II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 6 September 2005

on the aid scheme implemented by Italy for certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets

(notified under document number C(2005) 3302)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/638/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) On 2 October 2003 Decree Law No 269 of 30 September 2003 providing for urgent measures to promote development and to correct the trend of public finances ('Decree-Law No 269/2003'), as subsequently converted into Law No 326 of 24 November 2003, published in the Official Gazette of the Italian Republic No 274 of 25 November 2003, entered into force on its publication in the Official Gazette of the Italian Republic No 229 of 2 October 2003. Article 12 of Decree-Law No 269/2003 provides that the net operating result of certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies ('small- and mid-caps') listed on a regulated market in the European Union are subject to 5 % tax, instead of the standard 12,5 % tax withheld by non-specialised investment vehicles.

(2) By letter dated 22 October 2003 (D/56756), the Commission called on the Italian authorities to provide information about the incentives in question and their entry into force with a view to ascertaining whether they constituted aid within the meaning of Article 87 of the Treaty. By the same letter, it reminded Italy of its obligation to notify to the Commission before they are implemented any measures constituting aid pursuant to Article 88(3) of the Treaty.

(3) By letters of 11 November 2003 (A/37737) and 26 November 2003 (A/38138), the Italian authorities provided the information requested. On 19 December 2003 (D/58192) the Commission again reminded Italy of its obligations under Article 88(3) of the Treaty and invited the Italian authorities to inform those that might benefit from the incentives of the consequences provided for by the Treaty and by Article 14 of Council Regulation (EC) No 659/1999 [2] if the incentives in question were found to constitute aid unlawfully implemented without the prior authorisation of the Commission.

(4) By letter of 11 May 2004 (SG 2004 D/202046), the Commission informed Italy of its decision of 7 May 2004 to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the tax incentives granted by Italy by way of the scheme in question.

[1] OJ C 225, 9.9.2004, p. 8.

[2] OJ L 83, 27.3.1999, p. 1.

(5) By letter of 14 July 2004 (A/35463), the Italian authorities submitted their comments.

(6) On 9 September 2004 the Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union*, inviting interested parties to submit their comments ([3]).

(7) On 16 and 27 September 2004 two meetings took place between the Commission's representatives and the Italian tax authorities to examine certain aspects of the scheme.

(8) By letter of 7 October 2004 (A/37679), the Italian Association of Asset Management Companies ('Assogestioni') submitted its comments. By letter of 28 October 2004 (D/57696), the Commission forwarded the comments to the Italian authorities. By letter of 6 December 2004 (A/39479), the Italian authorities responded to the comments from Assogestioni.

(9) By letter of 18 February 2005 (A/31490), Assogestioni submitted further comments supplementing those sent on 7 October 2004. By letter of 24 February 2005 (D/51366), the Commission forwarded them to the Italian authorities. By letter of 4 April 2005 (A/32813), the Italian authorities submitted their comments on those further comments by Assogestioni.

(10) By letter of 28 February 2005 (A/31724), the *European Federation of Investment Funds and Companies* (FEFSI) submitted its comments. Since its comments were presented after the deadline set (see paragraph 6) and since they were similar to those submitted by Assogestioni, they were not forwarded to the Italian authorities or taken into account in the present decision.

II. DESCRIPTION OF THE MEASURE

General framework

(11) Article 12 of Decree-Law No 269/2003 introduces tax incentives for certain undertakings for collective investment in transferable securities (investment vehicles) that are subject to Italian law. In particular it stipulates that, as of the tax year in which certain conditions are met, the net operating result of those undertakings for collective investment in transferable securities that are specialised in shares of small- and mid-caps listed on a regulated market in the European Union (specialised investment vehicles) are subject to a 5 % tax, instead of the standard 12,5 % rate of tax. In general, under the Italian system of taxation of collective investments, the tax in question is withheld each year by collective investment undertakings on a taxable base corresponding to the annual increase in the registered daily value of their assets (net operating result), with a view to taxing the potential capital gains realised by the investors investing in such investment vehicles. In this way, no further tax is paid by the investors upon distribution of income deriving from such investments.

(12) The scheme amends the tax treatment in Italy of capital income accruing to various investment vehicles including the open-ended investment funds governed by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([4]), the 'historic Luxembourg' funds, open-ended investment companies (SICAVs) and closed-end investment funds, as governed by the laws regulating such investment vehicles. The relevant legal provisions concerned most notably include:

a) Articles 9 and 10b of Law No 77 of 23 March 1983 concerning the tax treatment of the net operating result of open-ended investment funds;

b) Article 11a of Decree-Law No 512 of 30 September 1983 concerning the tax treatment of the net operating result of certain investment funds, including the 'historic Luxembourg funds';

c) Article 11 of Law No 344 of 14 August 1993 concerning the tax treatment of the net operating result of closed-end investment funds;

d) Article 14 of Decree Law No 84 of 25 January 1992 concerning the tax treatment of the net operating result of SICAVs;

e) Articles 7 and 9 of Legislative Decree No 461 of 21 November 1997 concerning the tax treatment of capital income and other income accruing to investors resident in Italy;

f) Article 14 of Legislative Decree No 124 of 21 April 1993 concerning the tax treatment of capital income accruing to pension funds.

(13) The investment vehicles in question undertake collective investment in transferable securities including bonds, shares

([3]) See footnote 1.

([4]) OJ L 375, 31.12.1985, p. 3.

and other securities of listed and non-listed companies in the collective interest of third-party investors (participants). They may take the form of a contractual investment fund without legal personality (e.g. a unit trust) managed by a distinct management company or of a corporate investment fund (e.g. a SICAV) ([5]) or a pension fund ([6]). The investment vehicles taking the form of a unit trust can either be 'open-ended' or 'closed-end' funds. ([7])

(14) Article 12 of Decree-Law No 269/2003 provides that, as of the tax year in which the scheme entered into force, the specialised investment vehicles governed by the legislation in question are to apply a 5 % tax, instead of the standard 12,5 %, on the net operating result accruing to them and consisting in the annual increase in the registered daily value of their assets.

(15) Specialised investment vehicles within the meaning of Article 12 of Decree-Law No 269/2003 are:

a) investment vehicles whose bylaws expressly specify that at least two thirds of the value of the assets held are to be invested in shares of small- and mid-caps listed on a regulated market in the European Union;

b) investment vehicles that, one year after the starting date of the fund or from the date on which new bylaws were established, hold shares in small- and mid-caps listed on a regulated market in the European Union the value of which is equal to at least two thirds of its assets, during the calendar year for more than one sixth of the number of days of operation of the investment vehicle ([8]) following the end of the aforementioned period, on the basis of information taken from the Fund's relevant regular accounting reports.

([5]) The main difference between SICAVs (corporate funds) and contractual investment funds is that, in the case of SICAVs, there is no distinction between company capital and capital invested. The participating shares in a SICAV are its capital.

([6]) The tax rate applicable to the net operating result of pension funds is not directly reduced by Article 12 of Decree-Law No 269/2003 because special tax rules apply to them. However, pension funds investing in specialised investment vehicles benefit from a specific tax credit which allows them to apply the specific 5 % rate to the portion of their revenues deriving from specialised investment vehicles.

([7]) The difference between open-ended and closed-end funds is that, for the latter, the number of shares issued by the fund is fixed at the outset for a certain number of years, the participants do not have the right to request redemption of their shares at any time, and new issues of shares are also restricted. Open-ended funds are not subject to any of these restrictions (cf. Provvedimento del Governatore 27 agosto 2003 of the Bank of Italy amending the provisions on UCITS in the previous Provvedimento of 20 September 1999 and taking into account the changes to the provisions governing closed-end funds introduced by Decree No 47 of 31 January 2003).

([8]) This limit is set at two months in the case of closed-end funds.

(16) Small- and mid-caps within the meaning of Article 12 of Decree-Law No 269/2003 are companies whose market capitalisation does not exceed €800 million, as determined on the basis of the market price of the company's shares on the last trading day of each quarter of the calendar year ([9]).

(17) The scheme is applicable as of the tax year in which the investment vehicle's bylaws are amended (or adopted in case of a new investment vehicle), introducing the express requirement that the investment vehicle invest not less than two thirds of its assets in shares of small- and mid-caps listed on a regulated market in the European Union.

(18) The scheme amends the tax rules concerning all the various Italian investment vehicles in Italy, whether they are administered/incorporated in Italy and subject there to the special substitute tax levied on their net operating result (investment vehicles subject to substitute tax in Italy) or foreign vehicles subject to tax in Italy on revenues distributed to Italian subscribers. It amends with the same effect the tax rules applicable to foreign investment vehicles regulated by above-mentioned Council Directive 85/611/EEC (harmonised foreign UCITS) ([10]) and the net operating result of which is distributed to Italian investors or the shares of which are held by Italian investment vehicles ([11]).

(19) In order to clarify the effects of the scheme and the way in which it indirectly extends the tax reduction to non-specialised vehicles and to other participants, it is necessary to examine separately the different tax rules applicable to capital revenues accruing to investment vehicles and to their participants, as amended by Article 12 of Decree-Law No 269/2003. To this end, a distinction should be drawn between '*investment vehicles acting as financial intermediaries the income of which is subject to substitute tax in Italy*' and '*investment vehicles subject to substitute tax and acting as participants in other investment vehicles*', since the same investment vehicle may act both as a financial intermediary (i.e. it invests in transferable securities) and as a participant

([9]) A company can therefore be classified as a small- or mid-cap for one or more quarters, depending on stock market fluctuations.

([10]) The scheme does not directly affect taxation of foreign investment vehicles falling outside the scope of Directive 85/611/EEC.

([11]) To be more precise, while the foreign UCITS that distribute their net operating result to individual Italian investors apply Italian withholding tax upon distribution, the portion of the net operating result accruing to Italian investment vehicles from their participation in foreign UCITS is eligible for relief from double taxation by means of the exclusion of part of the net operating result deriving from such foreign UCITS.

investor (i.e. it invests in other investment vehicles). A separate section is devoted to the revenue accruing to other investors exempt from the substitute tax applicable to other investment vehicles.

Taxation of revenue accruing to investment vehicles acting as financial intermediaries subject to substitute tax in Italy

(20) Under the general system, investment vehicles are not subject to income tax. However, any operating revenue accruing to investment vehicles is ordinarily subject to the 12,5 % substitute tax calculated on their net operating result. As a general rule, this tax is in full discharge of tax liability, replacing any further tax on revenues distributed by investment vehicles.

(21) The net operating result is determined by deducting from the fund's net assets at the end of the year, plus the substitute tax payable and any amounts distributed during the year, the fund's net assets at the beginning of the year and the revenue from participation in collective investment undertakings subject to the substitute tax, as well as exempt revenue and revenue subject to withholding tax ([12]).

(22) Article 12 of Decree-Law No 269/2003 amends the general tax system in that it provides for the levying of a 5 % substitute tax on the operating revenue of specialised investment vehicles.

Taxation of revenue accruing to investment vehicles subject to Italian substitute tax and acting as participants in other investment vehicles

(23) Any revenue distributed by an investment vehicle subject to substitute tax in Italy to its participants (including other investment vehicles) is not subject to further taxation under the general system. The scheme in question maintains the exemption with regard to revenue deriving from specialised investment vehicles (subject to the 5 % substitute tax). It also reduces the effective tax on the revenue of non-specialized investment vehicles participating in foreign specialised investment vehicles not subject to substitute tax in Italy at a rate of 5 % ([13]).

Taxation of operating income accrued or distributed to other participants in investment vehicles not subject to the substitute tax

(24) Revenue distributed by Italian and foreign investment vehicles to Italian investors is not subject to further taxation in Italy because it has already been taxed at the level of the investment vehicle (withholding tax). However, if the participating investor is a business undertaking acting as such, the revenue received is included in its taxable income subject to the 33 % rate of tax. Such beneficiary undertakings qualify for a 15 % tax credit which offsets in full the double taxation of the capital revenue received. The scheme essentially confirms the tax credit, even when the revenue is distributed by specialised investment vehicles ([14]).

(25) Revenue distributed by foreign investment vehicles to Italian investors is subject to a 12,5 % withholding tax pursuant to Article 18 of the Italian Income Tax Code

([12]) Pursuant to Article 10b of Law No 77/1983, revenue from foreign investment vehicles not governed by Council Directive 85/611/EEC is included in the net operating result as it is not subject to withholding tax.

([13]) As a general rule, only 40 % of the net operating result accruing to an Italian investment vehicle from a foreign investment vehicle is taxable in Italy. This means that the foreign income accruing to an Italian investment vehicle is effectively taxed at 5 % (12,5 % of 40 % corresponds to a tax rate of 5 %). By excluding from the net operating result of an investment vehicle the entire amount of capital revenue deriving from a specialised investment vehicle subject to the reduced rate of 5 %, the scheme achieves the objective of ensuring equal treatment between investments made in Italian specialised investment vehicles and those made in foreign specialised investment vehicles.

([14]) Article 12 of Decree-Law No 269/2003 maintains the existing 15 % tax credit with a view to ensuring that the 5 % reduced tax levied on specialised investment vehicles is borne by the participating investor, which would be the case if the credit had been limited to 5 % (corresponding to the 5 % substitute tax paid by the investment vehicle) instead of 15 %. In short, the 15 % tax credit makes it possible to avoid higher taxation at the level of the investor, resulting in an aggregate rate of tax of 5 %. However, to prevent the participating investors from unduly benefiting from the full 15 % credit, while tax has been effectively paid at only 5 %, the scheme states that the tax credit constitutes a limited tax credit as regards the part not covered by the substitute tax on the accrued net operating result, i.e. 9 %, which cannot be reimbursed or used to offset income taxes due in tax years in which the revenue was taxed. To grant relief against withholding tax, Italian tax law provides for a tax refund to foreign (non-resident) investors participating in investment vehicles subject to tax in Italy, which qualify for a tax refund equal to 15 % of the amount distributed by the investment vehicles offsetting the tax previously charged. The scheme limits the refund to 6 % for distributions by specialised investment vehicles subject to the reduced substitute tax of 5 % under Article 12 of Decree-Law No 269/2003.

(TUIR). The scheme reduces the withholding tax to 5 % for revenue distributed by specialised investment vehicles. This provision ensures equal treatment of investors in foreign and Italian investment vehicles.

(26) Revenue deriving from investment vehicles is included in the net operating result of a pension fund participating in such investment vehicles. It is subject to a substitute tax of 11 %. To eliminate double taxation of the income accruing to pension funds, a tax credit equal to 15 % of such revenue is imputed against the substitute tax payable by such pension funds. The scheme adapts the new reduced-taxation arrangements for specialised investment vehicles to the specific tax system for pension funds.

(27) In parallel with the lowering of the substitute tax on specialised investment vehicles, the scheme reduces to 6 % the tax credit for revenue deriving from Italian specialised investment vehicles. Furthermore, Article 12 of Decree-Law No 269/2003 provides that the portion of the assets of pension funds generated by foreign specialised investment vehicles is subject to a 5 % substitute tax, instead of the standard 11 % ([15]).

III. GROUNDS FOR INITIATING THE PROCEDURE

(28) In its decision to initiate the formal procedure, the Commission considered that the measure met all the criteria for classification as state aid for specialised investment vehicles and for small- and mid-caps whose shares are held by such specialised vehicles within the meaning of Article 87(1) of the Treaty, while it did not raise any doubts regarding the direct tax reduction granted to investors in specialised investment vehicles because it constitutes a general measure for all investors.

(29) In raising doubts about the possible existence of aid for specialised investment vehicles, the Commission held them to be undertakings within the meaning of Article 87(1) of the Treaty because they either have a corporate form and constitute business entities *per se* or constitute separate assets managed by undertakings that compete on investment markets. Secondly, the Commission observed that specialised investment vehicles benefit either directly from a tax rate reduction or indirectly from additional capital investments by way of the tax reduction granted by the scheme to their investors where such vehicles invest primarily in small- and mid-caps listed on a regulated European market. The Commission further observed that the advantages in question are not proportionate to the number of shares in small- and mid-caps owned by such vehicles but are solely dependent on their status as specialised vehicles.

(30) As regards small-caps the Commission stressed that the measure provides an indirect advantage for those companies whose shares are held by specialised investment vehicles, because it has the effect of increasing their liquidity by providing them with easier access to capital. The advantage is dependent on their status as small- and mid-caps listed on a regulated European market and not on the performance; nor it is dependent on other conditions or investments made by such companies.

IV. COMMENTS FROM ITALY AND INTERESTED PARTIES

(31) In their comments, both Italy and Assogestioni claimed that the investment vehicles in question cannot be viewed as undertakings but simply as pools of assets managed by separate undertakings. The latter are subject to ordinary taxation on their profits and do not benefit from the tax reduction provided for in Article 12 of Decree-Law No 269/2003.

(32) Both Italy and Assogestioni further observed that the scheme should be viewed as a general tax policy measure directly benefiting the investors and only indirectly affecting small- and mid-caps and investment vehicles. For the interested parties, the scheme is aimed at fostering the market capitalisation of small- and mid-caps as opposed to other companies listed in Europe and, as such, it would fall outside the scope of state aid monitoring. Both Italy and the interested parties argued that the measure does not constitute aid for specialized investment vehicles or for certain management companies. In this respect, the Italian authorities stressed that the scheme is effectively open to all undertakings that create separate funds aimed at investing predominantly in small- and mid-caps listed on regulated European markets and would therefore constitute a general measure.

(33) Furthermore, according to those comments, the scheme would not affect competition because any European small- or mid-caps could benefit from the easier access to capital.

([15]) The effective 5 % substitute tax on the income accruing to pension funds from foreign specialised investment vehicles is realised because, under the specific tax provisions for pension funds, they may deduct from their net operating result, taxed at 11 %, the 54,55 % of the revenue distributed by a foreign specialised investment vehicle, with the result that applying the reduced rate of 11 % to 45,45 % corresponds to the imposition of a 5 % on total revenue. On the other hand, the revenue accruing to pension funds from Italian specialised investment vehicles is subject to an 11 % substitute tax although it qualifies for a 6 % tax credit to offset the tax already paid by such specialised investment vehicles.

Moreover, it would not constitute aid to such companies because investment vehicles or their management companies would take their investment decisions with a view to maximizing profits.

(34) Assogestioni provided detailed information on the functioning of the scheme during its first period of operation (2004). By the end of 2004 three specialised investment vehicles were operational: two that had existed previously and had amended their bylaws so that they invested primarily in shares of small- and mid-caps listed on regulated European markets, and one newly established fund. Assogestioni indicated that the tax cost of the scheme in 2004 was minimal. On the basis of the data presented by Assogestioni, the Commission calculated that the shortfall in tax revenues in 2004 amounted to some €1,1 million, account being taken of the necessary adjustments to offset the carry-forward of the virtual tax credits relating to tax incurred in previous years. Italy and the interested parties consider that these figures show that the scheme had an insignificant effect on intra-Community competition and trade, also bearing in mind that small- and mid-caps and investment vehicles established abroad may benefit from the indirect effects of the tax reduction in question.

V. ASSESSMENT OF THE MEASURE

State aid within the meaning of Article 87(1) of the Treaty

(35) Having considered the comments submitted by the Italian authorities and the interested parties, the Commission maintains its position that the tax reduction for investors constitutes state aid not only for specialised vehicles investing in shares of small- and mid-caps listed on regulated European markets but also for small- and mid-caps whose shares are held by such vehicles because it cumulatively meets all the criteria laid down in Article 87 (1) of the Treaty.

Selective advantage for specialised investment vehicles

(36) The Commission firstly confirms the view expressed in its letter opening the formal investigation procedure that, in some cases, investment vehicles are undertakings within the meaning of Article 87 of the Treaty and may accordingly benefit from the tax reduction provided for in Article 12 of Decree-Law No 269/2003. In particular, it considers that, even if specialised investment vehicles do not benefit directly from the tax reduction granted to their investors, they nonetheless receive an indirect economic benefit in so far as the tax reduction on investments in specialised vehicles prompts investors to buy shares in such vehicles, thereby providing additional liquidity and extra income in terms of entry and management fees.

(37) Pursuant to the Commission Communication on state aid and risk capital ([16]), in some cases where a state measure provides for the creation of a fund or other investment vehicle it is necessary to consider whether the fund or vehicle can be considered to be an enterprise benefiting from state aid. In the case at hand, the Commission takes note of the comment by the Italian authorities to the effect that the specialised investment vehicles benefiting from the reduced tax pursuant to Article 12 of Decree-Law No 269/2003 are simply pools of assets and so cannot be regarded as undertakings within the meaning of Article 87 of the Treaty. It notes, however, that in some cases such investment vehicles take corporate form and may therefore benefit individually from advantages although taxation of them is separate from taxation of the assets they manage. It further points out that other investment vehicles without legal personality are managed by undertakings which compete with other operators managing savings and that those undertakings may accordingly benefit from advantages.

(38) The Commission considers that specialised investment vehicles perform an economic activity and constitute undertakings within the meaning of Article 87(1). This is confirmed by the case law of the Court in the VAT field. In particular, the Court recently held ([17]) that transactions carried out by SICAVs and consisting in the collective investment in transferable securities constitute an economic activity carried out by taxable persons within the meaning of Article 4(2) of the Sixth VAT Directive ([18]). According to the case law ([19]), it is evident from the preamble to the First Directive ([20]) that VAT harmonisation aims to eliminate factors which may distort conditions of competition and therefore to secure neutrality in competition. Given that the state aid rules and the VAT harmonisation directives share the same purpose, the Commission considers it appropriate to refer to the case law concerning the latter, which confirms that the investment vehicles in question, whether or not they have corporate form, perform an economic activity and therefore constitute undertakings within the meaning of Article 87(1).

(39) The Commission accordingly considers that a tax advantage provided to investors investing in specialized investment vehicles favours the vehicles themselves as undertakings when they have corporate form or the undertakings

([16]) OJ C 235, 21.8.2001, p. 3, paragraph IV.1.

([17]) Case C-8/03 *BBL*, paragraphs 42 and 43.

([18]) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

([19]) Case 89/81 *Hong-Kong Trade Development Council* [1982] ECR 1277, paragraph 6.V. See also Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 20.

([20]) First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ 71, 14.4.1967, p. 1301; English Special Edition, Series I, Chapter 1967, p. 14).

managing such vehicles when they have contractual form. In particular, the increased demand for shares of specialized investment vehicles leads to an increase in the management and entry fees charged by the vehicles or by the undertakings managing them.

(40) The argument whereby the scheme is not selective in so far as it does not favour specific investment vehicles and managing undertakings with respect to their size, nationality, place of registration or composition is irrelevant in so far as what matters is the fact that the scheme provides for a tax reduction that is extraordinary and limited to the investment vehicles specialised in shares of listed small- and mid-caps and their managing undertakings. According to settled case law ([21]), the fact that aid is not aimed at one or more specific recipients defined in advance but is subject to a series of objective criteria cannot suffice to call into question the selective nature of a state measure. The Commission also considers that the fact that the advantage conferred by the scheme on investment undertakings managing specialised investment vehicles is only indirect cannot rule out the existence of state aid in so far as, according to the settled case law of the Court ([22]), direct tax advantages granted to investors who are not undertakings constitute indirect aid for the undertakings invested in.

(41) The Commission accordingly concludes that the measure confers the specific indirect advantage mentioned above on specialised investment vehicles and their management companies, to the detriment of other undertakings offering alternative forms of investment.

Selective advantage for small- and mid-caps whose shares are held by specialised investment vehicles

(42) The Commission also confirms the view expressed in its letter opening the formal investigation procedure that the effect of the scheme in question is to favour small- and mid-caps whose shares are held by specialised investment vehicles benefiting from the tax reduction provided for in Article 12 of Decree-Law No 269/2003. In particular, it considers that the scheme confers an indirect selective advantage on small- and mid-caps whose shares are held by specialised investment vehicles consisting in the increased demand for their shares and in increased liquidity. The argument that there would be no advantage for small- and mid-caps because funds and investors seek to maximize profits cannot be accepted since more favourable tax treatment enhances the attractiveness of such an investment, with increased liquidity for small- and mid-caps even in absence of any active behaviour by them aimed at benefiting from such an advantage.

(43) The argument according to which the scheme would constitute a general tax policy measure aimed at favouring the capitalisation of small- and mid-caps in Europe and would fall outside the scope of the state aid rules cannot be accepted either. The Commission takes the view that the tax advantage conferred does not offset any substantial disparity in tax treatment between collective investments in listed small- and mid-caps, on the one hand, and collective investments in other companies and individual investments in non-listed companies, on the other. Nor can the scheme be justified by its own specific objective because it provides solely for tax reductions in the case of specialised collective investments in shares of small- and mid-caps listed on regulated markets and, as such, it is not targeted at or proportionate to the aim of promoting the capitalisation of such companies but instead is conditional on the investments being made through specialised investment vehicles.

State resources

(44) The Commission would point out that the advantages in question are granted by the State or through state resources. Noting that Italy did not present any objections in this respect, it confirms the appraisal made in the decision to initiate the formal procedure according to which the advantage is attributable to the State as it consists in the forgoing of tax revenues by the Italian Treasury.

Effect on competition

(45) In view of the effects of the measure, the Commission confirms the appraisal made in the decision initiating the formal procedure that the measure may distort competition between undertakings and affect trade between Member States because the beneficiary companies can operate in international markets and pursue commercial and other economic activities in markets where competition is intense. In accordance with the settled case law of the Court ([23]), for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. In particular, the vehicles undertaking collective investment in transferable securities and specialised in shares of small- and mid-caps compete with other financial undertakings and operate in an open market characterised by substantial intra-Community trade. As to the small- and mid-caps whose shares are held by the specialised investment vehicles described in Article 12 of Decree-Law No 269/2003, at least some of them are active in sectors where trade between Member States takes place.

(46) The Commission considers that neither the limited tax expenditure on this scheme in 2004 (€1,1 million) nor the small number of specialised vehicles operating during that same year (three), as compared with the large number of listed small- and mid-caps whose shares have been held, can

([21]) Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 40, and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava and Others v Commission* [2002] ECR II-1385, paragraph 58.

([22]) Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 24 to 28, and Case T-93/02 *Confédération nationale du Crédit mutuel v Commission*, judgment of 18 January 2005, not yet reported, paragraph 95.

([23]) Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

affect the conclusion that the measure constitutes aid firstly because, according to the settled case law of the Court ([24]), even a small amount of aid affects competition and secondly because it is not ruled out by Italy that the scheme in question may have a far more important economic impact in the future. It must further be noted that the limited impact of the measure may also be explained by the fact that the Commission promptly initiated an investigation and opened the formal investigation procedure into the measure, and this may have influenced the behaviour of the operators. Lastly, although the number of eligible small- and mid-caps listed on regulated European markets is relatively large compared with the size of the tax reduction in 2004, the information presented by Italy does not indicate that the benefits accruing to any individual beneficiary fall within the limit for *de minimis* aid.

(47) The Commission has therefore come to the conclusion that the scheme alters (by way of the tax treatment accorded to investors) the competitive position of certain undertakings pursuing economic activities and, in so far as the latter operate on markets open to international competition, affects competition.

Lawfulness of the scheme

(48) Since the Italian authorities implemented the scheme without first notifying the Commission, they did not fulfil the obligation incumbent on them under Article 88(3) of the Treaty. In so far as it constitutes state aid within the meaning of Article 87(1) of the Treaty and was put into effect without prior approval from the Commission, the measure ranks as unlawful aid.

Compatibility

(49) As the measure constitutes state aid within the meaning of Article 87(1) of the Treaty, its compatibility with the common market must be assessed in the light of the derogations provided for in Article 87(2) and (3) of the Treaty.

(50) The Italian authorities have not explicitly challenged the Commission's assessment set out in its letter of 11 May 2004 instituting the formal investigation, namely that none of the derogations provided for in Article 87(2) and (3) of the Treaty and pursuant to which state aid may be considered compatible with the common market is applicable in the present case, and the Commission has not become aware of any other elements that invalidate this conclusion.

(51) The advantages in question are either unrelated to any expenses or linked to expenses ineligible for aid under existing Community guidelines or block exemptions.

([24]) Case C-142/87 Belgium v Commission [1990] ECR I-959.

(52) The derogations in Article 87(2) of the Treaty, which concern aid having a social character that is granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, do not apply in this case.

(53) Nor does the derogation in Article 87(3)(a) of the Treaty, which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, because the measure in question applies to Italian territory as a whole and not only to assisted regions in Italy within the meaning of Article 87(3)(a). Lastly, the scheme does not seem to contribute in any way to the development of the said regions.

(54) In the same way, the regime cannot be considered to be aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Italy, as provided for in Article 87(3)(b) of the Treaty. Nor does it have as its object the promotion of culture and heritage conservation, as provided for in Article 87(3)(d) of the Treaty.

(55) Lastly, the measures in question must be examined in the light of Article 87(3)(c) of the Treaty, which stipulates that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest is admissible. The tax advantages granted by the measure are not related or proportionate to specific investments, to job creation or to specific projects which would facilitate the development of certain economic activities or certain areas within the meaning of Article 87 (3)(c) of the Treaty. They cannot be declared compatible with the common market in accordance with the criteria laid down in the Commission Communication on state aid and risk capital ([25]) because the investments benefiting from them are targeted at companies listed on a regulated European market and the Italian authorities have not shown that those companies do not enjoy proper access to equity finance and face higher costs than other companies when it comes to raising capital. The Commission would finally point out that, as stated by the Court with respect to another aid measure favouring specific investments, '*there was nothing to prevent the scheme from being applied to undertakings in difficulties or operating in sensitive industries for which specific State aid rules have been laid down*' ([26]). It

([25]) OJ C 235, 21.8.2001, p. 3.

([26]) Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 69.

concludes that the advantages granted under the scheme reduce charges that should normally be borne by the beneficiaries in the course of their economic activities and must therefore be considered as operating aid, which, in accordance with practice and case law, is incompatible with the common market.

VI. CONCLUSIONS

(56) The Commission concludes that the tax reliefs granted under this measure constitute a scheme of operating aid not covered by any of the derogations from the general prohibition of such aid and that the measure is therefore incompatible with the common market. It also finds that Italy has unlawfully implemented the measure.

(57) Where state aid is found to have been granted unlawfully and to be incompatible with the common market, the natural consequence is that the aid should be recovered in order to restore as far as possible the competitive position that existed before the aid was granted.

(58) This decision concerns the scheme in question as such and must be immediately implemented, including recovery of the aid granted under the scheme pursuant to Article 14 of Procedural Regulation No 659/1999 ([27]).

(59) To this end, the Commission finds it necessary to ask Italy first to remove immediately the aid, which consists in the different tax treatment of their net operating result, in respect of the revenue accruing to investment vehicles specialised in shares of small- and mid-caps listed on regulated European markets by informing all those required by the relevant national rules of Article 12 of Decree-Law No 269/2003 to apply the tax incentives in question about the direct applicability of this Commission decision.

(60) Secondly, Italy must recover the aid from the investment vehicles or from the undertakings managing contractual investment vehicles that are at the same time the first beneficiaries of the aid and the persons required by tax legislation to pay to the State the substitute tax on their net operating result. The aid to be recovered corresponds to the difference between the standard substitute tax and the reduced tax resulting from the tax incentives in question. This decision is without prejudice to the possibility for the investment vehicles or for the undertakings that manage them to claim a corresponding amount from their investors, if such a possibility exists under national law. The obligation to recover the aid does not, however, rule out the possibility that all or part of the aid granted to individual beneficiaries may be compatible under Article 2 of Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([28]).

(61) The Commission calls on Italy to provide the information requested by replying to the questionnaire attached in Annex 1 to this decision, compiling a list of the financial intermediaries and the other parties concerned by the recovery of the tax incentive in question and indicating clearly the measures planned and already taken to obtain immediate and effective recovery of the unlawful state aid. It also calls on Italy to submit within two months of the adoption of this decision all documents showing that the proceedings for recovering the unlawful aid have been initiated (such as circulars, recovery orders, etc.).

(62) Interest has to be paid on the amounts to be recovered. It will be calculated on the basis of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([29]),

HAS ADOPTED THIS DECISION:

Article 1

The state aid in the form of tax incentives for undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on a regulated European market provided for by Article 12 of Decree-Law No 269/2003, unlawfully put into effect by Italy in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Article 2

The Italian Republic shall withdraw the aid scheme referred to in Article 1 with effect from two months following the date of notification of the present decision.

Article 3

1. Within two months of the date of notification of the present decision, the Italian Republic shall inform all the financial intermediaries, including the undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies and all the other parties concerned by the application of the state aid scheme referred to in Article 1, of the Commission decision deeming the scheme to be incompatible with the common market.

2. The Italian Republic shall take the necessary measures to recover the aid referred to in Article 1 and unlawfully made available to its beneficiaries from the corporate investment

([27]) See footnote 2.

([28]) OJ L 10, 13.1.2001, p. 30.

([29]) OJ L 140, 30.4.2004, p. 1.

vehicles or, as the case may be, from the undertakings managing the contractual investment vehicles, without prejudice to any subsequent recourse under national law.

Within two months of the date of notification of the present decision, the Italian Republic shall inform the Commission of the identity of the beneficiaries, the amount of aid granted individually and the methods by which such amounts were determined.

3. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

4. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.

Interest shall be calculated in accordance with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004.

Article 4

The Italian Republic shall inform the Commission, within two months of the date of notification of this decision, of the measures taken and planned to comply with it. It shall provide this information using the questionnaire attached in Annex 1 of this decision. It shall submit within the same period all documents showing that the recovery proceedings have been initiated against the beneficiaries of the unlawful aid.

Article 5

This decision is addressed to the Italian Republic.

Done at Brussels, 6 September 2005.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

Information regarding the implementation of the Commission decision on aid scheme C 19/2004 — Italy: Direct tax incentives for undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets

1. **Total number of beneficiaries and total amount of aid to be recovered**

1.1. Please explain in detail how the amount of the tax incentives to be recovered from individual beneficiaries will be calculated:

— principal

— interest

1.2. What is the total amount of unlawful aid granted under this scheme that is to be recovered (gross grant equivalent; at … prices)?

1.3. What is the total number of beneficiaries from whom the tax incentives unlawfully granted under this scheme are to be recovered:

2. **Measures already taken and planned to recover the aid**

2.1. Please describe in detail what measures have already been taken and what measures are planned to ensure immediate and effective recovery of the tax incentives. Please also indicate where relevant the legal basis for the measures taken/planned.

2.2. By what date will the recovery be completed?

3. **Information by individual beneficiary**

Please provide details for each subject from whom the tax incentives unlawfully granted under the scheme are to be recovered in the table overleaf.

Identity of the subject	Amount of the incentive unlawfully granted (*) Currency: …	Amounts reimbursed (º) Currency: …

(*) Amount put at the disposal of the beneficiary (in gross grant equivalent; at … prices).

(º) Gross amounts reimbursed (including interest).