

COMMISSION DECISION

of 10 July 2007

concerning an Italian State aid scheme to the Sardinian shipping sector C 23/96 (NN 181/95) and C 71/97 (N 144/97)

(notified under document number C(2007) 3257)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2008/92/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, 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, pursuant to those provisions, called on the parties concerned to submit their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 24 June 1996 ⁽¹⁾, the Commission informed the Italian authorities of its decision to initiate the procedure provided for in Article 88(2) of the EC Treaty (formerly Article 93(2)) with regard to an unlawful aid scheme established by the region of Sardinia in favour of shipping companies for the construction, acquisition, conversion, modification or repair of ships (hereinafter original aid scheme).
- (2) After the procedure was opened, the Italian Government sent its observations to the Commission in a letter dated 31 October 1996 (DG7-Transport A/23443). The Sardinian regional authorities sent their observations in letters dated 11 October 1996 (DG7-Transport A/21870) and 22 January 1997. No other Member States or interested third parties sent their observations within the time limit of one month after publication of the decision to open the procedure. It should be noted, however, that some third parties submitted comments outside this deadline.
- (3) On 21 October 1997, the Commission adopted Decision 98/95/EC, which establishes the incompatibility with the

common market of the aid scheme in question ⁽²⁾. On 12 November 1997 (SG (97) D/9375), the Italian authorities were informed of this decision.

- (4) In a letter of 14 November 1997, the Commission informed the Italian authorities of its decision to initiate the procedure set out in Article 88(2), of the EC Treaty (formerly Article 93(2)) with regard to Sardinian Regional Law No 9 of 15 February 1996 which amends the original aid scheme implemented for the benefit of shipping companies ⁽³⁾. The Italian authorities submitted their comments on 16 January 1998 (DG7-Transport A/1221) and 23 December 1997 (DG7-Transport A/144). No other Member States or interested third parties sent their observations within the time limit of one month after publication of the decision to initiate the procedure.
- (5) In its judgment of 19 October 2000 (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission*) ⁽⁴⁾ the Court of Justice of the European Communities annulled Decision 98/95/EC on the grounds that it lacked an adequate statement of reasons with regard to the effect on Community trade.
- (6) Following a letter from the Commission dated 23 November 2006 (D 2006 224962) requesting information from the Italian authorities, a response was sent by e-mail on 8 March 2007 (TRENA/26193).

2. DESCRIPTION OF THE MEASURE

2.1. The original scheme

- (7) Following a complaint lodged in 1993, the Commission learned of an aid scheme set up by the region of Sardinia for shipping companies intending to build, purchase, convert or repair ships. It took the specific form of loans and leases granted on favourable terms that were agreed initially only with companies whose head office, domicile for taxation purposes and port of register were situated in the region of Sardinia.

⁽¹⁾ C 23/96 (NN 181/95), (OJ C 368, 6.12.1996, p. 2).

⁽²⁾ OJ L 20, 27.1.1998, p. 30.

⁽³⁾ C 71/97 (NN 144/97), (OJ C 386, 20.12.1997).

⁽⁴⁾ European Court Reports, 2000, ECR I-8855.

Regional Law No 20 of 15 May 1951 amended by Law No 15 of 11 July 1954

- (8) The scheme in question was set up by Sardinian Regional Law No 20 of 15 May 1951 (hereinafter Law No 20/1951), subsequently amended by Regional Laws No 15 of 11 July 1954 (hereinafter Law No 15/1954) and No 11 of 4 June 1988 (hereinafter Law No 11/1988). Law No 20/1951, amended by Law No 15/1954, provided for the setting up of a fund for loans to shipping companies intending to build, purchase, convert or repair ships. These loans were to be agreed only with companies with their head office, country of domicile for tax purposes and port of register within the region of Sardinia.
- (9) Such loans could not exceed 20 % of the investment in cases of building, conversion or repair works for which the applicant had already received aid under national legislation in force at that time. Where no such aid under national legislation had been awarded, loans could not exceed 60 % of investment costs.
- (10) 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 already been received under national legislation, and 3,5 % in all other cases (an average interest rate subsidy of 10-12 percentage points). The capital was to be repaid in not more than 12 annual instalments commencing from the third year following entry into service of the ship for which the loan had been granted.

Regional Law No 11 of 4 June 1988

- (11) Articles 99 and 100 of Law No 11/1988 introduced substantive amendments to the aid scheme, but said changes were not notified to the Commission. Since the aid scheme had been amended, it therefore constituted non-notified aid.
- (12) The following conditions were added to those provided for by Law No 20/1951 for the granting of aid to 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) all the vessels owned by the undertaking should be in the registry of one of the ports of the region;

- (c) 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, these should terminate or regularly call at one or more of those ports;
- (d) 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) 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 all the crew required, whether general or special, the only restrictions being those laid down by the national regulations on the employment of seafarers ...'
- (13) Law No 11/1988 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).
- (14) At the end of the contract, the ship for which the contribution was paid may be purchased by the leasee by paying an amount equal to 1 % of the purchase price. According to the Italian authorities, (letter of 5.6.1988 and reply of 1.7.1998), no lease was signed under Law No 11/1988.
- (15) According to information in the possession of the Commission, loans amounting to the sum of ITL 12 697 450 000 (approximately EUR 6,5 million) have been granted since the entry into force of the original aid scheme. The last financing decision was taken in December 1991.

- (16) In their latest letter of 8.3.2007, the Italian authorities claimed that financing granted on the basis of the 1988 law concerned the acquisition of ships of gross tonnage between 24 and 138 tonnes. These ships were said to be mainly for the purpose of costal maritime transport within a market that had not yet been opened up for competition at the time.

2.2. Doubts raised over the original aid scheme subject to procedure C 23/96

- (17) In the document initiating the procedure on 24 June 1996, the Commission expressed serious doubts over the compatibility of the aid with the common market on the basis of information available to it for the following reasons:

- the aid scheme contained 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 conflicted with the principle of freedom of establishment inasmuch as the aid was conditional, inter alia, on operators having their head office in Sardinia,
- the scheme involved aid to encourage investment in ships in a way which is liable to infringe Community law.

2.3. The scheme amended by Law No 9 of 15 February 1996

- (18) To make Law No 20/1951 compatible with Community law and the relevant Directives, the regional authorities amended the original aid scheme by means of Regional Law No 9 of 15 February 1996 (hereinafter Law No 9/1996) as follows:

- (a) the provisions which involved discrimination on the grounds of nationality were removed;
- (b) a new condition was introduced whereby a preference for innovative, high technology vessels was agreed;

- (c) technical changes were introduced: the loan/lease duration could not exceed 12 years and had to be for 70 % less than the envisaged cost, with a ceiling of ITL 40 billion (approximately EUR 20 million) per ship. The aid was granted in the form of a contribution on the interest equal to the difference between the repayment instalment calculated at the reference rate for loans to the shipping sector in Italy and the instalment calculated at a rate equal to 36 % of the same reference rate.

- (d) a system was introduced to check that the aid was not granted twice (by the national authorities and by the regional authorities) for the same loans/leases.

2.4. Doubts expressed during proceeding C 71/97

- (19) In its Decision of 14 November 1997 the Commission, while noting that the notified aid scheme no longer contained discriminatory provisions based on breach of the right to establishment, expressed serious doubts over the compatibility of the amendments with the common market for the following reasons:

- risk of conflict with Community legislation on shipbuilding in force at that time ⁽⁵⁾,
- conflict between the aid scheme and the guidelines on State aid to maritime transport current at that time ⁽⁶⁾,
- existence of unlawful operating aid, granted in the form of leases on favourable terms for the acquisition of ships.

2.5. Commission Decision of 98/95/EC

- (20) In Decision 98/95/EC, the Commission, without reference to the amendments added subsequently, found the original aid scheme constituted State aid for the purposes of Article 92(1) of the EC Treaty, inasmuch as: '(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); and (d) the aid affects trade between Member States.'

⁽⁵⁾ Council Directive 90/684/EEC, of 21 December 1990, on aid to shipbuilding (OJ L 380, 31.12.1990) and Council Regulation (EC) No 3094/95 of 22 December 1995, on aid to shipbuilding (OJ L 332, 30.12.1995), amended by Regulation (EC) No 1904/96 (OJ L 251, 3.10.1996).

⁽⁶⁾ Financial and fiscal measures concerning shipping operations with ships registered in the Community, SEC(89) 921 final of 3 August 1989 and Community guidelines on State aid to maritime transport (OJ C 205, 5.7.1997).

(21) With regard to letter (d), the Decision initiating the proceedings states that 'more than 90 % of the goods from Member States are transported towards Sardinia by sea and more than 90 % of goods from Sardinia are transported towards Member States by the same route. It was also noted that 65 % of tourist traffic (passengers and vehicles) between Member States and Sardinia are managed by shipping companies.' The Commission also noted that the observations made by the Italian authorities did not contest these data, or the categorisation of the aid scheme as State aid within the meaning of Article 92(1).

(22) In light of the above, the Commission concluded that:

(a) the financial aid granted under Law No 11/1988 constituted State aid under Article 92(1) of the Treaty (now Article 87(1)),

(b) the aid was granted in breach of Article 93(3) of the EC Treaty (Article 88(3)), and

(c) in the case in point, none of the derogations provided for in Article 92 could be applied.

The Commission therefore ordered that Italy should recover the unlawful aid granted on the basis of the 1988 aid scheme (Article 2).

2.6. The judgment of 19 October 2000 and its legal consequences

(23) In its judgment of 19 October 2000 (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission*)⁽⁷⁾ the Court of Justice of the European Communities annulled Decision 98/95/EC on the ground that it lacked an adequate statement of reasons with regard to the effect on Community trade.

(24) The Court found that the Commission, in limiting itself to stating that the aid was selective and reserved to the shipping sector in Sardinia, that more than 90 % of goods transport between the mainland and Sardinia took place by sea and that 65 % of tourist transport (passengers with cars) was carried out by shipping companies, failed to provide any information on the competition between the Sardinian shipping companies and companies established in other Member States. According to the Court, the Commission failed to take into account, in that respect, the fact that, until 1 January

1999, island cabotage in the Mediterranean was excluded from the liberalisation of maritime transport service within Member States.

(25) The Court also noted that the Commission, despite pointing out that the aid scheme to the Sardinian shipping companies was in breach of the fundamental principles of freedom of establishment and the prohibition of discrimination on grounds of nationality, failed to use this breach as grounds for demonstrating the distortion of trade between Member States.

(26) In consequence of the judgment of 19 October 2000 the formal investigation procedure initiated by the decision of 24 June 1996 has been reopened. The Commission must therefore adopt a new final decision.

(27) In addition to adopting a new Decision following the Court's annulment of Decision 98/95/EC, the Commission must also decide as to the amendment to be made to the scheme introduced by Law No 9/1996, in respect of which the investigation procedure of 14 November 1997 was initiated. Although at the time it had decided to examine both schemes separately, the Commission must now examine these schemes jointly in the present Decision in order to determine their overall implications.

3. COMMENTS BY ITALY

3.1. Observations on the original aid scheme submitted in the context of procedure C 23/96

(28) In procedure C 23/96, the Italian authorities informed the Commission in a letter of 31 October 1996 of changes that they had made to the original aid scheme to make it, in their opinion, compatible with Community law. The main amendment was the adoption of Regional Law No 9/1996 that removed discriminatory provisions based on nationality and also provisions that were in breach of freedom of establishment. The authorities also notified the Commission that they had introduced a direct control mechanism to rule out the possibility of aid being granted twice (by the national authorities and by the regional authorities).

(29) In its letters of 11 October 1996 and 22 January 1997, the regional authorities justified the need for measures arising out of amendments to Law No 9/1996, inter alia, by the difficult economic conditions in Sardinia, which is an 'Objective I' region.

⁽⁷⁾ European Court Reports, 2000, ECR I-8855.

3.2. Observations on the modified aid scheme submitted in the context of procedure C 71/97

- (30) As to the observations submitted in the context of procedure C 71/97, the Italian authorities pointed out, first, that they had no way of knowing the Community law referred to by the Commission in its decision to initiate the investigation procedure, arguing that Council Regulation (EC) No 3094/95⁽⁸⁾, amended by Council Regulation No 1904/96, and the Community Guidelines on State aid to Maritime Transport of 1997 had been published after the adoption of Law No 9/1996.
- (31) Secondly, Italy emphasised that the measures envisaged by Law No 9/1996 had not been implemented and that no financial commitments had been assumed with third parties. Italy also claimed that the specified measures were necessary to allow for the absence of economies of scale in the goods and passenger maritime transport sector in an island region such as Sardinia.
- (32) In their conclusion, the Italian authorities declared themselves willing to amend the legislation and to respect all Community laws in force.

4. ASSESSMENT OF THE AID

4.1. Assessment of the original scheme applicable during the period 1988-96

Existence of an unlawful new State aid

- (33) The Commission considers that, by failing to notify the aid scheme in question in favour of companies registered in Sardinia intending to build, acquire, convert, modify or repair ships, the Italian authorities failed to fulfil their obligations under Article 88(3) of the Treaty (formerly Article 93(3)). Even though the scheme had been set up before the entry into force of the Treaty, Law No 11/1988 substantially amended the aid scheme introduced by Laws No 20/1951 and No 15/1954. The amendments introduced in 1988 should have therefore been notified to the Commission and therefore constitute new non-notified aids. Since this characterisation was not contested by the Italian authorities in their comments following the initiation of the procedure on 24 June 1996 it is therefore confirmed in this Decision.
- (34) The Commission finds that the measure in question constitutes State aid within the meaning of Article 87(1) of the Treaty. The Sardinian companies effectively benefited from interest rates more favourable than market rates and a reduction in costs relating to the loans and leases; they were therefore relieved of a financial burden that they would normally have had to bear. The financial burden was borne by public resources and the aid was selective because it was reserved to

companies operating within the shipping sector and established in Sardinia.

- (35) The Commission also observes that the measure affected trade between the Member States. The scheme implemented by the Italian authorities concerns Sardinian shipping companies in general, whether involved in cabotage activities or international transport. While it is true that regulation No 3577/92⁽⁹⁾, which liberalised the maritime cabotage service market within the Community, excluded the liberalisation of cabotage with Mediterranean islands until 1 January 1999, it is also true that this Regulation did not exclude from its scope changes in trade in the maritime service market between different Member States, in particular between France, Spain and mainland Italy. It should be noted in this regard that the aid in question was not limited to cabotage, i.e. to maritime services carried out within Italian territorial waters, liberalised from 1.1.1999, but also concerned Sardinian shipping companies that carried out international maritime transport services, which had already been liberalised in 1986⁽¹⁰⁾, so that such companies could therefore operate in competition with other Community operators.
- (36) Information in the possession of the Commission⁽¹¹⁾ shows that between 1992 and 1997, maritime traffic existed in the form of merchant shipping (and cruise shipping) leaving and entering Sardinian ports, to and from other EU and non-EU destinations. In particular, a French company operated out of Toulon bound for Sardinia and two Italian companies operated from Corsica to Sardinia. These circumstances show that during that period (between 1988 and 1996) there was an effect on international maritime transport services trade between Italy and certain Member States.
- (37) In their final letter of 8.3.2007, the Italian authorities claimed that the finance granted under Law No 11/1988 concerned 'the purchase of vessels with gross tonnage between 24 and 138 tonnes'; these ships were reportedly mainly used for the purpose of coastal maritime transport activities within a market that was not at the time open to competition. However, in at least two cases the scheme was applied for the purposes of acquiring ferries used for transporting passengers and vehicles between Sardinia and the mainland, which were able to compete with other national and Community operators. The Italian authorities stated that they were not in possession of any information on goods and passenger traffic between Sardinia and the rest of Italy and between Sardinia and other Community countries for the period in question.

⁽⁹⁾ Council Regulation (EEC) No 3577/92 of 7 December 1992, applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992).

⁽¹⁰⁾ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986).

⁽¹¹⁾ Information recorded by the Olbia Harbour Master Office.

⁽⁸⁾ See footnote No 5.

- (38) It should also be noted that Regulation No 3577/92 on cabotage did not rule out the existence of competition between companies in the maritime transport market operating between Sardinia and the Italian mainland during the period prior to 1 January 1999 because foreign companies were entitled to carry out maritime cabotage services in Italy, subject to registering their ship there, but were not able to benefit from the aid schemes reserved for Sardinian shipping companies. This scheme therefore had the effect of discouraging shipping companies from other Member States from opening branches in Italy to carry out maritime cabotage services with Sardinia, in view of the fact that they would have been unable to benefit from the aid while having to compete with other operators who were able to obtain this aid.
- Non-applicability of the derogations provided for in Article 87(2) and (3)*
- (39) For the following reasons, none of the derogations provided for in Article 87(2) and (3) (formerly Article 92(2) and (3)) may be applied.
- (40) The Italian authorities stated that the aid was required to allow the development of a region beset by difficult economic circumstances.
- (41) Although Sardinia is a region eligible for regional aid, the derogation provided for in Article 87(3)(a), of the Treaty cannot be applied because the aid in question was not granted for the purpose of promoting regional development but simply to benefit shipping companies. The Italian authorities failed to demonstrate sufficiently how the aid schemes benefiting Sardinia shipping companies enabled development of the region under the terms of Community laws applicable at that time, i.e. the Commission communication on the method of application of Article 92(3)(a) and (c) to regional aid⁽¹²⁾. Although the region of Sardinia was included in the list of proposed regions for the purpose of Article 92(3)(a), (see Annex I to the above mentioned Communication), it has not been shown that the measure was necessary as an aid to initial investment or to job creation, or that it could be considered a short-term operational aid to compensate for particular or permanent regional disadvantages, allowing sustainable and balanced development without giving rise to excess capacity in the sector in question.
- (42) The communication also states that any regional aid should respect the Community guidelines laid down for given industrial sectors such as the shipbuilding sector, which is not the case in the aid scheme in question, as will be shown below.
- (43) The aid could not therefore benefit from the derogation in Article 87(3)(a).
- (44) Nor may the derogation in Article 87(3)(c) on aid for the purpose of promoting the development of certain economic activities be relied upon since the scheme in question does not respect Community guidelines in force during the period 1988-96. The relevant regulations in force at the time, i.e., Chapter II of Annex I to the 1989 guidelines on State aid to shipping companies⁽¹³⁾, provided that such aid may be granted on the condition that it did not alter trade conditions to an extent contrary to common interest. The seventh paragraph of the above guidelines states '... The common interest would be served by measures aiming above all at maintaining ships under the Community flag, in other words by countering the tendency to use third country flags, in particular by improving technological equipment and, secondly, by recruiting as many Community seafarers as possible on board such ships'. In this case, the Italian authorities did not provide enough information to show that the original Sardinian regional scheme could be justified by improving safety on the ships or safeguarding the employment of Community seafarers.
- (45) Chapter II(6) of Annex I to the 1989 guidelines on State aid to shipping companies provided that aid could be granted to shipping companies for the building, conversion or repair of ships only on condition that they were calculated within limits established by Community law and in particular by Council Directive 87/167/EEC of 26 January 1987 on aid for shipbuilding⁽¹⁴⁾ and by Council Directive 90/684/EEC⁽¹⁵⁾ and Council Regulation (EC) No 3094/95⁽¹⁶⁾. Article 4 of Directive 87/167/EEC provided as follows: production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid, hereinafter referred to as the ceiling.
- (46) The national authorities are responsible for ensuring compliance with Community law on aid to the shipyards to which the Commission may not grant derogations. Since this clearly constitutes a compatibility condition for the aid in question, the Member State must demonstrate compliance with Community law by providing 'all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled' (ECJ, Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20 et seq.).

⁽¹²⁾ Commission communication on the method for the application of Article 92(3)(a) and (c), in particular Section I(6) (OJ C 212, 12.8.1988), amended in 1990 and 1994 (OJ C 163, 4.7.1990 and OJ C 364, 20.12.1994).

⁽¹³⁾ SEC(89) 921 final of 3 August 1989.

⁽¹⁴⁾ OJ L 69, 12.3.1987, p. 55.

⁽¹⁵⁾ OJ L 380, 31.12.1990, p. 1.

⁽¹⁶⁾ OJ L 332, 30.12.1995, p. 1. Regulation modified by Regulation (EC) No 1904/96 (OJ L 251, 3.10.1996, p. 5).

- (47) Since the Italian authorities have not supplied any information as to whether the total amount of aid granted respects the ceiling laid down in Article 4 of Directive 87/167/EEC⁽¹⁷⁾, and in the absence of any other information concerning compliance of the original measure with both the above Directives and Article 5 of Regulation (EC) No 3094/95⁽¹⁸⁾, the Commission is bound to conclude that the aid does not comply with shipbuilding guidelines⁽¹⁹⁾ either.
- (48) Furthermore, these derogations cannot be relied upon in order to authorise an aid scheme that is contrary to the general principles of the Treaty. The Commission considers that the aid scheme to Sardinian shipbuilders is incompatible with Community law due to the fact that several of the supplementary conditions introduced by Law No 11/1988 breached the fundamental principles of freedom of establishment (Article 52) and the prohibition of any discrimination based on nationality (Article 6 and Article 48(2)).
- (49) Contrary to Article 52 of the Treaty, the aid scheme required not only that the beneficiary company should be established in Sardinia, but also that it should have its administrative headquarters and shipping business, as well as its main stores, depots and ancillary installations permanently in one of the ports of the region. It also laid down that all vessels owned by the beneficiary company (and not only those for which a loan was granted under the scheme) should be registered in Sardinia.
- (50) Furthermore, as provided for in Article 99(e) of Law 11/1988 and as observed by the Court of Justice in its

⁽¹⁷⁾ Article 4 specifies the following: production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid, hereafter referred to as the ceiling.

⁽¹⁸⁾ Paragraph 1: Aid for shipbuilding and ship conversion, excluding repair granted to ship-owners or third parties in the form of State loans and guarantees, may be considered compatible with the common market if it complies with the OECD Understanding on Export Credit for Ships (1) or with any agreement amending or replacing that Understanding [...]. Paragraph 3: Aid granted by a Member State to ship-owners or to third parties in that State for the building or converting of those ships may not distort or threaten to distort competition between shipyards in that Member State and shipyards in other Member States in the placing of the orders.

⁽¹⁹⁾ With regard to the application of provisions regarding shipbuilding, it should be observed, as the Advocate General stated in his Opinion (paragraphs 34-38), that although aid to shipbuilding may include an aid to shipbuilders, the Commission rightly considered the 1988 aid scheme as aid to shipbuilders that should be examined only in the light of the less demanding obligation imposed by the Treaty because the Italian authorities were in breach of the obligation to notify, provided for by Article 11 of the above Directive.

judgment in Joined Cases C 15/98 and C 105/99 (paragraph 19), in the case of ships with gross tonnage greater than 250 tonnes, the undertaking should recruit a minimum complement of crew members registered in the general duty roster of the port of registry. The beneficiary company was therefore obliged to recruit a certain percentage of local seafarers even if other seafarers were able to carry out the required work, thus breaching the principle that prohibits any discrimination on grounds of nationality. It therefore follows that the aid in question is contrary to the fundamental principles of Community law.

4.2. Assessment of the original scheme amended by Law No 9 of 15 February 1996 in force from 1996

Existence of State aid

- (51) The Commission considers that the scheme amended by Law No 9/1996 constitutes State aid within the meaning of Article 87(1) for the following reasons: (a) the beneficiary companies are relieved of a financial burden that they would normally have to bear by means of favourable terms on normal commercial interest rates and other charges on loans/leases; (b) this burden continues to be borne by state resources; (c) the aid is selective (being reserved to companies operating in the shipping sector; and (d) the aid affects trade between Member States because the amended scheme concerns shipping companies aiming to buy, build and convert ships used for goods and passenger transport services with Sardinia and other Sardinian islands as their departure and destination points. As indicated above, companies that may effectively benefit from the aid do not operate only within the cabotage market, liberalised from 1.1.1999, but also in the international maritime transport market, liberalised from 1986⁽²⁰⁾. In any event, there is no doubt that this scheme continues to affect competition within a sector that has been fully liberalised since 1999 inasmuch as it remains in force.

- (52) On the basis of information sent by the Italian authorities in October 1996 and January 1997, no beneficiary has received any aid under Law No 9/1996. Since such aid was not granted in the past, the Commission considers that it is not necessary to assess compatibility with Community laws in force at the time for the purposes of the present Decision. However, given that the aid could be granted in the future, it is necessary to determine its compatibility with Community laws in force, i.e. the 2004 Community guidelines on State aid to maritime transport⁽²¹⁾ (hereinafter: the 2004 Community guidelines).

⁽²⁰⁾ Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986).

⁽²¹⁾ Commission Communication C(2004)43 — Community guidelines on State aid to maritime transport (OJ C 13, 17.1.2004).

Incompatibility of the modified scheme

- (53) The modified aid scheme no longer contains provisions that involve discrimination based on nationality or a breach of the principle of establishment. The Commission nevertheless considers that the amended scheme does not fulfil the conditions laid down by the 2004 Community guidelines and cannot benefit from the derogations provided for in Article 87(3)(a) and (c), for the reasons set out below.
- (54) According to paragraph 5 of the 2004 Community guidelines, subsidies paid for fleet renewal tend as a general rule to distort competition. In this particular case, the Commission considers that the subsidies in question are not part of any structural reform aiming to reduce overall capacity nor are they aiming to improve equipment on board the ships or promote the use of safer ships. In this regard, the fact that, under the amended aid scheme, the subsidies are earmarked for 'innovative and high technology transport' methods does not make it possible, in the absence of a definition of the said technologies and associated expenses, to assess the effective scope of the new amendment.
- (55) The Commission considers that the scheme cannot be described as regional aid within the meaning of paragraph 6 of the regional Community guidelines either. Although Sardinia is a disadvantaged region, the Italian authorities have not sufficiently demonstrated that the region derives an advantage from the scheme in question (Chapter 5(4) of the 2004 Community guidelines) or that the scheme complies with Community rules on regional aid in force⁽²²⁾.
- (56) The Commission also considers that, for the reasons set out above, the aid scheme is prejudicial to the economies of other Member States and distorts competition between Member States contrary to the common interest (Chapter 2 of the 2004 Community guidelines).
- (57) The Commission also observes that, according to the 2004 Community guidelines, any aid to investment must comply with the Community provisions applicable in the shipbuilding sector, i.e. Regulation (EC) No 1540/98⁽²³⁾. It may be observed that Article 3(1) of this Regulation states: 'Until 31 December 2000, production aid in support of contracts for shipbuilding and ship conversion, but not ship repair, may be considered compatible with the common market provided that the total amount of all forms of aid granted in support of any particular contract (including the grant equivalent of any aid granted to these ship-owners or third parties) does not exceed, in grant
- equivalent, a common maximum aid ceiling expressed as a percentage of the contract value before aid [...]'. In view of the fact that Italy has not provided any information as to whether the total amount of all forms of aid granted in support of a any particular contract does not exceed, in grant equivalent, a common ceiling expressed as a percentage of the contract value before aid, it must be found that the measure does not comply with Article 3(1).
- (58) Furthermore, under Article 3(4) of Regulation (EC) No 1540/98: 'Aid in the form of state-supported credit facilities granted to national and non-national shipowners or third parties for the building or conversion of vessels may be deemed compatible with the common market and shall not be counted within the ceiling if it complies with the terms of OECD Council Resolution of 3 August 1981 (OECD Understanding on Export Credits for Ships) or with any agreement amending or replacing that Understanding'. The Commission is nevertheless in possession of information indicating that the aid provided for by the amended scheme respects the OECD Council resolution of 3 August 1981.
- (59) Under Article 6 of Regulation (EC) No 1540/98, aid granted for innovation in existing shipbuilding, ship conversion and ship repair yards may be deemed compatible with the common market up to a maximum aid intensity of 10 % gross provided that it relates to the industrial application of innovative products and processes that are genuinely and substantially new, i.e. are not currently used commercially by other operators in the sector within the Community, and which carry a risk of technological or industrial failure. This aid must also be limited to supporting expenditure on investment and engineering activities directly and exclusively related to the innovative part of the project and their amount and intensity is limited to the minimum necessary taking into account the level of risk associated with the project. However, as indicated above, the fact that the amended aid scheme states that the aid is destined for 'innovative and high technology transport' methods does not make it possible to assess in the absence of any definition of the said technologies and associated expenses, the scope of the amendment introduced. The Commission must therefore conclude that aid scheme, even as amended, does not comply with the provisions on shipbuilding.
- (60) Lastly, the derogations provided for in Article 92(3)(a) and (c) cannot be applied because it is the responsibility of the national authorities to show compliance with Community law on aid to shipbuilding, from which the Commission cannot derogate. Since this clearly constitutes a condition of compatibility of the aid in question, the Member State must demonstrate compliance with Community law by providing full information to enable the Commission to verify that the conditions for the derogation sought are fulfilled.

⁽²²⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

⁽²³⁾ Council Regulation No 1540/98 of 29.6.1998, on aid to shipbuilding (OJ L 202, 18.7.1998).

Conclusions

- (61) In conclusion, the original aid scheme as it was applied during the period 1988-96 is unlawful and incompatible with the common market.
- (62) It follows that the amount of aid arising out of the granting of loans (for a total of ITL 12 697 450 000) on favourable terms under Regional Law No 11/1988 must be repaid by the beneficiaries in accordance with the procedures and provisions of Italian law. Since no subsidy was paid for leases, it is not necessary to arrange for any recovery.
- (63) The aid to be recovered includes interest from the date on which they were made available to the beneficiaries to the date of their recovery.
- (64) Because the Commission has not been able to quantify directly the aid element or the total amount of the aid to be recovered from each beneficiary, the Italian authorities are responsible for obtaining the information and notifying the Commission of the sums to be recovered from each beneficiary.
- (65) As regards the aid scheme amended by Law No 9/1996 and in force from 1996, the Commission notes that no aid was paid from that year, but concludes that the scheme constitutes State aid incompatible with the common market. It is not necessary to arrange for recovery in view of the fact that no subsidy was paid for this purpose,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of loans and leases granted to shipping companies under Law No 20 of 15 May 1951 of the region of Sardinia, as amended by Law No 11 of 4 June 1988, is incompatible with the common market.

Article 2

1. Italy shall take all necessary measures to recover from the beneficiaries the aid described in Article 1, made available to them unlawfully and corresponding to the difference between

the total amount that the beneficiaries would have paid for interest and ancillary costs under normal market conditions applied at the date on which the loans were taken out and the total interest and ancillary costs actually paid by the beneficiaries.

2. The recovery shall be carried out without delay and in accordance with procedures of domestic law provided that these allow the immediate and effective execution of this Decision. The aid to be recovered includes interest from the date on which the aid was made available to the beneficiaries until the date of recovery.

3. For payment instalments on loans still outstanding at the date of notification of this Decision, Italy shall take steps to ensure that the borrower pays the balance of the instalments under normal market conditions.

Article 3

The State aid scheme in the form of loans and leases issued to shipping companies by Law No 20 of 15 May 1951 of the region of Sardinia, as amended by Regional Law No 9 of 1966, is incompatible with the common market.

Article 4

Italy shall abolish the aid scheme described in Articles 1 and 3.

Article 5

The Italian State shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with it.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 10 July 2007.

For the Commission

Jacques BARROT
Vice-President