

COMMISSION DECISION

of 16 March 2005

on aid scheme C 8/2004 (ex NN 164/2003) implemented by Italy in favour of newly listed companies

(notified under document number C(2005) 591)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/261/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Italy of its obligation under Article 88(3) of the Treaty to notify the Commission of any measures constituting aid before their implementation.

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⁾,

- (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 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 unlawful aid implemented without prior authorisation by the Commission.

Whereas:

- (4) By letter of 18 February 2004 (SG 2004 D/200644), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of Italy's tax incentives for newly listed companies.

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'), which entered into force on the date of publication in Official Gazette of the Italian Republic No 229 of 2 October 2003. Articles 1(1)(d) and 11 of DL 269/2003 provide for specific tax incentives for companies admitted to listing on a regulated market in the European Union between 2 October 2003 and 31 December 2004. The above provisions were 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.

- (5) By letter of 22 April 2004 (A/32918), the Italian authorities submitted their comments.

- (6) The Commission decision to initiate the formal investigation procedure was published on 3 September 2004 in the *Official Journal of the European Communities*, with an invitation to interested parties to submit their observations ⁽³⁾.

- (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 Treaty. By the same letter, the Commission reminded

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

⁽¹⁾ OJ C 221, 3.9.2004, p. 7.

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

⁽³⁾ See footnote 1.

- (8) By fax of 4 October 2004 (A/37459), Borsa Italiana SpA (the Italian stock exchange) submitted observations. By letter of 28 October 2004 (D/57697), the Commission forwarded them to the Italian authorities, which reacted by letter of 2 December 2004 (A/39473).

II. DESCRIPTION OF THE MEASURE

- (9) The measure provides for two sets of tax incentives with respect to the stock exchange listing of companies subject to Italian corporation tax.

- (10) Pursuant to Article 11 of DL 269/2003, any companies whose shares are admitted to listing on a regulated market in a Member State of the European Union between 2 October 2003 and 31 December 2004 may over a three-year period benefit from a reduced corporate income tax rate of 20% (rate normally applied: 35% in 2003 and 33% in 2004). This 'listing premium' applies only if the newly listed companies increase their net worth by at least 15 percent as a result of the Initial Public Offering (IPO) of their stock and provided that they have not already been listed on a European stock exchange. The maximum amount of income which may be subject to the reduced rate is limited to €30 million per year, corresponding to maximum aid of €4,5 million ($35 - 20 = 15\%$ of 30 million) in 2003, and €3,9 million ($33 - 20 = 13\%$ of 30 million) in 2004.

- (11) Where a company is admitted to listing during the above period but subsequently de-listed, the incentive is applied only with respect to the period(s) in which the company's shares were effectively traded on the stock exchange. The benefit is also maintained on the same terms if a company is subsequently re-listed on another European stock exchange which guarantees an equivalent level of investor protection as that afforded by the Italian stock exchange.

- (12) Article 1(1)(d) of DL 269/2003 provides that newly listed companies fulfilling the conditions laid down in Article 11 of DL 269/2003 may reduce their taxable income by an amount equal to the IPO expenses they incur in 2004. This reduction in taxable income is in addition to the ordinary deduction of the costs involved in the IPO, which are recognised for tax purposes as any other business expense. The expenses incurred with respect to

an IPO transaction notably include due diligence costs, fees of external consultants and the regulatory costs of the transaction which, in the case of the Italian stock exchange, total between 3,5% and 7% of the amount traded during the listing operation. In order to benefit from this reduction in taxable income, a company must obtain certification by an external auditor of the actual expenditures incurred.

- (13) The reduction in taxable income provided for by Article 1(1)(d) of DL 269/2003 has the effect of reducing the effective tax burden for the year 2004 since the amount of the tax liability is reduced by 33% (the corporate income tax rate for 2004, not considering the 20% reduced nominal rate which would apply because of the above listing premium) of the amount of eligible expenses concerned with the listing. Under the system of advance payment of corporation tax in Italy, a beneficiary company would pay in two instalments the income tax due in respect of the 2004 tax year, based on an estimate of the tax that the company expects to pay for 2004, therefore including the reduction resulting from the scheme. To prevent the benefits being carried over to the advance payments for 2005 (which would take place if the latter were computed on the basis of the – reduced – tax paid in 2004), Article 1(1)(d) of DL 269/2003 provides that the advance tax payments for 2005 are to be computed on the basis of the tax that would have been payable in 2004 in the absence of the tax benefit in question.

- (14) The two incentives provided for respectively by Article 1(1)(d) and Article 11 of DL 269/2003 therefore have different timeframes. While the income reduction is applicable only in 2004, the listing premium is applicable as from the date of listing and over a three-year period. The Italian authorities have confirmed that the incentives do not have any effect on the advance tax due in 2003, but are only available in 2004 and, solely in the case of the listing premium under Article 11 of DL 269/2003, during the three years after listing.

- (15) In tabling the Decree-Law providing for the tax incentive in question, the Italian Government estimated that the measure could concern 10 possible beneficiaries in 2003 and 25 in 2004, corresponding to tax expenditures of €7,2 million in 2003 and €27,7 million in 2004. No estimate of the expenditure was provided for the following two years of operation of the scheme.

III. GROUNDS FOR INITIATING THE PROCEDURE

- (16) In its letter initiating the formal investigation procedure, the Commission considered that the measure fulfilled all the criteria for being classed as state aid under Article 87(1) of the Treaty. In particular, the Commission considered that the measure affords two sets of economic advantages. First, it grants companies newly listed on a regulated stock exchange a reduced corporate income tax rate of 20%, thereby increasing the after-tax income they earn from any business activity over a three-year period. Owing to the reduction in the nominal rate, beneficiary undertakings enjoy a reduced tax liability in the year in which they obtain a listing and in the following two years. Second, the scheme lowers the taxable income in the tax year in which the listing transaction takes place by allowing the beneficiary undertakings to reduce their taxable income by an amount corresponding to the IPO expenses. This negative adjustment also has the effect of lowering the effective tax rate applied to 2004 income.
- (17) The Commission observed that the above advantages seemed to favour certain undertakings. In particular, it pointed out that the tax incentives at issue were likely to favour companies with their registered office in Italy. Foreign companies operating in Italy by means of a permanent establishment or any other establishment in the form of an agency, branch or subsidiary within the meaning of Article 43 of the Treaty would benefit from the effective tax rate reduction only with respect to the share of their business activities attributable to such Italian establishments, and this differentiation – although justifiable for tax measures following the territorial logic of the tax system – is not justified for an aid measure because it clearly puts foreign companies carrying on business in Italy at a competitive disadvantage with respect to Italian companies.
- (18) The Commission also observed that, although the benefits of the scheme are formally open to all companies admitted to listing on a European regulated market, and the scheme therefore does not ostensibly discriminate between companies that obtain a listing in Italy and those listed in another Member State, the measure effectively favours only companies listed for the first time within the narrow timeframe stipulated. In this respect, the Commission pointed out that the rules on company listing lay down a number of stringent requirements, including the ability to demonstrate the soundness of the company's assets and financial position, duly certified by company accounts and external auditors. Candidates for listing must take the form of limited companies, so that their shares are freely transferable, and must fulfil certain minimum capi-

talisation requirements. The Commission accordingly observed that the time limits laid down by the scheme would *de facto* exclude many potential candidate companies from the benefits in question.

- (19) In its decision to initiate the formal investigation procedure, the Commission pointed out that the measure involved the use of state resources as it consists in the forgoing of tax revenues and that it was liable to distort competition and trade within the common market because the beneficiaries, being listed companies, operate on markets where competition is intense and where intra-Community trade takes place.
- (20) The Commission finally considered that the selective character of the tax advantages at issue did not appear to be justified by the nature or general scheme of the Italian tax system, nor did the measure appear to compensate for possible expenses incurred as the aid amount is not contingent upon specific costs being borne as a result of admission to listing. Neither did any of the exceptions provided for in Article 87(2) and (3) of the Treaty seem to apply.

IV. COMMENTS FROM ITALY AND INTERESTED PARTIES

- (21) Both the Italian authorities and Borsa Italiana SpA, the only interested party that submitted comments, essentially raised three objections.
- (22) Firstly, according to the Italian authorities and Borsa Italiana SpA, the scheme should be viewed as a general tax policy measure aimed at encouraging Italian companies to seek a listing, thereby countering the negative trend observed in recent years, and strengthening their capitalisation and competitiveness on global markets. As such, they argue, the scheme falls outside the scope of state aid review.
- (23) Secondly, they claim, the scheme does not affect competition because any undertaking can benefit from the incentive by obtaining a listing on a European stock exchange; the scheme is applicable across the board to all business sectors and all industries and is therefore not selective.

- (24) Finally, they argue that the scheme does not affect competition because of its limited duration and budget and because foreign companies are also eligible to receive the incentives in question.

V. ASSESSMENT OF THE MEASURE

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

- (25) 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 fulfils the relevant criteria laid down in Article 87(1) of the Treaty.

Selective advantages

- (26) The Commission considers that the measure in question clearly confers selective advantages, since it derogates from the normal operation of the tax system, and that it favours certain undertakings or the production of certain goods, in that it constitutes a specific scheme favouring only the undertakings that are able to obtain a listing during the period stipulated by the scheme, thereby excluding undertakings that are already listed, undertakings that do not fulfil the conditions for being listed and undertakings that decide not seek a listing in that period.
- (27) Italy's argument that the scheme constitutes a tax policy measure falling outside the scope of the state aid rules cannot be accepted, nor can this exception to the normal tax rules be justified by the nature of the Italian tax system, since it does not address any fundamental tax distinctions between the situations of listed as opposed to non listed companies. In particular, since the scheme provides for a reduction in the tax rate applicable to future profits earned by its beneficiaries, it cannot be deemed proportionate because such profits are unrelated to the fact that the beneficiaries are admitted to listing, to their capital structures and to the other characteristics associated with listing. Finally, the scheme cannot be justified by its own specific objectives, because its short duration makes it effectively inaccessible to many potential beneficiaries.
- (28) In the same vein, the reduction of taxable income is also an extraordinary incentive because it comes on top of the ordinary deduction of business expenses. Although such

a measure might potentially be deemed to be justified by the specific objective pursued by the scheme on the basis of the case law of the Court ⁽⁴⁾, the Commission notes that the short duration of the measure makes it inconsistent with the specific objective of encouraging companies to seek a listing, as it effectively excludes many possible beneficiaries.

- (29) As for the objection that the scheme does not confer any specific advantage and cannot therefore have the effect of distorting competition and trade within the Community because it favours only undertakings subject to different tax legislations, the Commission refers to the relevant case law of the Court ⁽⁵⁾ confirming that a derogatory tax measure not justified by the nature of the tax system or by the specific nature of the scheme may constitute aid.
- (30) The Commission notes that in another judgment ⁽⁶⁾ the Court endorsed the Commission's appraisal that a national tax measure, although formally general, constituted aid because it was more advantageous to certain national industrial sectors. In the case in point, the Commission considers that a tax incentive granted as an exception to the normal tax treatment to all undertakings taxable in Italy which are admitted to listing on a regulated market has significant effects on companies of a certain size and could distort competition by improving the competitive position of such companies vis-à-vis their competitors not registered in Italy. In addition, as the aid is granted through the tax system, it mainly favours Italian undertakings because, while the tax reduction applies to the worldwide profits generated by Italian undertakings, it only applies to the Italian profits of foreign undertakings and, in this respect, the latter are put at a disadvantage. While this difference in treatment could normally be justified by the nature of the tax system, in the case in point the fact that the scheme is an extraordinary incentive that cannot be justified as part of the ordinary operation of the tax system rules out such a justification.
- (31) With respect to the limited period of validity of the scheme, Italy argues that the limitation on the number of potential beneficiaries (only companies admitted to listing before 31 December 2004) is imposed by budget constraints. In its view, this further strengthens

⁽⁴⁾ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

⁽⁵⁾ Case 173/73 *Italy v Commission* [1974] ECR 709.

⁽⁶⁾ Case 203/82 *Italy v Commission* [1983] ECR 2525.

the conclusion that the measure's effect on competition is quite limited. The Commission considers that the limited budget earmarked for the incentive does not detract from its classification as aid or from the resulting distortions of competition. The scheme produces an alteration (through taxation) of the pre-existing competitive position of certain undertakings engaged in business activities open to international competition, and as such it constitutes aid which is liable to distort competition.

- (32) The Commission therefore concludes that the measure affords the beneficiaries certain specific tax advantages reducing the costs they normally bear in the course of their business.

State resources

- (33) The Commission considers that the advantages at issue are 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.

Effect on competition and trade

- (34) Considering the effects of the measure, the Commission confirms the appraisal made when initiating the formal investigation procedure, namely that the measure is liable to distort competition and have an effect on trade between Member States because the beneficiaries may be operating on international markets and involved in trade and other business activities in markets where competition is intense. Following the settled case law of the Court ⁽⁷⁾, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

- (35) In applying for admission to listing on a regulated stock exchange a company seeks to achieve several significant financial objectives, which include (a) increasing and

diversifying the sources of corporate financing with a view to pursuing asset and stock acquisitions; (b) increasing the financial standing of the listed company with respect to debt holders, suppliers and other creditors accepting the stock as a guarantee of debt; and (c) obtaining a market valuation for the company, so as to facilitate merger and acquisition transactions at any future date. By conferring an extraordinary tax advantage on companies that decide to seek a listing, the scheme improves their competitive position and financial standing vis-à-vis their competitors. Given that the above effects may favour Italian beneficiaries operating on markets where intra-Community trade takes place, the Commission considers that, for this reason too, the scheme affects trade and distorts competition.

- (36) The Commission moreover notes that, as of 31 December 2004, ten companies were admitted to listing on the Italian stock markets (a 100% increase on the previous year) ⁽⁸⁾. Under the scheme, the newly listed companies are entitled to tax benefits in proportion to their future profits. The companies obtaining a listing on the Italian stock markets belong to various sectors, ranging from manufacturing to public utilities, which are open to international competition. Neither the Italian authorities nor third parties have argued that, on account of certain specific features of the beneficiaries, the advantages granted to them do not affect competition and intra Community trade. In the light of projections based on the profits generated by the beneficiaries in the three years prior to their listing, the Commission has established that each of the companies could benefit from considerable tax reductions. For example, the Commission has calculated that the tax benefits which would be enjoyed by one beneficiary alone over the period 2004-07 could potentially amount to €75 million. However, because of the above-mentioned clause in Article 11 of DL 269/2003 limiting the benefits, the actual tax concession could not exceed €11,7 million over the three-year period. Italy's submissions do not, however, demonstrate that the benefits accruing to any individual beneficiary would remain below the limit for *de minimis* aid.

- (37) The Commission concludes that the distortion of competition deriving from the scheme in the different sectors where the beneficiaries operate is significant, considering that the beneficiaries are often leaders in their respective business sectors in Italy, and this justifies the negative appraisal of the scheme.

⁽⁷⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽⁸⁾ These were: (1) Trevisan SpA, industrial painting plants; (2) Isagro SpA, pharmaceuticals, (3) Digital Multimedia Technologies (DMT) SpA, media, (4) Terna SpA, public utilities (electricity); (5) Procomac SpA, bottling plants; (6) Azimut Holding SpA, financial services; (7) Greenvision Ambiente SpA, services, (8) Panariagroup SpA, ceramics; (9) RGI SpA, IT applications; (10) Geox SpA, clothing.

Legality of the scheme

- (38) 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 Treaty. In so far as the measure constitutes state aid within the meaning of Article 87(1) of the Treaty and has been put into effect without prior approval from the Commission, it is to be classed as unlawful aid.

Compatibility

- (39) In so far as the measure constitutes state aid within the meaning of Article 87(1) of the Treaty, its compatibility must be assessed in the light of the exceptions provided for in Article 87(2) and (3) of the Treaty.

- (40) 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 Treaty, whereby state aid may be considered compatible with the common market, applies in the present case. Nor has the Commission found any other elements that could invalidate this conclusion.

- (41) The advantages in question are either unrelated to any expenses or linked to expenses that are not eligible for aid under the Community block exemption regulations or guidelines.

- (42) The exceptions provided for in Article 87(2) of the 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.

- (43) Neither does the scheme qualify for the exception allowed by Article 87(3)(a) of the Treaty for 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 throughout Italy and not only in the Article 87(3)(a) areas of the country. Finally, the scheme does not appear to contribute in any way to the development of such areas.

- (44) In the same way, the scheme cannot be considered to be an important 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 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 Treaty.

- (45) Finally, the scheme in question must be examined in the light of Article 87(3)(c) of the 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 business and must therefore be regarded as operating aid that is incompatible with the common market.

VI. CONCLUSIONS

- (46) 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 general ban on such aid and is therefore incompatible with the common market. The Commission also finds that Italy has unlawfully implemented the measure in question.

- (47) Where unlawfully 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.

- (48) Although in this case the procedure was closed shortly after the end of the first tax year of application of the scheme and therefore before the tax due by most beneficiaries had to be paid, the Commission cannot rule out the possibility that some firms may already have benefited from the aid in terms, for example, of lower advance payments of taxes relating to the current tax year.

- (49) 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 any aid already made available to the beneficiaries should be recovered.

- (50) To that end, Italy should be required to enjoin the potential beneficiaries of the scheme, within two months of the date of notification of this Decision, to reimburse the aid with interest calculated in accordance with Chapter V 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⁽⁹⁾. In particular, where the aid has already been 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.
- (51) Italy should be required to provide the Commission with the necessary information, compiling a list of the beneficiaries concerned and indicating clearly the measures planned and already taken to secure immediate and effective recovery of the unlawful state aid. It should also be called upon to forward to the Commission, within two months of the notification of this Decision, all documents giving evidence that recovery proceedings have been initiated against the beneficiaries of the unlawful aid.
- (52) This Decision concerns the scheme as such and must be implemented immediately, including recovery of aid granted under the scheme. However, it is without 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 aid to SMEs,

HAS ADOPTED THIS DECISION:

Article 1

The state aid scheme in the form of tax incentives for companies admitted to listing on a regulated European market, provided for by Articles 1(1)(d) and 11 of Decree-Law No 269 of 30 September 2003, which Italy has put into effect, is incompatible with the common market.

Article 2

Italy shall abolish the aid scheme referred to in Article 1 with effect from the tax year current on the date of notification of this Decision.

Article 3

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.
2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective implementation of the Decision.
3. The recovery shall be completed at the earliest opportunity. In particular, 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 tax year current on the date of notification of this Decision.
4. 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.
5. The interest shall be calculated in accordance with Chapter V of Commission Regulation (EC) No 794/2004.
6. Within two months of the date of notification of this Decision, Italy shall enjoin all beneficiaries of the aid referred to in Article 1 to reimburse the unlawful aid, with interest.

Article 4

Within two months of the date of notification of this Decision, Italy shall inform the Commission of the measures already taken and planned to comply with it. This information shall be provided using the questionnaire in Annex I to this Decision. Within the same period of time, Italy shall transmit all documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the unlawful aid.

Article 5

This Decision is addressed to the Republic of Italy.

Done at Brussels, 16 March 2005.

For the Commission

Neelie KROES

Member of the Commission

⁽⁹⁾ OJ L 140, 30.4.2004, p. 1.

