic or industrial use, along similar lines to the electricity or water sectors.

As stated in its letter of 31 May 1996, the Commission considers that if this were price differentiation based on purely commercial criteria, it could indeed be considered not to be State aid but normal commercial practice [2]. However, in the case of the tax credit scheme for road hauliers, the tariff differentiation cannot be considered commercial practice since it is implemented by the State through a tax system, without any possibility of reduction in the operating accounts of operators in the fuel sector and, hence, does not correspond to the normal behaviour of a commercial operator. Moreover, if the tax credit were based on genuine commercial calculations, it would not be limited to 100 vehicles per firm for the second half of 1994.

The tax credit for Italian professional road hauliers, examined under aid dossier No C/45/95, relates to an amount equivalent to between 9,7% and 24,3% of the actual cost of fuels and lubricants borne by road hauliers. The Italian authorities argue that this aid does not constitute a benefit but rather compensation since the Italian excise duties on fuels are very high compared with those in other Community countries. The table below shows the excise duty levels on diesel fuel in Community countries for 1993 and 1994:

	1993	1994
B	296	288
DK	245	257
D	267	318
GR	289	243
E	287	252
F	249	321
IRL	291	303
I	406	357
L	197	234
NL	258	309
P	328	296
UK	318	372

Council Directive 92/82/EEC of 19 October 1992 [3] establishes, from 1 January 1993, minimum rates for indirect taxes on mineral fuels in the Community countries. As regards diesel, this minimum rate is ECU 245 per thousand litres.

Although it is true that excise duties on diesel in Italy in 1993 and 1994 were amongst the highest in the Union, the Commission cannot, in view of the case-law of the Court of Justice [4], accept this as an argument for introducing financial aid which directly reduces the operating costs of a single sector. The circumstance that the Italian Government proposed bringing the fuel tax levels into line with those practised in the other Member States makes no difference to the nature of the measure as State aid, which is prohibited save in the cases and under the procedures provided for in the Treaty. Disparities in legislation which distort competition in no way justify compensatory State aid. This aid therefore constitutes a non-additional benefit for the hauliers receiving it through the direct increase in the cash flow of a single sector.

Moreover, the table set out below shows, for each category, the maximum number of kilometres subsidized per category of vehicle, given the prices excluding VAT for each year (ECU 599 per 1 000 litres in 1993 and ECU 550 per 1 000 litres in 1994) [5], as well as the hypotheses of kilometres covered per vehicle per litre of diesel applied by the Italian authorities in their Implementing Decree. The figures indicate the number of kilometres covered without fuel costs for the haulier.

[1] Judgment of 2 July 1974 — *Government of the Italian Republic* v. *Commission of the European Communities* [1974] ECR, p. 709 to 721.

[2] *Cf.* Judgment of the Court of Justice of 29 February 1996 in Case C-56/93 (preferential tariff system for supplies of natural gas to Dutch nitrate fertilizer producers).

[3] OJ No L 316, 31. 10. 1992, p. 19.

[4] Judgment of 10 December 1969, Cases 6 and 11/69, *Commission* v. *France* [1969] ECR 523, paragraph 21.

[5] Figures from *Oil Bulletin* — European Commission — Directorate-General for Energy.

Category of vehicle	km/l	1993		1994 (1)		1994 (2)	
		A	B	A	B	A	B
< 6 000 kg	8	297	61 km	134	30,4 km	127	28 km
6 000 — 11 500 kg	6	629	175 km	285	86 km	265	80 km
11 500 — 24 000 kg	3,5	1 791	854 km	819	425 km	764	397 km
> 24 000 kg	2,2	3 035	2 303 km	1 389	1 147 km	1 300	1 074 km

A: maximum ceiling of aid in ECU.

B: maximum number of kilometres subsidized.

(1) first half.

(2) second half.

It should be noted that the tax credit involves a subsidy which increases on a non-linear basis with the size of the vehicle so that the biggest vehicles will benefit most. It is precisely these that are most likely to be in competition on the international market.

In addition, in response to the opening of the procedure, the Italian association of large and medium-sized transport undertakings, *Coordinamento,* stressed that since the adoption of Decree No 92 of 29 March 1995 the tax credit scheme has been limited to a maximum of 100 vehicles per company with the result that the largest companies could not be refunded for the fuel of all their vehicles in the same way as small operators.

As regards non-Italian Community hauliers engaged in the carriage of goods for hire or reward, the Italian authorities argue that the measure introduces no discrimination against them given that provision has been made for an equivalent compensatory payment to them. At a meeting on 21 June 1996 the Italian authorities announced that they had found a mechanism for compensation for the fuel costs of non-Italian hauliers through the requests for VAT refunds on exports. The draft decree to this end is apparently frozen in response to the suspension of payments ordered by the Commission. Consequently, as things stand, Italian professional road hauliers' costs are reimbursed automatically on the basis of their income tax return and this has been regulated by Decree since 1993, whereas the rules for compensatory payments for non-Italians are not clear and have not actually been put into effect.

At the meeting on 21 June 1996 the Italian authorities also pointed out that non-Italian hauliers could have made informal requests for refunds but did not do so, which, in their opinion, proves that non-Italian hauliers feel no need for compensation because they obtain their fuel supplies outside Italy, where the tax is lower. The Commission considers this reasoning unacceptable because the lack of any pre-established refund procedure constitutes an obvious barrier to any initiative by non-Italian hauliers, while, by contrast, Italian hauliers are free to obtain fuel supplies in other countries on the same terms as non-Italian hauliers.

Moreover, the budget allocated to non-Italian hauliers constitutes between 3,7 % and 5,3 % of the total budget. For the 1993 tax year, the breakdown of the initial overall budget between Italian and non-Italian hauliers was determined by ministerial decree 'on the basis of the distances covered by the two categories on Italian territory'. However, no justification was given for the distribution of the additional budget of Lit 200 000 million for 1993, nor of the budgets allocated for 1994. This breakdown is not balanced and could give rise to discrimination in favour of Italian road hauliers. Finally, evidence has to be provided that non-Italian road hauliers engaged in the carriage of goods for hire or reward can be refunded for the cost of lubricants in the same way as Italian firms.

Italian road hauliers carrying goods for hire or reward are in competition both with road hauliers of other nationalities and own-account road hauliers.

In 1992 own-account operations accounted for 19,2 % of national and 3,8 % of international transport operations by Italians (1).

As regards the discrimination that the aid scheme for professional road hauliers could imply for own-account carriers, the Italian authorities consider that this has no significance (letter of 13 January 1994). This view is based on the argument that the costs of fuels and lubricants are of marginal importance in these firms since transport operations are subsidiary to their main activity. That argument cannot be accepted by the Commission, which feels that, from the competition point of view, the transport market includes both hire or reward and the alternative

(1) *Road freight transport in the single European market* — Report by the Committee of Enquiry — July 1994.

own-account services and that the effect in terms of distortion of competition has to be analysed by comparing the conditions in which the competing activities operate, without taking account of any other activities in which the companies are involved.

As regards competition with other Community hauliers acting for hire or reward, it should be pointed out that in 1992 around 16,2 % of Italian road transport operations for hire or reward, in terms of kilometre tonnes, were international operations. Similarly, between 1990 and 1993, 14 % of Community road cabotage, in terms of kilometre tonnes, was carried out in Italy [1], making it the second most attractive country in the Union for Community hauliers.

These figures which reflect actual competition in the past have to be considered in the light of potential competition and the recent liberalization of the carriage of goods by road which since 1993 has opened the way to more intensive competition in this sector. This liberalization in the goods transport sector stems in particular from the following Community legislation:

— Council Regulation (EEC) No 881/92 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States [2]. This Regulation envisages the abolition of all quantitative restrictions on international road transport services from 1 January 1993,

— Council Regulation (EEC) No 3118/93 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State [3]. This Regulation provides for the complete liberalization of road cabotage by 1 July 1998, but establishes a transitional period with an annual increase of 30 % from 1 January 1995, starting from an initial total of 30 000 Community authorizations.

The Commission therefore considers that the aid benefits firms in a sector which is open to international competition and is therefore involved in international trade.

Where financial aid granted by a Member State enhances the opportunities for firms in a particular sector engaged in intra-Community trade, the latter must be considered as being affected within the meaning of Article 92 (1) of the Treaty.

The Italian aid to hauliers engaged in the carriage of goods for hire or reward improves the financial position and opportunities of those firms receiving it as compared with their competitors and this effect is produced in the context of intra-Community trade, which is therefore likely to be affected.

The Italian authorities argue in their letter dated 26 March 1996 that a lorry of more than 24 000 kg covers an average of 80 000 km per year, whereas a subsidy covering 2 303 km would be equivalent to only one return journey without fuel costs between Rome and Munich. Other similar examples of calculations were also submitted by the Italian authorities to defend the view that the amounts involved are too small to distort or threaten to distort competition. The Commission has reminded the Italian authorities on several occasions that the *de minimis* rule established in the guidelines on State aid for SMEs [4] in force at the time did not apply to the transport sector, as is clear from Article 3 (2) thereof. In a sector such as transport, where the European Union is employing all means to promote a transfer of capacity from roads to other cleaner, safer modes, a qualitative, non-quantitative analysis must be made of any aid schemes.

V

Given that the aid to the road haulage sector constitutes aid within the meaning of Article 92 (1) of the Treaty, consideration must be given to whether it is eligible for the exemptions provided for in Articles 77, 92 and 93 of the Treaty, application of which, moreover, has not been invoked by the Italian authorities.

Article 3 of Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway authorizes, until the entry into force of Community rules on access to the transport market, aid granted as an exceptional 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. The aid to the road transport sector examined under dossier No C/45/95 cannot be covered by the exemption referred to in the abovementioned Regulation since it does not form part of any reorganization plan for the sector in question within the meaning of the abovementioned Article.

Moreover, the scheme is not aid granted to individual consumers on social grounds, is not intended to make good damage caused by natural disasters or exceptional occurrences and does not relate to a project of European interest within the meaning of Article 92 (2) and (3) of the Treaty.

[1] Data sent by Member States to DG VII and included in the letter of 10 February 1995 to the Permanent Representatives.
[2] OJ No L 95, 9. 4. 1992, p. 1.
[3] OJ No L 279, 12. 11. 1993, p. 1.
[4] OJ No C 213, 19. 8. 1992, p. 2.

The exemptions for aid serving regional development provided for in Article 92 (3) (a) and (c) of the Treaty cannot apply either to the Italian aid scheme in question given that all road hauliers operating for hire or reward, wherever their place of establishment, may receive them and that the aid has no regional development objective.

As regards Article 92 (3) (c) of the Treaty relating to aid to facilitate the development of certain economic activities, it should be noted that the aid in question, for which all road hauliers are eligible (since the only condition is to be entered on the register of hauliers), meets no objective associated with reorganization of this sector and is nothing other than an operating subsidy; generally, such subsidies are considered not to meet the admissibility criteria laid down by the Article in question. Such operating aid may result in other Member States having to introduce similar measures with all the consequent financial costs. Moreover, the absence of any *quid pro quo* constitutes an undue advantage which cannot be justified by the Community interest.

In their letters dated 26 August 1993 and 26 March 1996 the Italian authorities stated that the same result could have been achieved by reducing tax on fuels (which is above the Community minimum), but that it was not possible to adopt such a solution because it was contrary to budgetary policy and to the policy to control fuel consumption. This argument does not alter the incompatibility of the aid and cannot be accepted by the Commission given the above considerations indicating that the measure constitutes aid within the meaning of Article 92 (1) of the Treaty. Moreover, it appears that this type of aid also has the effect of reducing the fuel costs borne by hauliers and thus of encouraging higher consumption.

The Commission therefore considers that the Italian aid to road hauliers carrying goods for hire or reward in the form of a tax credit is not compatible with the common market under the terms of Article 92.

VI

The aid should have been notified to the Commission in good time, as required by Article 93 (3) of the Treaty. Since the Italian Government introduced the aid scheme without complying with this notification obligation, the aid must be considered illegal under Community law.

When the Commission initiated the procedure, as communicated to the Italian authorities by letter dated 4 December 1995, it called on Italy to suspend immediately the payment of any new aid in the form described above, pending the result of its examination, and to inform the Commission within 15 working days of the steps it had taken to comply with this obligation. This obligation includes not only the requirement to abstain from paying aid for which arrangements have already been made, but also to refrain from adopting new legislative instruments aimed at introducing the types of aid scheme described above.

By letter dated 26 March 1996, the Italian authorities stated that no legislation had been adopted in Italy to extend the tax credit scheme beyond the 1994 tax year. They also stated that it was impossible to suspend the scheme for 1993 and 1994 since it had already been put fully into effect when those directions were issued. Finally, they said that they had frozen the process for adoption of the decrees aiming to introduce compensatory payments for non-Italian carriers.

In accordance with the case law of the Court of Justice, the Commission reserved the right to take a Decision calling on the Member State to recover any aid granted unlawfully, as the Member States were reminded in the Communication published in *Official Journal of the European Communities* No C 156 of 22 June 1995, page 5. In the case in point the Commission considers recovery of the aid necessary in order to restore the equitable conditions of competition which existed before the aid was granted,

HAS ADOPTED THIS DECISION:

Article 1

The scheme of aid in favour of professional road hauliers introduced by Italy in the form of a tax credit, as provided for in Law No 162 of 27 May 1993 (GURI No 123, 28. 5. 1993), Law No 84 of 22 March 1995 (GURI No 68, 22. 5. 1995) and Decree Law No 402 of 26 September 1995 (GURI No 226, 27. 9. 1995), is unlawful on the grounds that it was introduced in breach of the procedural rules laid down in Article 92 (3), and is also incompatible with the common market within the meaning of Article 92 (1) of the Treaty, in so far as it meets none of the conditions for the exemptions provided for in Article 92 (2) and (3) nor the conditions in Regulation (EEC) No 1107/70.

Article 2

Italy shall abolish the aid referred to above, refrain from adopting new legislative or regulatory instruments introducing any new aid in the form described above and recover the aid. The aid shall be reimbursed in accordance with the procedures and provisions of Italian law,

together with interest calculated by applying the reference rates used for assessment of regional aid, for the period from the date on which the unlawful aid was granted to the date on which it was actually repaid.

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 addressed to the Italian Republic.

Done at Brussels, 22 October 1996.

For the Commission

Neil KINNOCK

Member of the Commission