JUDGMENT OF THE COURT (Sixth Chamber)
19 May 1999 *

In Case C-6/97,

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-Adélaïde,

applicant,

v

Commission of the European Communities, represented by Laura Pignataro and Anders C. Jessen, of its Legal Service, and Enrico Altieri, a national official on secondment to that service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for the annulment of Commission Decision 97/270/EC of 22 October 1996 on a tax credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95) (OJ 1997 L 106, p. 22),

THE COURT (Sixth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 July 1998, at which the Italian Government was represented by Oscar Fiumara and the Commission by Laura Pignataro and Dimitrios Triantafyllou, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 January 1997, the Italian Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Commission Decision 97/270/EC of 22 October 1996 on a tax credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95) (OJ 1997 L 106, p. 22, 'the contested decision').

2 The Italian Republic introduced, for the 1993 and 1994 tax years, a tax credit scheme for Italian road hauliers and a compensatory payment for non-Italian hauliers from within the Community based on fuel consumption over the distance covered on Italian territory, in accordance with the detailed rules set out in Laws No 162/93 of 27 May 1993 (GURI (Official Journal of the Italian Republic) No 123 of 28 May 1993) and No 84/95 of 22 March 1995 (GURI No 68 of 22 March 1995), and in Decree Law No 402 of 26 September 1995 (GURI No 226 of 27 September 1995).

3 The tax credit took the form of a bonus which Italian road hauliers were able to deduct, at their choice, from the sums they owed by way of income tax on natural persons, income tax on legal persons, municipal income tax and value added tax ('VAT'), and from sums deducted at source from the incomes of employees and compensatory payments for self-employed work. The Italian road hauliers to whom the tax credit scheme applied were those entered in the register provided for by Law No 298/74 of 6 June 1974.

4 The amount of the tax credit was fixed as a percentage of the actual cost of fuel and lubricants, net of VAT, but could not exceed certain ceilings, fixed according to the weight of the vehicle and its load, that is to say, under 6 000 kg, between 6 000 and 11 500 kg, between 11 500 and 24 000 kg and over 24 000 kg. The maximum

amounts were calculated on the basis of the assumption that the four categories of vehicles were capable of covering 8, 6, 3.5 and 2.2 kilometres respectively, per litre of diesel consumed.

5 For each period of application, moreover, the scheme provided for compensatory payments to be made to transport undertakings established in other Member States, on the basis of the consumption of diesel required for the distance covered on Italian territory. The budget allocated for such compensatory payments amounted to ITL 30 000 million for 1993, ITL 15 000 million for the first half of 1994 and ITL 8 000 million for the second half of 1994.

6 By letter of 4 December 1995 (OJ 1996 C 3, p. 2), the Commission informed the Italian authorities that it had decided to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) against that tax scheme. By the same letter, the Commission directed the Italian Republic, first, to supply all the documents and information necessary to enable it to examine whether the aid was compatible with the common market, and second, to suspend payment forthwith of any new aid in the form of the tax credit.

7 By letter of 26 March 1996, the Italian Republic submitted its observations. It stated, in particular, that the ministerial decrees, which were intended to lay down detailed rules for granting the compensatory payments to undertakings established in other Member States, had not yet been finalised, but that in any event they would not be adopted, in compliance with the Commission's directions.

8 On completion of the procedure, on 22 October 1996, the Commission adopted the contested decision, Articles 1, 2 and 3 of which provide as follows:

'*Article 1*

The scheme of aid in favour of professional road hauliers introduced by Italy in the form of a tax credit, as provided for in Law No 162 of 27 May 1993 (GURI No 123, 28.5.1993), Law No 84 of 22 March 1995 (GURI No 68, 22.3.1995) and Decree-Law No 402 of 26 September 1995 (GURI No 226, 27. 9. 1995), is unlawful on the grounds that it was introduced in breach of the procedural rules laid down in Article 92(3), and is also incompatible with the common market within the meaning of Article 92(1) of the Treaty, in so far as it meets none of the conditions for the exemptions provided for in Article 92(2) and (3) nor the conditions in Regulation (EEC) No 1107/70.

Article 2

Italy shall abolish the aid referred to above, refrain from adopting new legislative or regulatory instruments introducing any new aid in the form described above and recover the aid. The aid shall be reimbursed in accordance with the procedures and provisions of Italian law, together with interest calculated by applying the reference rates used for assessment of regional aid, for the period from the date on which the unlawful aid was granted to the date on which it was actually repaid.

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.'

9 In support of its application, the Italian Republic raises a single plea in law alleging infringement of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the Treaty, which is in two parts, comprising a principal claim and an alternative claim.

10 Primarily, the Italian Republic claims that the tax credit scheme does not constitute State aid incompatible with the common market, since there is no allocation — direct or indirect — of State resources which distorts or threatens to distort competition by affecting intra-Community trade. In the alternative, it claims that recovery of the aid, as provided for in Article 2 of the contested decision, is absolutely impossible.

The nature of State aid within the meaning of Article 92 of the Treaty

11 Taking as its starting point the finding, in the first recital in Part IV of the contested decision, that 'Article 92 makes no distinction as to the form, causes or objectives of the measures in question, but defines them in terms of their effects', the Italian Republic observes that it could lawfully have achieved the same effect as that actually obtained by way of the tax credit by reducing excise duty on fuel, which would have led to a proportionate reduction in VAT and the price of diesel at the pump. However, no such system was introduced because, had it been extended to all consumers using diesel — both companies and individuals — it would have led to an overall fall in tax revenue that would have been unacceptable, whilst if a distinction had been introduced in the price of diesel between road hauliers and other users

(in particular, car owners), no satisfactory solution could have been found in order to prevent fraud, given the impossibility of distinguishing between the resources allocated to some and those allocated to others.

12 The Italian Republic further observes that, contrary to the finding made in the second recital in Part IV of the contested decision, the tax credit in favour of Italian road hauliers constitutes neither a temporary nor a definitive derogation from the application of a general system of taxation. Income tax on natural and legal persons, net income tax and VAT, as well as deductions at source from the incomes of employees and compensatory payments for self-employed work, remain unchanged both in form and in substance. Deduction of the tax credit, strictly linked to the quantity of diesel and mineral oil acquired in Italy, merely constitutes a book-keeping operation in the form of a 'balancing amount' ('compensazione di cassa'), that is to say an indirect repayment of the taxes paid on fuel.

13 According to the Commission, the definition of aid laid down in the Treaty and recognised by the Court in its case-law, which is extremely broad, makes it quite pointless to carry out research into the actual nature of the measure in national law or in accordance with the accounting principles of the undertaking concerned, since it is not disputed that that measure entails a decrease in income for the State budget (in this case, tax revenue) and is reflected in a corresponding advantage for certain undertakings.

14 It should be borne in mind that, according to Article 92(1) of the Treaty, aid granted by States or through State resources, in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

15 The Court has consistently held that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19, and Case C-200/97 *Ecotrade* v *AFS* [1998] ECR I-7907, paragraph 34).

16 A measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty (Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 14).

17 In the circumstances, it suffices to note that the national legislation at issue in the contested decision was intended to reduce the tax burden on road hauliers operating for hire or reward. Since that legislation meets the condition that it should relate to specific undertakings, which is one of the defining features of State aid (see *Ecotrade*, paragraph 40), no purpose would be served by determining whether other tax rules from which the sector concerned also benefited would have escaped classification as aid within the meaning of Article 92 of the Treaty.

18 The Italian Republic further states that, in Italy, excise duty on diesel, like excise duty on other mineral oils, has always been a major component of State revenue and has therefore always been fixed at a high level, even, in absolute terms, at the highest level in the Community as a whole. In that regard it refers to the figures set out in the fifth recital in Part IV of the contested decision, which show that excise duty on diesel applied in neighbouring States is quite clearly lower than the level of excise duty imposed in Italy.

19 According to the Italian Republic, contrary to the finding in the seventh recital to the effect that disparities in legislation which cause distortions of competition cannot justify the grant of compensatory State aid, the scheme introduced restored legislative parity (through a more flexible system of reimbursement than a reduction in the tax burden, but with exactly the same results) which is essential for the entire sector concerned.

20 The Commission contends that a difference in the tax burden imposed on one particular activity cannot, by itself, justify the grant of State aid. In this case, the tax credit scheme leads to an increase in cash flow for only one sector of the economy, that is to say Italian road hauliers operating for hire or reward, through the grant of a temporary derogation from the application of a general tax system. Therefore it is not an exemption justified by the nature or logic of the system.

21 It is clear from the Court's case-law that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid (see to that effect Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraph 21). It therefore falls to be considered whether the tax credit has adverse effects on the recipients' competitors, namely road hauliers established in other Member States, whether operating on their own account or for hire or reward.

22 In that regard the Italian Republic argues that no provision for repayment is made for own-account carriers, with the result that the price of diesel is borne entirely by the products' distribution costs. However, that part of the overall cost is of only marginal significance inasmuch as it is no more than a modest additional component in the wider structure of the total costs of the undertaking's principal activity and is by no means directly connected to the production costs borne by other undertakings competing within the common market. Given the disparate nature of the activities concerned, it is unacceptable to compare the conditions under which competing activities are carried on without taking into account any other activities

in which the undertakings might be involved, as the Commission does in the 16th recital in Part IV of the contested decision.

23 As regards the effect of the tax credit on competition between haulage undertakings at Community level, the Italian Republic emphasises that, contrary to the ninth recital, the mechanism for calculating the amount of the tax credit, particularly having regard to the ceilings set for each category of vehicles, does not favour the vehicles with the greatest load capacity, that is to say, those which are most frequently in competition on international markets. It states that Italian hauliers going abroad do not operate only on the territory to which they travel with fuel bought on the spot at a lower price; like non-Italian hauliers, they return to Italy after filling their tanks and the diesel bought abroad does not enter into the determination of the tax credit. Those who benefit most from the system are therefore Italian hauliers who do not operate abroad.

24 The Commission points out that the balance of competition between own-account hauliers and hauliers for hire or reward can be upset by aid which, for one of those categories, reduces the cost that they would all otherwise have had to take into consideration in the same way when calculating their profits. That is clearly so as regards both discrimination between activities carried on by haulage undertakings on their own account and activities for hire or reward and discrimination between large and small carriers (having regard to the maximum number of vehicles in respect of which Italian law authorises the tax credit).

25 It should be borne in mind that, according to the 14th recital in Part IV of the contested decision, 'Italian road hauliers carrying goods for hire or reward are in competition both with road hauliers of other nationalities and own-account road hauliers'.

26 The 15th recital states that own-account operations accounted in 1992 for 19.2% of national and 3.8% of international transport operations by Italian hauliers. As regards competition with other Community hauliers acting for hire or reward, the 17th recital indicates that in 1992 international operations represented approximately 16.2% of Italian road transport operations for hire or reward, in terms of kilometre-tonnes.

27 The Italian Republic acknowledges that the tax credit scheme in question entails adverse effects on competition between Italian and non-Italian road hauliers. With regard to its argument that the vehicles with the greatest load capacity, that is to say those most likely to be in competition on the international market, do not gain more from the scheme, since they operate in Italy with diesel bought abroad, which does not enter into the determination of the tax credit, it is sufficient to state that it is not supported by any evidence.

28 Finally, the Italian Republic maintains that, as regards the finding in the 11th recital that the detailed rules for compensatory payments have neither been defined nor put into effect, the adoption of the implementing decree for the payment of the contribution to non-Italian hauliers has been frozen by the initiation of the infringement procedure. However, failure to adopt the rules regulating the procedure in due time does not prevent interested parties from submitting an application for reimbursement even now on the basis of the rules in force. The fact that so far no application has been made to that end demonstrates, in its view, that non-Italian operators essentially have no interest in the system, since they are able to operate in Italy with tankfuls of fuel purchased at a lower price in their home country.

29 The Commission observes that, while it is true that the aforesaid decrees have not been adopted, the tax credit has none the less been granted to Italian road hauliers

in the meantime under the legislation in force. The Italian Government has therefore merely refrained from adopting other provisions, in compliance with the directions contained in Article 2 of the contested decision and confined to the discriminatory scheme in force, thus making a 'choice' between provisions and actually applying the scheme in respect of which the Commission had already initiated the infringement procedure. The conduct of non-Italian hauliers who had not submitted any application for reimbursement is therefore explained precisely by the fact that there are no rules.

30 In that regard, it should be pointed out that, in the absence of any provisions laying down detailed rules for granting the stated compensatory payments, road hauliers who are nationals of other Member States could not in any event usefully avail themselves of the right to claim such payments.

31 The arguments alleging that the tax credit scheme in issue is not in the nature of aid must therefore be rejected.

The impossibility of recovering the aid

32 With regard to the obligation imposed in Article 2 of the contested decision to recover the aid granted, the Italian Republic claims, first, that any demand for repayment of the sums in question, whatever the form in which it is made, would cause social conflict from which the State could only emerge as the loser, and second, that the technical operations necessary to recover those sums would raise

problems which might reasonably be considered to be insuperable, given the huge number of persons concerned and the need to break down the tax credit as between various taxes and rates of tax.

33 With regard to the latter argument, the Italian Government acknowledged at the hearing that the Italian financial administration is capable of identifying the various Italian hauliers who have received the tax credit and of demanding repayment either in the usual way or by legal action.

34 With regard to the former argument, suffice it to note that, since the Italian Government has made no attempt to recover the tax credit in question, implementation of the decision to effect recovery cannot be shown to be impossible (Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraph 15).

35 In those circumstances, the application must be dismissed.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Italian Republic to pay the costs.

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 19 May 1999.

R. Grass — Registrar

P. J. G. Kapteyn — President of the Sixth Chamber