

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 2004

Direct tax incentives in favour of companies taking part in trade fairs abroad

(notified under document number C(2004) 4746)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2005/919/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) Italy enacted Decree-Law No 269 of 30 September 2003 laying down urgent measures to promote development and correct the trend in public finances (DL 269/2003), published in *Official Gazette of the Italian Republic* No 229 of 2 October 2003. Article 1(1)(b) of DL 269/2003 provides for specific tax incentives for participation in trade fairs abroad and was subsequently converted, without amendments, into Law No 326 of 24 November 2003 (L 326/2003), published in *Official Gazette of the Italian Republic* No 274 of 25 November 2003.

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

(3) By letters of 11 November 2003 (A/37737) and 26 November 2003 (A/38138), the Italian authorities provided the information requested. By letter dated 19 December 2003 (D/58192), the Commission again reminded Italy of its obligations under Article 88(3) of the EC Treaty and invited the Italian authorities to inform the possible beneficiaries of the tax incentives in question of the consequences envisaged by the Treaty and by Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ in the event that the incentives in question were found to constitute aid implemented without prior authorisation by the Commission.

(4) By letter of 18 March 2004 (SG 2004 D/201066), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of Italy's tax incentives in favour of undertakings taking part in trade fairs abroad. By letter of 1 June 2004 (A/35042), the Italian authorities submitted their observations.

⁽¹⁾ OJ C 221, 3.9.2004, p. 2.

⁽²⁾ OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

- (5) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Communities*, with an invitation to interested parties to submit their observations ⁽³⁾. No comments were received.

II. DESCRIPTION OF THE MEASURE

- (6) Article 1(1)(b) of DL 269/2003 provides that any undertakings liable to corporate income tax in Italy and in business on the date the scheme entered into force may reduce their taxable income by the amount of the expenses directly incurred with respect to their participation in trade fairs abroad. The provision applies exclusively to the expenses incurred by beneficiaries during the first tax year following the one when DL 269/2003 entered into force (2 October 2003); thus, for undertakings whose business cycle follows the calendar year, the measure affects the determination of their 2004 taxable income. Article 1(1)(b) of DL 269/2003 provides that the reduction in taxable income is in addition to the ordinary deduction from the beneficiary's declared income of the costs associated with participation in trade fairs abroad.

- (7) As regards the general rules for deducting business costs associated with participation in trade fairs abroad, Article 108(2) of the Italian Income Tax Code (TUIR) makes a distinction between advertising and promotion costs, including trade fair costs, on the one hand, and agency costs, on the other. While advertising and promotion costs are deductible in full in the tax year in which they are incurred or in equal instalments in that and the following four years, agency costs may only be deducted up to one third of their amount, in equal instalments over a period of five years.

- (8) With respect to the possible different categories of expenses associated with participation in trade fairs, the wording of Article 1(1)(b) of DL 269/2003 indicates that the incentives provided under the scheme are limited to the costs of exhibiting products and that no other costs

incurred in connection with participation in trade fairs are included in the amount eligible for aid under the scheme.

- (9) The Italian authorities have indicated that the benefit applies irrespective of the classification of the expenses, which are usually subject to differentiated tax treatment, as seen above. Italy explained that all the expenses associated with participation in trade fairs are treated alike in order to overcome the difficulty in classifying expenditure items in the various categories. However, Article 1(1)(b) of DL 269/2003 expressly excludes from the eligible amount sponsoring costs, which form part of advertising costs and are ordinarily deductible in full under Article 108(2) TUIR.

III. GROUNDS FOR INITIATING THE PROCEDURE

- (10) In its letter of 18 March 2004 initiating the formal investigation procedure, the Commission considered that the measure fulfilled the criteria for being classed as state aid under Article 87(1) of the EC Treaty.

- (11) In particular, the Commission took the view that the scheme conferred a selective advantage on the beneficiaries because it appeared to benefit only companies engaged in exhibiting products for export, while excluding other business activities. For example, Italian companies trading their goods exclusively on the Italian market, those providing services, companies trading in goods that are not suitable for being exhibited at trade fairs, and those taking part in trade fairs in Italy are excluded from the scheme.

- (12) The Commission was also of the opinion that the scheme favoured Italian undertakings participating in trade fairs abroad, thereby strengthening their position with respect to their foreign competitors, including both foreign traders competing with the undertakings in question in the Italian and foreign markets and foreign competitors established in Italy competing with the beneficiaries on the Italian market.

⁽³⁾ See footnote 1.

(13) The Commission finally considered that the selective character of the tax advantages at issue could not be justified by the nature or general scheme of the Italian tax system, nor did it appear to compensate for possible expenses incurred abroad on account of participation in such trade fairs, as the aid is not contingent upon any specific foreign tax or financial burden being imposed. Neither did any of the exceptions provided for in Article 87(2) and (3) of the EC Treaty seem to apply. The advantages were linked to expenses not eligible for aid under any of the block exemption regulations or Community guidelines; under the Block Exemption Regulation for SMEs in particular, aid for participation in trade fairs is admissible only if it does not exceed 50 % of the eligible costs and for the first participation by an SME in a particular fair or exhibition, while the tax incentive in question concerns all companies and all costs associated with taking part in any trade fairs abroad.

IV. COMMENTS FROM ITALY

(14) In response to the appraisal made by the Commission in its letter of 18 March 2004 initiating the formal investigation, the Italian authorities raised three main observations aimed at demonstrating that the scheme at issue does not discriminate between potential beneficiaries in the different branches of the distributive trades, but constitutes a general measure open to all undertakings engaged in trading activities.

(15) First, according to the Italian authorities, the measure is applicable without distinction to all sectors of the economy and is open to all undertakings liable to Italian business taxation, provided they incur costs with respect to participation in trade fairs abroad. The Italian authorities also point out that the tax incentive in question also applies to undertakings having a permanent establishment abroad. They add that the tax incentive is strictly linked to the costs incurred in taking part in trade fairs abroad, and does not provide any disproportionate tax benefits. The Italian authorities consider that the scheme does not promote participation in trade fairs abroad as a separate business activity, but as an investment open to all undertakings, which the Italian Government intends to encourage as a general economic policy objective. The Italian authorities finally clarify that the advantage applies to undertakings having a

permanent establishment abroad insofar as the expenditure incurred in taking part in trade fairs is charged to the head office in Italy.

(16) Second, the Italian authorities argue that the measure does not put non-exporting undertakings at a disadvantage, but that, on the contrary, it offers an incentive for them to find it worthwhile to participate in fairs of this kind. Where an undertaking operated in a sector producing goods or services that cannot be traded or exported, it would not be in competition with other undertakings operating in sectors producing the same goods or services.

(17) Third, the Italian authorities stress that the measure is in force for one year only, and that therefore the advantage given to undertakings participating in trade fairs abroad does not significantly distort the functioning of the common market.

V. ASSESSMENT OF THE MEASURE

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

(18) Having considered the observations submitted by the Italian authorities, the Commission maintains the position it expressed in the letter of 18 March 2004 initiating the formal investigation procedure, namely that the scheme under examination constitutes state aid because it cumulatively fulfils all the relevant criteria laid down in Article 87(1) of the EC Treaty.

(19) First, to be considered aid a measure must afford the beneficiaries an advantage that reduces the costs they would normally bear in the course of their business. All undertakings in Italy are liable for corporate income tax charged on their net profits resulting from the difference between their gross revenues and their business expenses as indicated in their accounts. The scheme affords the beneficiaries an economic advantage consisting in the reduction of their taxable profits by an amount corresponding to the costs incurred through taking part in trade fairs abroad, in addition to the ordinary deduction from gross revenues permitted for tax purposes. A beneficiary undertaking incurring such

costs posts in its accounts a corresponding negative adjustment having the effect of lowering the corporate income tax burden for the tax year in question. This advantage finally results in lower payments of tax due for the year, constituting a financial benefit for the beneficiary.

the measure is open to all undertakings taxable in Italy and carrying out certain investments which are favoured by the Italian Government, according to the economic policy objectives pursued by the scheme in question.

(20) In its submissions, Italy observed that the scheme in question does not confer any significant competitive advantages on its beneficiaries in that its effects are limited to the costs actually incurred, and the same mechanisms are applied as for the other deductions allowed by the Italian Income Tax Code (TUIR).

(24) After attentive scrutiny, the Commission confirms its opinion that the exceptional tax deduction scheme enacted by Italy constitutes a specific scheme favouring only the undertakings incurring certain eligible expenses concerned with participation in trade fairs abroad and excluding other undertakings not participating in these fairs. Even if it is in principle open to all undertakings participating in trade fairs abroad on a voluntary basis, the scheme effectively favours only the undertakings engaged in exporting and is not open to other business sectors. According to the case law of the Court of Justice, advantages granted to undertakings that carry on export activities and incur certain expenses related to those activities are selective in nature ⁽⁴⁾.

(21) The Commission considers, however, that, as the Italian authorities have recognised, the deduction at issue is extraordinary with respect to the normal deduction allowed for tax purposes and should therefore be viewed as an advantage reducing costs normally borne by undertakings liable to corporate income tax in Italy. The Commission therefore confirms its appraisal that the scheme in question provides its beneficiaries with an economic and financial advantage taking the form of a reduction of taxable profits in Italy.

(25) The Commission cannot accept the argument put forward by the Italian authorities that undertakings not involved in trading and exporting cannot be compared with those involved in trading and therefore that the scheme is general. The Commission considers that, since the advantage conferred by excluding certain specific expenses from the tax base is limited only to undertakings carrying on export activities and comes on top of the ordinary tax deduction, it cannot be considered a general measure. The Commission further notes that the Italian authorities have not demonstrated that the measure is justified by the nature or general scheme of the tax system. In any event, the advantages conferred on the beneficiaries are not consistent with the internal logic of the Italian tax system and are of an exceptional and temporary nature.

(22) Second, the advantage must be granted by the State or through state resources. As the Italian authorities did not submit any objections, the Commission confirms the appraisal made when initiating the formal investigation procedure, according to which the advantage is attributable to the State as it consists in the forgoing of tax revenues normally collected by the Italian Treasury.

(26) The Commission therefore confirms its view that the scheme is specific because, for example, it favours only undertakings that are engaged in exporting and accordingly 'exhibit products' at trade fairs abroad, as opposed to service undertakings, undertakings trading in goods not suitable for being exhibited at trade fairs, and undertakings taking part in trade fairs in Italy.

(23) Third, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The Italian authorities essentially maintain that

⁽⁴⁾ Judgment of the Court of 10 December 1969 joined Cases 6 and 11/69 Commission of the European Communities v French Republic [1969] ECR 523; Judgment of the Court of 7 June 1988 Case 57/86 Hellenic Republic v Commission of the European Communities [1988] ECR 2855; Judgment of 15 July 2004 Case C-501/00 Kingdom of Spain v Commission of the European Communities [2004] ECR I-6717.

- (27) The Commission also confirms its initial doubts as to whether all the companies subject to tax in Italy are entitled to the same level of benefits with respect to trade fairs in which they take part abroad. The Italian authorities have confirmed that the expenses eligible for the incentive at issue also include those incurred by a foreign permanent establishment of an Italian company which assumes a degree of independence from its head office, as provided by Article 162 TUIR or under the relevant tax conventions in force with the country where the permanent establishment is situated.
- (28) However, Italy maintains that the advantage in question is applicable only if, in accordance with Article 1(1)(b) of DL 269/2003, the expenses in question are directly incurred by an Italian beneficiary. This obliges foreign establishments or branches of Italian companies to charge the expenses in question directly to an Italian office in order to benefit from the tax reduction in question, effectively excluding foreign establishments of Italian-based undertakings from the advantage at issue. The Commission concludes that for this reason too the scheme does not seem open to all undertakings on an equal basis.
- (29) Finally, the measure must affect competition and trade between Member States. Italy essentially maintains that the measure does not affect competition at all or, alternatively, that its effects on competition are insignificant given the short duration of the scheme in question.
- (30) Considering the effects of the measure, the Commission confirms the appraisal made when initiating the formal investigation. In line with settled case law of the Court⁽⁵⁾, 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 Commission confirms that the measure distorts competition and trade between Member States because its objectives and effects are specifically concerned with improving the trading conditions of the beneficiaries in exporting their goods to foreign markets and therefore directly affect companies active in international trade, including intra-Community trade. Moreover, even aid for extra-Community export activities may affect intra-Community trade and distort competition within the Community⁽⁶⁾.
- (31) The Commission cannot accept the argument concerning the scheme's limited effects on competition, because the fact that the measure remains in force for only one year does not rule out the possibility that the amounts involved may be large enough to have significant effects on certain markets. This is particularly true where the beneficiaries are large companies that normally take part in many trade fairs. Moreover, given that the aid is not limited in absolute terms, its amount could be substantial. In any event, the limited amount of the aid would not be enough to rule out the possibility of competition and trade between Member States being distorted.
- (32) In addition, it seems reasonable to assume that the short period of validity of the measure will not allow undertakings that do not normally take part in trade fairs to benefit from the advantage provided, in particular if these companies have to take decisions such as whether or not to enter a new market. The measure therefore seems more aimed at benefiting firms that already commonly use trade fairs, including companies whose main business objective is specifically to organise and manage the exhibition of products at trade fairs, which would disproportionately benefit from the incentive at issue because they are not expressly excluded from the scope of Article 1(1)(b) of DL 269/2003.
- ## 2. Legality of the scheme
- (33) The Italian authorities have put the scheme into effect without prior notification to the Commission and have therefore failed to fulfil their obligation under Article 88(3) of the EC Treaty. Insofar as the measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty and has been put into effect without prior approval from the Commission, it is to be classed as illegal aid.

⁽⁵⁾ See, for instance, Judgment of the Court of First Instance of 30 April 1998 Case T-214/95 *Het Vlaamse Gewest* (Flemish Region) v Commission of the European Communities [1998] ECR II-717.

⁽⁶⁾ Judgment of the Court of 21 March 1990 Case C-142/87 Kingdom of Belgium v Commission of the European Communities [1990] ECR I-959.

3. Compatibility

- (34) Insofar as the measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty, its compatibility must be assessed in the light of the exceptions provided for in Article 87(2) and (3) of the EC Treaty.
- (35) The Italian authorities have not explicitly challenged the Commission's assessment, set out in its letter of 18 March 2004 initiating the formal investigation, that none of the exceptions provided for in Article 87(2) and (3) of the EC Treaty, whereby state aid may be considered compatible with the common market, applies in the present case. The Commission therefore confirms its assessment as set out in points 25 to 32 of its letter of 18 March 2004.
- (36) The advantages in question are linked to expenses that are not eligible for aid under any of the block exemption regulations or Community guidelines. With special reference to participation in trade fairs, Article 5(b) of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (*) (7) provides that aid for participation in trade fairs is only admissible if it does not exceed 50 % of the eligible costs and for the first participation by an SME in a particular fair or exhibition, while the tax incentive in question concerns all companies and all costs associated with taking part in any trade fairs abroad.
- (37) The exceptions provided for in Article 87(2) of the EC Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.
- (38) Neither does the scheme qualify for the exception allowed by Article 87(3)(a) of the EC Treaty for aid to
- promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.
- (39) In the same way, the scheme cannot be considered to be a project of common European interest or to remedy a serious disturbance in Italy's economy, as provided for by Article 87(3)(b) of the EC Treaty; nor does it have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d) of the EC Treaty.
- (40) Finally, the scheme in question must be examined in the light of Article 87(3)(c) of the EC Treaty. This Article provides for the authorisation of 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 that is contrary to the common interest. The tax advantages granted by the scheme are not linked to specific investments, job creation or specific projects. They simply constitute a reduction in the costs that would normally have to be borne by the firms concerned in the course of their export business and must therefore be regarded as export linked operating aid. In line with the Commission's standard practice, such aid is considered to be incompatible with the common market.
- (41) The Commission observes furthermore that, even if the measure were found to facilitate the development of certain economic activities, such as the internationalisation of Italian businesses, and thus result in increased volumes of trade, the Commission cannot rule out the possibility that the extent of the relative effects on intra-Community trade would be contrary to the common interest.
- (42) The Commission concludes that the tax incentives granted under this measure constitute operating aid that does not qualify for any of the exceptions to the prohibition and is therefore incompatible with the common market. The Commission also finds that Italy has illegally implemented the measure in question.

VI. CONCLUSIONS

(*) The text contains a material error. This sentence should read: 'With special reference to participation in trade fairs, Article 5(b) of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises [...]'. The Regulation is to be found in OJ L 10, 13.1.2001, p. 33 and not p. 1 as incorrectly stated at the end of footnote 7.

(7) OJ L 10, 13.1.2001, p. 1.

(43) Where illegally granted state aid is found to be incompatible with the common market, the natural consequence of such a finding is that the aid should be recovered from the beneficiaries. Through recovery of the aid, the competitive position that existed before the aid was granted is restored as far as possible.

prejudice to the possibility that all or part of the aid granted in individual cases may be deemed compatible, in particular under Article 5(b) of the Block Exemption Regulation for SMEs,

HAS ADOPTED THIS DECISION:

(44) Although the present procedure was closed before the end of the tax year in which the scheme is in force and therefore before the tax liability of most beneficiaries has become definitive, the Commission cannot rule out the possibility that firms may already have benefited from the aid in terms, for example, of lower part payments of taxes relating to the current tax year. The Commission notes that, following the opening of the formal investigation, the Italian authorities publicly warned the scheme's potential beneficiaries of the possible consequences should the Commission find that the measure in question constituted incompatible aid. The Commission nevertheless considers it necessary that, in order to recover any aid already made available to the beneficiaries, Italy should enjoin the potential beneficiaries of the scheme, within two months of the adoption of this Decision, to reimburse the aid with interest in accordance with 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⁽⁸⁾. In particular, where the aid has been already made available through reductions in payments of taxes due for the current tax year, Italy must collect the entire tax due by means of the final scheduled payment for 2004. In any event, full recovery must be completed at the latest by the end of the first tax year following the date of notification of the present Decision.

Article 1

The state aid scheme in the form of tax incentives in favour of companies taking part in trade fairs abroad, provided for by Article 1(1)(b) of Decree-Law No 269 of 30 September 2003, which Italy has unlawfully put into effect in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Italy shall abolish the aid scheme referred to in the first paragraph.

Article 2

1. Italy shall take the necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

Recovery shall be effected without delay and in accordance with the procedures of national law.

(45) Italy must provide the Commission, using the questionnaire in the Annex to this Decision, with a list of the beneficiaries concerned and indicate clearly the measures planned and already taken to secure immediate and effective recovery of the illegal state aid. Within two months of the adoption of this Decision, all documents giving evidence that recovery proceedings have been initiated against the beneficiaries of the illegal aid (such as circulars, recovery orders, etc.) must also be transmitted to the Commission.

2. Where the aid has already been made available by means of lower part payments of taxes due for the current tax year, Italy shall collect the entire tax due by means of the final scheduled payment for 2004.

In all other cases, Italy shall recover the tax due at the latest by the end of the first tax year following the date of notification of this Decision.

(46) This Decision concerns the scheme as such and must be implemented immediately, including recovery of aid granted under the scheme. However, it is without

3. The aid to be recovered shall bear interest, running from the date on which it was first put at the disposal of the beneficiaries until its actual recovery and calculated in accordance with the Articles 9, 10 and 11 of Regulation (EC) No 794/2004.

⁽⁸⁾ OJ L 140, 30.4.2004, p. 1.

Article 3

Within two months of the date of notification of this Decision, Italy shall inform the Commission, using the questionnaire in the Annex to the Decision, of the measures taken to comply with it.

Within the same period of time as that referred to in the first paragraph, Italy shall:

- (a) enjoin all beneficiaries of the aid referred to in Article 1 to reimburse the illegal aid, with interest;

- (b) transmit all documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the illegal aid.

Article 4

This Decision is addressed to the Republic of Italy.

Done at Brussels, 14 December 2004.

For the Commission

Neelie KROES

Member of the Commission

