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Judgment of the Court (Sixth Chamber) of 29 January 1998. - Commission of the European Communities v Italian Republic. - State aid - Fiscal bonus on certain taxes - Recovery of aid - Not absolutely impossible. - Case C-280/95.

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Keywords

Actions for failure to fulfil obligations - Non-compliance with a Commission decision concerning State aid - Decision not challenged by way of an action for annulment - Defences - Absolutely impossible to implement - Criteria of assessment

(EC Treaty, Art. 93(2))

Summary

Where an application for a declaration of failure to fulfil obligations is brought in respect of a Member State which is the addressee of a decision adopted under Article 93(2) of the Treaty ordering that State to recover illicit aid, and where no action has been instituted for the annulment of that decision, the only defence available to the Member State in opposing the application is to plead that it was absolutely impossible for it to implement the decision properly.

However, that condition is not satisfied where the government of the Member State merely informs the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome.

Moreover, although insuperable difficulties may prevent a Member State from complying with its obligations under Community law, mere apprehension of such difficulties cannot justify a failure by

a Member State to apply Community law correctly.

Parties

In Case C-280/95,

Commission of the European Communities, represented by Antonio Aresu and Anders C. Jessen, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

defendant,

APPLICATION for a declaration that, by failing to adopt the measures necessary to comply with Commission Decision 93/496/EEC of 9 June 1993 on State aid procedure C 32/92 (ex NN 67/92) - Italy (tax credit for professional road hauliers) (OJ 1993 L 233, p. 10) and, in particular, by failing to recover aid granted as from the 1992 financial year in the form of a tax credit on income tax, municipal tax, or value added tax, unlawfully introduced by Ministerial Decree of 28 January 1992 in favour of professional road hauliers in Italy, the Italian Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G.F. Mancini, J.L. Murray and G. Hirsch (Rapporteur), Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 May 1997, at which the Italian Government was represented by Oscar Fiumara and the Commission by Anders C. Jessen and Lauro Pignataro, of its Legal Service, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 18 August 1995, the Commission of the European Communities brought an action under Article 93(2) of the EC Treaty for a declaration that, by failing to adopt the measures necessary to comply with Commission Decision 93/496/EEC of 9 June 1993 on State aid procedure C 32/92 (ex NN 67/92) - Italy (tax credit for professional road hauliers) (OJ 1993 L 233, p. 10, hereinafter the 'decision') and, in particular, by failing to recover aid granted as from the 1992 financial year in the form of a tax credit on income tax, municipal tax, or value added tax, unlawfully introduced by Ministerial Decree of 28 January 1992 in favour of professional road hauliers in Italy, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

2 By Ministerial Decree of 28 January 1992 (Gazzetta Ufficiale della Repubblica Italiana No 25 of 31 January 1992, p. 17, hereinafter the 'decree'), the Italian Government introduced for the 1992 financial year, in favour of Italian undertakings engaged in the transport by road of goods on behalf of third parties, a tax credit on income tax, on municipal tax or on value added tax. That tax credit enabled the beneficiaries thereof to deduct it from the payment of income tax, corporation tax, municipal tax or value added tax and subsequently also to deduct it on the occasion of the payment by representatives of amounts withheld at source on the earnings of employees and self-employed persons. The date and frequency of the deduction varied according to the type of tax chosen by the beneficiaries as the basis for tax credit. The amount of the latter was calculated on the basis of the difference between the price of gasoline in Italy and the average price charged in other Member States. The total amount of the tax credit was fixed at LIT 275 billion.

3 Not having been informed by the Italian Government prior to the introduction of the tax credit, the Commission requested the Italian Government by a note dated 15 April 1992 to provide it with detailed information on the decree and pointed out that the introduction of the aforesaid tax credit was liable to constitute an infringement of Article 92(1) of the EC Treaty. The Italian Government stated that the tax credit did not constitute aid within the meaning of Article 92 of the Treaty but rather a measure of a purely fiscal nature which sought to offset levies on transport undertakings, particularly those on fuel and lubricants, with the result that it gave rise to no distortion of competition. By a note dated 26 October 1992, the Commission informed the Italian Government that it had decided to initiate the procedure provided for in Article 93(2) of the EC Treaty.

4 Following conclusion of that procedure, the Commission adopted the decision, Articles 1, 2 and 3 of which provide as follows:

'Article 1

The aid in favour of professional road hauliers in Italy in the form of a tax credit on income tax or on municipal tax or on VAT which was introduced by the Ministerial Decree of 28 January 1992 is unlawful in so far as it is granted in breach of the procedural rules laid down in Article 93(3) of the Treaty. The aid is also incompatible with the common market within the meaning of Article 92(1) of the Treaty, in so far as it meets neither the conditions for the exemptions provided for in Article 92(2) and (3) nor the conditions of Regulation (EEC) No 1107/70.

Article 2

The Italian Republic shall abolish the aid referred to in Article 1 and ensure that the aid granted is recovered within two months of the notification of this decision. The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on overdue payments owed to the Government, with interest starting to run from the date on which the unlawful aid was granted.

Article 3

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

5 The Italian Republic, which neither contested the decision nor proceeded to recover the tax credit, renewed the Decree on several occasions, whilst amending it as from the 1993 financial year in order that the aid might also be granted to professional road hauliers of other Member States, depending on their gasoline consumption on Italian territory (Article 15 of Decree Law No 82 of 29 March 1993, converted into Law No 162 of 27 May 1993).

6 Thus, in its letter of 26 August 1993, the Italian Government informed the Commission that, since the principal complaint against it in the decision was that of discrimination between Italian road hauliers and those from the other Member States, it had eliminated the disparity of treatment by granting to Community road hauliers, with effect from the 1993 financial year, aid financially comparable to the tax credit granted to Italian road hauliers. It added that it would be technically very difficult and onerous for the tax authorities to recover the tax credit already granted since it was deductible from payments on account and amounts remaining due in respect of direct taxation and from monthly or quarterly payments of value added tax.

7 In its reply of 24 November 1993, the Commission stated that the decision was not merely prompted by the discrimination between Italian road hauliers and road hauliers from other Member States but also by the distortion of competition. Therefore, by failing to recover aid granted in 1992 and by extending the system of tax credit, albeit in modified form, the Italian Republic had failed to comply with the decision.

8 By a letter dated 13 January 1994, the Italian Government replied that the recovery referred to in the decision was technically impossible since, the tax credit being deductible from various kinds of taxes, it would require the tax authorities to carry out a whole series of specific checks on a large quantity of declarations made by around 150 000 transport undertakings and their representatives.

9 In the context of these proceedings, the Commission submits that the decision laid down in clear terms the obligation on the Italian Government to require repayment of the aid; consequently, by not having effected recovery of the aid, the Italian Republic has failed to fulfil its obligations under the Treaty.

10 The Italian Republic does not dispute that the recovery order results from the declaration of the incompatibility of the aid and that it has not recovered the tax credit granted for the 1992 financial year. However, against the Commission's conclusion that it failed to fulfil its Treaty obligations, the Italian Republic argues that it was absolutely impossible to comply with the decision.

11 It contends, in the first place, that the contested tax credit scheme was introduced as a result of serious conflicts in the road haulage sector at the end of the 1980s which had grave repercussions on social and economic life in Italy. In 1990 the Government signed an agreement with the trade associations seeking to limit the costs imposed on road haulage and specifically the cost of gasoline. One of the measures adopted immediately under the agreement was the tax credit. To recover that credit from a sector which secured the benefit thereof, whether lawful or not, after a very resolute and united struggle would be to reopen the conflict with yet more explosive consequences.

12 The Commission replies that the consequence of the Italian Government's line of argument is that it would be enough, in order to rely on the absolute impossibility of recovering the aid, for the

aid in question to be granted to a very large sector of commercial operators who press their claims particularly hard and have sufficient means available to them to carry out their threats. Added to the advantage conferred on beneficiaries by the grant of the aid is the further advantage of having at its disposal a deterrent capacity to ward off any attempt at recovery. That line of argument is manifestly unacceptable.

13 In that regard it should be stated that the validity of the decision has not been challenged. However, the parties are at odds over the question whether Article 2 of the decision, which requires recovery of the tax credit in question, lays down an obligation which is absolutely impossible to perform. According to consistent case-law, the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly (see, most recently, Case C-348/93 Commission v Italy [1995] ECR I-673, paragraph 16).

14 However, that condition is not satisfied where the defendant government merely informs the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome (see Case 94/87 Commission v Germany [1989] ECR 175, paragraph 10, and Case C-183/91 Commission v Greece [1993] ECR I-3131, paragraph 20).

15 That is the situation in this case. It is apparent that the Italian Government made no attempt to recover the tax credit in question. Without any such step being taken, implementation of the recovery decision cannot be shown to be impossible.

16 It should, moreover, be emphasised that, although insuperable difficulties may prevent a Member State from complying with its obligations under Community law (see Case 101/84 Commission v Italy [1985] ECR 2629, paragraph 16), mere apprehension of such difficulties cannot justify a failure by a Member State to apply Community law correctly (see Case C-52/95 Commission v France [1995] ECR I-4443, paragraph 38, and Case C-265/95 Commission v France [1997] ECR I-0000, paragraph 55).

17 In view of the fact that in the present case the Italian Government merely anticipates a resurgence of the earlier conflict in the road haulage sector, without having regard to all the aspects of the current situation, including in particular the existence of the decision and the obligation to comply with it, its arguments on this point cannot be upheld.

18 The Italian Republic claims, secondly, that recovery of the tax credit is also technically impossible to carry out. It would require, it says, the number of beneficiaries to be determined (around 100 000), and then each individual situation would have to be examined over one or more years (1992 and subsequent years). Then, it would be a case of checking the tax credit actually used, the allocation of the total credit used by each beneficiary to the different tax headings, preparing the documents in support of each recovery demand and the demand itself, on the basis that each department is to recover the taxes within its area of competence, both by reference to geographical territory and to the type of tax. Evidently, such a recovery procedure would involve a large number of departments scattered over the territory (tax offices, area offices, direct taxation departments, departments responsible for value added tax) and would require them to conduct checks in excess of those normally provided for and planned on the basis of their capacities. The resources devoted to such an action would seriously affect the normal capacity of those services for carrying out checks, which would prejudice the proper functioning of the tax system.

19 In that context the Italian Republic criticises the Commission for exacerbating the difficulties attendant on recovery by waiting nearly two years before bringing the matter before the Court.

20 The Commission points to the Italian fiscal legislation to support its contention that, thanks to the insertion of a special table in the tax declarations of beneficiaries together with the obligation to state the calculation made and the effects of exemption from taxes due, and to the checks which have to be carried out by district tax offices on the declarations to ensure that the beneficiaries of the tax credit have used it correctly, the Italian authorities are in a position to calculate for each beneficiary the exact amount of the tax credit deducted from the chargeable amount, that is to say the amount to be reimbursed by the road hauliers.

21 As to the actual method of recovery, the Commission considers that the recovery of taxes - subsumed under the off-setting scheme - presents no difficulties other than those encountered by the tax authorities where income tax declarations have to be rectified under Italian legislation (the main provisions in this respect being Decree No 600 of the President of the Republic of 29 September 1973, the common provisions on verification of income taxes and Decree No 633 of the President of the Republic of 26 October 1972, the introduction of value added tax and the rules governing it, amended several times), which provides for special procedures, namely the sending of a warning, recovery by distraint and collaboration with the Guardia di Finanza (revenue enforcement officers), in order to obtain the sums owing from the taxpayer.

22 Moreover, the Commission considers that its attitude as regards the need to recover the aid granted has always been clear.

23 In that connection the Court finds that, even if recovery of the tax credit does present difficulties from an administrative point of view, that fact is not such as to enable recovery to be deemed to be technically impossible.

24 Moreover, at the hearing the representative of the Italian Government acknowledged that, in general terms, the system does not preclude recovery of the credit, since the Italian authorities are in a position to identify the different hauliers, to reconstruct the situation of each of them by verifying the tax declarations submitted, to determine the various taxes and the amounts relating thereto discounted to each of them and to claim back from each of the hauliers the amount necessary to offset the tax credit granted.

25 As regards the resulting burdens on the tax authorities, it should be said that, by the Commission's letter of 15 April 1992 at the latest, the Italian Government was informed of the possible incompatibility of the tax credit scheme with Article 92(1) of the Treaty and, consequently, of the risk that it would have to recover that credit. To acknowledge in such circumstances that recovery is impossible would be to call in question the effectiveness of Community law on State aid, which cannot be permitted.

26 In the light of the foregoing it must therefore be held that, by not complying with the decision, the Italian Republic has failed to fulfil its obligations under the Treaty.

Decision on costs

Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay

the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

- 1. Declares that, by not complying with Commission Decision 93/496/EEC of 9 June 1993 on State aid procedure C 32/92 (ex NN 67/92) - Italy (tax credit for professional road hauliers), the Italian Republic has failed to fulfil its obligations under the EC Treaty;*
- 2. Orders the Italian Republic to pay the costs.*