

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 October 1997

concerning aid granted by the Region of Sardinia (Italy) to shipping companies
in Sardinia

(Only the Italian text is authentic)

(Text with EEA relevance)

(98/95/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having given the parties concerned the opportunity to submit their comments, in accordance with the above-mentioned Articles (¹),

Whereas:

I

By letter of 24 June 1996 (²), the Commission informed the Italian authorities of its decision to initiate the procedure provided for in Article 93(2) of the EC Treaty in respect of an unlawful aid scheme set up by the region of Sardinia, in favour of shipping companies.

In opening the procedure, the Commission, on the basis of the information at its disposal, has expressed serious doubts as to the compatibility of the aid, for the following reasons:

— the aid scheme contains provisions which involved discrimination on the grounds of nationality in that

ship operators were obliged, *inter alia*, as an effective condition of aid, to employ Sardinian seafarers on board their vessels,

- the scheme conflicts with the principle of freedom of establishment since aid was conditional, *inter alia*, on operators having their head office in Sardinia,
- the scheme involves aid to encourage investment in ships in a way which is liable to infringe Community rules.

II

Following the opening of the procedure, the Italian Government submitted comments to the Commission by letter of 31 October 1996. The Sardinian authorities submitted comments by letters of 11 October 1996 and 22 January 1997.

No comments were submitted by other Member States or third parties within the time limit of one month from publication of the decision to open the procedure. It may be noted, however, that a number of third parties submitted comments outside this deadline.

In their comments, the Italian and Sardinian authorities did not contest the objections of the Commission. They also informed the Commission of amendments to the aid scheme which, according to them, would meet the objections of the Commission. The main amendment is made by Regional Law No 9 of 15 February 1996 of the Region of Sardinia. It is to be noted that these amendments, including Law No 9/1996, are not the subject of this Decision and will be dealt with separately.

(¹) OJ C 368, 6. 12. 1996, p. 2.

(²) See footnote 1.

III

The Commission learned of the existence of the aid scheme in question from a complaint regarding a case in which the scheme was applied.

The aid scheme is established by Sardinian Regional Law No 20 of 15 May 1951, as amended by Regional Laws No 15 of 11 July 1954 and No 11 of 4 June 1988.

Law No 20/1951, as amended by Law No 15/1954 (hereinafter: 'Law No 20/1951') established a fund for the grant of loans to shipping companies intending to build, purchase, convert or repair vessels. These loans were to be granted only to companies whose head office, country of domicile for tax purposes and port of register were in the region of Sardinia. The loans could not exceed 20 % of the investment costs in the case of building, conversion or repair work where the applicant had already received aid for such work under national legislation in force at the time. Where no such aid under national legislation had been awarded, loans could not exceed 60 % of investment costs.

Under Law No 20/1951, interest, commission and other charges related to the loan could not exceed 4,5 % per year of the loan where aid had also been received under national legislation, and 3,5 % where no such aid had been received (an average interest rate subsidy of 10 to 12 percentage points). The capital was to be refunded in not more than 12 annual payments, from the third year following entry into service of the ship for which the loan had been granted.

By Regional Law No 11/1988, substantive amendments were made to the aid scheme established by Law No 20/1951. The Italian Government failed to notify the amendments to the Commission in accordance with Article 93(3) of the EC Treaty and thus the amended aid scheme (hereinafter: 'aid scheme') constituted a non-notified aid, as the Commission noted in its decision to open the procedure pursuant to Article 93(2). The Italian Government did not contest that finding in its comments.

Under the aid scheme, the granting of aid was made subject to the following requirements on the beneficiary companies:

- (a) that the undertaking should have its head office, administrative headquarters and shipping business and, where applicable, its main stores, depots and accessory equipment permanently in one of the ports of the region;
- (b) that all the vessels owned by the undertaking should be entered in the ports of registry of the region;
- (c) that the undertaking should use the ports of the region as the centre of its shipping activities, making them a normal port of call as part of those activities,

and, where regular services are operated, that these should terminate or regularly call at one or more of those ports;

- (d) that the undertaking should commit itself to carrying out refitting work in the ports of the region, provided that shipyards have the operational capacity and that there are no grounds of *force majeure*, unavoidable chartering requirements or obvious economic or time constraints;
- (e) that, as regards the crewing of vessels with a gross tonnage of more than 250 tonnes, the undertaking should establish a special complement, comprising all the seafarer categories needed to crew the vessel for which it was requesting aid, using solely crew members registered in the general duty roster of the port of registry, and to take from those rosters, whether general or special, all the crew required, the sole restrictions being the national regulations on the employment of seafarers ...

The aid scheme also introduced the option whereby the Sardinian authorities could grant a contribution to the costs of a lease where a shipping company had opted for a lease instead of a loan. The contribution is equal to the difference between the interest actually owed on a loan, corresponding to the annual amortisation rate, calculated at the commercial reference interest rate for shipping in Italy and the interest payable on the same loan calculated at 5 % (an average interest rate subsidy of about 10 percentage points). At the end of the contract, a vessel for which a contribution has been paid may be acquired by the lessee for an amount equal to 1 % of the purchase price.

According to data provided by the Sardinian authorities, the aid scheme has, since its entry into force, been used to provide loans and contributions totalling Lit 12 697 450 000.

IV

The aid scheme constitutes State aid within the meaning of Article 92(1) of the EC Treaty, since:

- (a) the beneficiary companies are relieved of a financial burden which they would normally bear (normal commercial interest rates and other charges on loans/leases);
- (b) the burden is borne by State resources (the Sardinian authorities);
- (c) the aid is selective (being reserved to the shipping sector);
- (d) the aid affects trade between Member States.

As regards point (d) above, it was noted in the decision opening the procedure that over 90 % of goods from Member States are transported to Sardinia by sea and that over 90 % of goods originating in Sardinia are transported to Member States in the same way. In addition, it was noted that 65 % of tourist traffic (passengers and vehicles) between the Community and Sardinia is handled by shipping companies. The Italian authorities in their comments did not contest the above statistics, nor indeed the designation of the aid scheme as State aid within the meaning of Article 92(1).

V

The aid is unlawful, since Law No 20/1951 was amended substantially by Law No 11/1988, that is, since the entry into force of the EEC Treaty, without prior notification of the amendments by the Italian authorities to the Commission in accordance with Article 93(3).

VI

Article 92(1) of the EC 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) and (3) of the Treaty cannot apply because the aid conflicts with fundamental principles of Community law: freedom of establishment (Article 52 of the Treaty) and non-discrimination on grounds of nationality (Articles 6 and 48(2)).

As to freedom of establishment, the aid scheme requires not only establishment of the beneficiary in Sardinia but, *inter alia*, the siting of the head office of the beneficiary in Sardinia. Furthermore, it requires that all the vessels of the beneficiary company, not only those aided under this scheme, be registered in Sardinia. Those requirements alone are sufficient to constitute a breach of Article 52 of the Treaty, since companies established in Sardinia but having their head office elsewhere or vessels registered elsewhere are automatically excluded from aid.

As to non-discrimination on grounds of nationality, the aid scheme requires, for vessels of over 250 tonnes gross, a minimum contingent of seafarers who are registered in the general duty roster of the (Sardinian) port of registry of the vessel. This requirement is, in effect, an obligation on the beneficiary company to employ a quota of locally-based seafarers who will in practice be Sardinian, even if

other seafarers are objectively equally, or more, suited for the tasks to be carried out.

It is to be noted that, in their comments, the Italian authorities did not contest the above arguments of the Commission regarding a breach of Articles 6, 48(2) and 52 of the Treaty.

However, even if the aid did not conflict with basic principles of Community law, it would still be incompatible with the common market for the reasons set out below.

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

Article 92(3) of the Treaty lists aid which may be considered compatible with the common market. Compatibility 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 point (g) of Article 3 of the Treaty, the exceptions provided for in Article 92(3) must be construed narrowly when any aid scheme or individual aid award is scrutinised. In particular, they may be relied on only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to guide the recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

Applying the exceptions to aid which does not contribute to the attainment of such an objective, or 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) of the Treaty.

Article 92(3)(a) exempts aid which promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. Although Sardinia is eligible for regional aid under Article 92(3)(a), the aid in question was not granted under an aid scheme designed primarily to promote regional development since it is limited to shipping companies. In any case, Article 92(3) does not apply to an aid scheme which, as the present one, breaches Community guidelines on aid to specific sensitive sectors such as maritime transport.

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

With regard to the exceptions provided for in Article 92(3)(c) relating to aid to facilitate the development of certain economic activities, the aid scheme affects trading conditions to an extent contrary to the common interest, since:

- both the guidelines on State aid to shipping companies of 3 August 1989⁽¹⁾ and the Community guidelines on State aid to maritime transport⁽²⁾ require that aid which is available to shipping companies for building, conversion or repair of ships (as in this case) be presented in a transparent way for the purposes of applying Council legislation on contract-related shipbuilding aid to Community yards (Council Regulation (EC) No 3094/95⁽³⁾, amended by Regulation (EC) No 1904/96⁽⁴⁾); this requirement also applies where, as in this case, aid is granted in an area qualifying for Article 92(3)(a) status; the aid scheme at issue contains no mechanism to ensure its adherence to those Community provisions,
- as far as aid for the leasing of ships is concerned, such aid constitutes operating aid of the type not allowed by either the 1989 or the 1997 guidelines.

VII

In conclusion, the aid scheme in question is unlawful and incompatible with the common market.

According to the Italian authorities, arrangements have already been put in place in order to render the aid scheme compatible with the common market, *inter alia*, by the adoption of Sardinian Regional Law No 9 of 15 February 1996. These arrangements are not the subject of this Decision.

Nevertheless, it remains the case that loans/leases totalling Lit 12 697 450 000 have been granted on favourable terms for the whole period falling between Regional Laws No 11/1988 and No 9/1996.

The aid element of these loans/leases must be repaid by the beneficiaries in accordance with the procedures and

provisions of Italian law, with interest applicable as from the date on which the unlawful aid was paid out. Interest is to be calculated using the reference rate for regional aid.

The Commission has not been enabled to quantify for itself the aid element to be recovered from each beneficiary, nor the total sum of aid to be recovered from all beneficiaries. For that reason, in adopting the implementing measures required for compliance with this Decision, the Italian authorities must determine themselves and communicate to the Commission the amount to be recovered from each beneficiary.

This Decision is without prejudice to any Commission appraisal of amendments communicated by Italy with a view to rendering the aid scheme in question compatible with Community law, and in particular Regional Law No 9/1996. That Law will be the subject of a separate examination,

HAS ADOPTED THIS DECISION:

Article 1

The loans/leases totalling Lit 12 697 450 000 granted to companies in the shipping sector under Regional Law No 20 of 15 May 1951 of the Region of Sardinia, as amended by Regional Laws No 15 of 11 July 1954 and No 11 of 4 June 1988, contain elements which constitute State aid within the meaning of Article 92(1) and are unlawful for having been granted in breach of Article 93(3) of the EC Treaty.

The above loans/leases are incompatible with the common market because they do not fulfil the criteria for the exceptions to Article 92(1) of the Treaty set out in Article 92(2) and (3) thereof.

Article 2

Italy shall recover from each beneficiary of a loan/lease as described in Article 1, an amount corresponding to the difference between, on the one hand, the total of interest and/or other charges which the beneficiary in question would have paid for the loan/lease under normal market conditions prevailing at the date at which the loan/lease was contracted and, on the other hand, the sum of the interest and/or the other charges actually paid by the beneficiary for that loan/lease.

⁽¹⁾ SEC(89) 921 final, of 3 August 1989.

⁽²⁾ OJ C 205, 5. 7. 1997, p. 5.

⁽³⁾ OJ L 332, 30. 12. 1995, p. 1.

⁽⁴⁾ OJ L 251, 3. 10. 1996, p. 5.

Where a loan/lease is still outstanding at the date of this Decision, Italy shall ensure that the remainder of the loan/lease is discharged by the borrower/lessee under normal market conditions. In addition to recovering the amount referred to in the first paragraph, the Italian authorities shall charge interest thereon, running from the date of grant of the loan/lease. Interest shall be calculated at the reference rate used by the Commission for regional aid.

Article 3

Italy shall inform the Commission within two months 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, 21 October 1997.

For the Commission

Neil KINNOCK

Member of the Commission
