

COMMISSION DECISION**of 21 February 2007****on State aid No C 16/2006 (ex NN 34/2006) to be implemented by the Region of Sicily for
Nuova Mineraria Silius SpA***(notified under document number C(2007) 473)***(Only the Italian text is authentic)****(Text with EEA relevance)***(2007/499/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

PROCEDURE

- (1) The aid that Italy is planning to grant to Nuova Mineraria Silius was notified to the Commission by letter of 30 November 2005. The Commission requested further information on 21 December 2005 and Italy replied by letter registered as received on 7 February 2006.
- (2) By letter of 26 April 2006, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.
- (4) A meeting with the Italian authorities took place on 12 May 2006. The same authorities reacted to the initiation

of the procedure by means of letters dated 14 July and 30 August. The Commission requested additional information by letter of 18 September 2006, to which Italy replied on 3 November and 31 December.

- (5) The Commission received comments from interested parties. It forwarded them to Italy, which was given the opportunity to react. The reply by the Italian authorities was submitted by letter of 3 November 2006.

DESCRIPTION OF THE BENEFICIARY AND AID MEASURES

- (6) The aid beneficiary would be Nuova Mineraria Silius S.p.A. (hereinafter 'NMS'), a company wholly owned by the Autonomous Region of Sardinia ('RAS'). NMS exploits a deposit of fluorite ⁽³⁾ in the municipality of Silius, Sardinia. In 2004 (the most recent year for which data are available) the company had a turnover of EUR 4,96 million and 163 employees.
- (7) NMS was established in 1992 by RAS and the Minmet Financing Company. RAS subsequently assigned ownership (97,5 % in 1996 and currently 100 %) to the public entity Ente Minerario Sardo ('EMSA'). In 1998 EMSA was put into liquidation. The official receiver was charged with privatising the activities where possible and otherwise with arranging their closure. However, when the attempts to privatise NMS failed and EMSA ceased activities (June 2002), NMS was not wound up.
- (8) Following the failure of the privatisation, Italy notified to the Commission a plan for a new capital injection into the company of some EUR 24 million. According to Italy, the new capital would allow investments in preparation for the exploitation of new, deeper deposits, leading to an increase in the fluorite content of the minerals extracted and in overall production at the mine.

⁽¹⁾ OJ C 210, 1.9.2006, p. 39.

⁽²⁾ See footnote 1.

⁽³⁾ Fluorite is used in the synthesis of organic molecules for the production of plastic materials such as teflon, resins, aerosols and lubricants.

- (9) Italy argued that the measure had been notified solely for purposes of legal certainty as it did not involve State aid, and this for two reasons:

(a) Intra-Community trade would not be affected as the supply of fluorite in the Community covers hardly 30 % of demand. Hence, the only likely results of the plan would have been a reduction in imports from third countries and a moderation of price increases.

(b) RAS was behaving in the same way as a market economy investor since (i) exports of fluorite from China, which account for some 50 % of world production, are declining because of increased domestic consumption, and this is likely to have a positive impact on fluorite prices, (ii) the company had prepared a new industrial plan for the next eight years which foresaw a full recovery in investment and a generation of profits as from the fourth year, even given current market conditions, and (iii) by continuing business activities, the shareholder avoided loss of its previous investments in the company and probably a number of legal disputes with clients.

In the alternative, if the Commission concluded that there might be an element of State aid in the planned measure, Italy claims that the aid element would have been limited to the amount in excess of the profits to be obtained from the investment project. According to Italy's calculations, this excess would not be greater than 26 % of the investment, which would be below the threshold for compatible regional aid in the area ⁽⁴⁾.

- (10) In addition to the notified measure, the information provided by the Italian authorities shows that NMS has benefited in recent years from a continuous transfer of public funds from its single shareholder RAS ⁽⁵⁾, with the objective of covering losses during the pre-liquidation period. Since 1997, these transfers have amounted to EUR 90,7 million:

(EUR)	
Year	Amount transferred
1997	7 230 397
1998	9 296 224
1999	5 706 849
2000	12 496 708

⁽⁴⁾ The municipality of Silius is located in the NUTS III region of Cagliari, Sardinia, and is eligible under Article 87(3)(a) with an aid intensity of 35 % nge for the entire period 2000-06. For SMEs there is a top-up of 15 % gge.

⁽⁵⁾ Including funds from the Sardinian public holding EMSA until 2003.

(EUR)

Year	Amount transferred
2001	11 671 925
2002	11 834 000
2003	14 379 827
2004	6 890 000
2005	11 200 000
Total	90 705 931

The transfers are entered in the company balance sheet under the items 'RAS cover for future losses' and 'EMSA cover for future losses'.

- (11) Furthermore, the Italian authorities confirmed that NMS had benefited from the following public support:

(a) By the Ministerial Decree of 9 May 2002, the company was granted EUR 7,66 million under Law No 488/92 ⁽⁶⁾ of 19 December 1992 in respect of eligible investments amounting to EUR 14,31 million.

(b) By the Ministerial Decree of 28 December 2000 ⁽⁷⁾, the company was granted EUR 1,869 million under Article 9 of Law No 752/82 of 6 October 1982 in order to finance 60 % of the cost of prospecting for deeper deposits at the mine. However, according to the Italian authorities, this amount has not yet been paid.

INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

- (12) In its decision to initiate the formal investigation procedure, the Commission raised doubts as to the compatibility of the above measures with the common market, and in particular their compliance with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽⁸⁾ ('the Guidelines').

⁽⁶⁾ Law No 488/92 concerns a regional aid scheme approved by the Commission by decision of 12 July 2000 (Case N 715/99). The scheme expired on 31 December 2006.

⁽⁷⁾ Extended by the Ministerial Decree of 20 December 2002, which provided for its expiry in December 2004. The company's accounts for 2004 show an amount of EUR 1,41 million entered under this heading. They also show that a request for a further extension beyond 2004 was envisaged.

⁽⁸⁾ OJ C 244, 1.10.2004, p. 2; these Guidelines replaced the text adopted in 1999 (OJ C 288, 9.10.1999, p. 2).

COMMENTS FROM INTERESTED PARTIES

- (13) The Commission's invitation to submit comments on the measure resulted in reactions from three competitors.
- (14) According to the first competitor, the situation at NMS has been critical for the last twenty years and the company is able to survive only thanks to the constant provision of public funds. Even though market prices have increased significantly in the last five years, leading other companies to expand their existing mines or to open new ones, NMS remained unprofitable throughout. Furthermore, it was impossible to privatise because it was not considered viable despite the State aid it had already received. According to this competitor, the aid amounts are spectacular, scandalous, and incredibly disproportionate, as shown by the fact that during 2004 they exceeded the company's turnover two-fold.
- (15) The second competitor expressed its astonishment at the situation. NMS and the other European fluorite producers suffered severely from the adverse market conditions of the 1990s, which were triggered by dumping from China and eased only after 2000. Whereas it was known that NMS received public funds, this competitor claims not to have been aware of the magnitude of the aid, which, in its view, was unreasonably high. On the basis of its own rough calculations, it estimates that the funds received by NMS from RAS during the last five to six years have been about 10 times the amount of a typical investment per tonne applying normal industry standards. This competitor concludes that, as a European producer operating in the very competitive market for fluorite, it cannot accept a situation where a single company is kept afloat by means of large state transfers over many years.
- (16) The third competitor expressed its strong opposition to the granting of aid to NMS that was, in its view, substantial and disproportionate. According to this submission, the amount of financial support intended for a company with such small mining activities appears to represent extremely poor value for money, and it risks being used merely to support uneconomic employment at the mine.

REACTION FROM ITALY

- (17) In their reaction to the initiation of the formal investigation procedure, the Italian authorities announced that RAS had decided not to implement the notified aid and, in view of its financial difficulties, to wind up the company. By letter of 30 August 2006, the Italian authorities

confirmed that NMS was indeed to be wound up, as decided by the extraordinary general meeting held on 28 July 2006.

- (18) Italy further claimed (i) that the liquidation of NMS assets would not permit the repayment of RAS financing, (ii) that, with the company's exit from the market, there would be no further effects on intra-Community trade, and (iii) that, under those circumstances, any order to recover the aid could not produce any practical effects. By way of conclusion, Italy requested the Commission to refrain from issuing a recovery order.
- (19) As regards the comments made by NMS competitors, Italy considers that they are no longer relevant insofar as the notification has been withdrawn and the company will be wound up.

ASSESSMENT OF THE MEASURE**1. Existence of State aid**

- (20) Article 87(1) of the EC Treaty declares incompatible with the common market any aid granted by a Member State 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 and affects trade between Member States.

Investment project and loss cover

- (21) The Commission notes that the measures listed in paragraphs 8 and 10 involve the allocation of state resources attributable to the public authorities. As the public support is directed to one individual company, the selectivity criterion is met. Furthermore, since NMS has been active in the fluorite market, a sector in which trade exists between Member States, the criterion of effect on intra-Community trade is also fulfilled. In particular, the argument by the Italian authorities according to which there would be no effect on intra-Community trade has to be rejected since, according to settled caselaw, when aid granted by a State or through state resources strengthens the position of an undertaking compared with all other undertakings competing in intra-Community trade, the latter must be regarded as being affected by that aid⁽⁹⁾. Furthermore, the presence of intra-Community trade is borne out by the observations received from competing suppliers of fluorite in different Member States in reaction to the decision to initiate the procedure.

⁽⁹⁾ See, for example, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11, and Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 33.

(22) As regards the argument in the original notification to the effect that RAS behaved in a manner comparable to that of a market economy investor, the Commission points out that, in view of its performance in recent years and the change in its financial ratios⁽¹⁰⁾, NMS had to be considered a 'firm in difficulty' within the meaning of Section 2.1 of the Guidelines.

(23) Accordingly, and taking into consideration the company's continuing need for loss cover in recent years, it seems very unlikely if there is no improvement in its financial situation that a market economy investor would have committed additional funds of EUR 24 million to a project that had hitherto proved unprofitable. This conclusion is further supported by the fact that all attempts to privatise the company in the period from 1998 to 2002 resulted in failure. This has also been confirmed by the reactions received from competitors in the industry.

(24) In addition, RAS showed no interest in the past in weighing the costs to be borne in the event of liquidation against the costs of continuing with NMS activities. On the contrary, liquidation was explicitly avoided in June 2002, when it became clear that the privatisation procedure had failed.

(25) Furthermore, it was apparent from the notification that, to a large extent, RAS had been supporting NMS on the basis of public welfare considerations, such as the fact that it was one of the few industrial companies remaining in the region. However, arguments of that kind are not relevant for a market economy investor.

(26) Accordingly, as the Commission concluded in the decision initiating the procedure and would again stress, the investments proposed in the original notification, together with all previous contributions from the shareholder designed to cover losses and amounting to EUR 114,7 million constitute State aid within the meaning of Article 87(1) of the EC Treaty. The latter aid (loss cover) is illegal as it was granted in breach of Article 88(3) of the Treaty. As regards the measure in the original notification, the Italian authorities have confirmed that some of the funds had already been granted to the beneficiary in order to undertake some urgent and non-delayable works. Therefore, this part of the aid, totalling an unknown amount, was granted unlawfully.

Funds provided under Laws Nos 488/92 and 752/82

(27) As regards the measures mentioned in paragraph 11, it is not contested that they constitute State aid within the meaning of Article 87(1) of the EC Treaty. Nevertheless, Italy has declared that no aid has as yet been paid under Law No 752/82.

2. Derogations under Article 87(2) and (3) of the EC Treaty

(28) The primary objective of the measures mentioned in paragraphs 8 and 10 seems to be to assist a firm in difficulty. In such cases, provided that the relevant conditions are met, only the derogation in Article 87(3)(c), which permits State aid designed to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest can apply.

(29) Rescue or restructuring aid to ailing firms is currently governed by the Guidelines.

(30) The transitional provisions stipulate that the Guidelines will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some or all of the aid is granted after 1 October 2004, the date of publication of the new Guidelines in the *Official Journal of the European Union* (point 104). Consequently, the new Guidelines are applicable in the present case as the notification took place in 2005 and at least EUR 11 million of public aid (out of the EUR 90,7 loss cover mentioned in paragraph 10) was granted after 1 October 2004.

(31) As regards the aid granted under Law No 488/92 and possibly under Law No 752/82, its compatibility must also be assessed in the light of the Guidelines insofar as the Commission considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest *only* if the conditions set out in the Guidelines are met⁽¹¹⁾. As firms in difficulty are explicitly excluded from the scope of Law No 488/92, the Commission concludes that NMS was not eligible for regional aid under Law No 488/92, the firm already being in difficulty at the time the aid was granted (May 2002)⁽¹²⁾.

⁽¹⁰⁾ In particular, the 2004 annual accounts show losses totalling EUR 10,46 million, equivalent to 101 % of the subscribed capital at the time (EUR 10,33 million). Losses in 2003 were EUR 9,61 million. Turnover also followed a downward trend, from EUR 7,31 million in 2003 to EUR 4,96 million in 2004.

⁽¹¹⁾ Point 20 of the Guidelines.

⁽¹²⁾ According to point 56 of the Guidelines, the fact that the firm is located in an assisted area under Article 87(3)(a) plays a role only as regards the implementation of compensatory measures and the size of the beneficiary's contribution.

(32) For the same reason, the subsidiary argument by the Italian authorities according to which the supposed aid would have to be regarded as falling below the threshold set for regional aid in Sardinia has to be rejected.

(33) As regards the eligibility of NMS for restructuring aid, the Commission considers that the criteria for compatible aid laid down in the Guidelines are not met. In particular:

(a) the successive amounts of aid for loss cover have artificially kept in business a company that otherwise would have gone into bankruptcy; apparently, no restructuring was carried out; the measures must therefore be regarded as operating aid;

(b) neither the loss cover in the past nor the measure indicated in the original notification can be considered as compatible rescue aid since they both extend over a period of several years, they were granted in a non-eligible form and no reimbursement/restructuring plan/liquidation of the company was planned within a period of six months;

(c) the industrial plan sent to the Commission in the notification consisted in an analysis of the profitability prospects in the light of the new investment project, with no mention of restructuring measures, with no conditions for the granting of public aid and without taking into account the illegal support in the past;

(d) in the absence of a restructuring plan, the Commission is not able to ascertain whether the proposed aid could restore long-term viability and would be kept to a minimum and whether undue distortions of competition could be avoided (notably having regard to the continuous debt cover provided in recent years, in breach of the Deggendorf ruling ⁽¹³⁾).

Withdrawal of the notification and winding-up of the company

(34) The Commission takes note of the announcement by Italy that RAS has decided not to implement the notified aid of some EUR 24 million and, in view of the financial difficulties of NMS, to wind up the

company. However, contrary to the claims by Italy, the Commission considers pursuant to Council Regulation (EC) No 659/1999 ⁽¹⁴⁾ laying down detailed rules for the application of Article 93 of the EC Treaty that, in cases of unlawful aid which is not compatible with the common market, effective competition should be restored and that, for this purpose, the aid, including interest, needs to be recovered without delay.

CONCLUSION

(35) The Commission finds that Italy has unlawfully implemented, in breach of Article 88(3) of the Treaty, the measures consisting in repeated cover for NMS losses, in the granting of aid to NMS under Law No 488/92 and the Ministerial Decree of 28 December 2000, and potentially in a partial payment of additional aid under the notified measure. In addition, the Commission finds that the aid indicated in the original notification and the aid granted by the Ministerial Decree of 28 December 2000 under Article 9 of Law No 752/82, are neither compatible with the common market nor eligible for any derogation under the EC Treaty. Therefore, the parts of the above measures that have not yet been granted or paid must not be implemented ⁽¹⁵⁾, and the aid already paid totalling EUR 98,36 million, including EUR 90,7 million of loss cover (see paragraph 10) and EUR 7,66 million granted by the Ministerial Decree of 9 May 2002 (see paragraph 1), has to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Italy has implemented for Nuova Mineraria Silius S.p.A., amounting to EUR 98 360 000, is incompatible with the common market.

2. The State aid which Italy is planning to grant to Nuova Mineraria Silius S.p.A., amounting to EUR 25 869 000, is also incompatible with the common market and may not therefore be implemented.

Article 2

1. Italy shall recover from the beneficiary the aid referred to in Article 1(1).

2. The sums to be recovered shall include interest for the entire period running from the date on which they were at the disposal of the beneficiary until the date of their recovery.

⁽¹⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁵⁾ According to the information submitted by Italy, this would include EUR 24 million in the original notification plus EUR 1,869 million pursuant to the Ministerial Decree of 28 December 2000 and Italian Law No 752/82 (see paragraph 11).

⁽¹³⁾ Case C-355/95 P *Textilwerke Deggendorf v Commission and others* [1997] ECR I-2549.

3. The interest shall be calculated on a compound basis in conformity 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 ⁽¹⁶⁾.

Article 3

1. Italy shall take all necessary measures to recover from the beneficiary the illegal and incompatible aid referred to in Article 1(1).

2. Recovery shall take place without delay and in accordance with the procedures under national law provided that they allow the immediate and effective execution of the decision.

3. Italy shall ensure that the present decision is implemented within four months of the date of notification.

Article 4

1. Italy shall keep the Commission informed of the progress of the national proceedings to implement this decision until these proceedings have been completed.

2. Within two months of notification of this decision, Italy shall submit information specifying the total amount (principal and interest) to be recovered from the beneficiary and a detailed description of the measures already taken or planned to comply with the present decision. By the same deadline, it shall send to the Commission all the documents demonstrating that the beneficiary has been ordered to repay the aid.

3. After the period of two months referred to in paragraph 2, Italy shall submit, on a simple request by the Commission, a report on the measures already taken or planned to comply with this decision. This report shall also provide detailed information on the amounts of aid and interest already recovered from the beneficiary.

Article 5

This decision is addressed to Italy.

Done at Brussels, 21 February 2007.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁶⁾ OJ L 140, 30.4.2004, p. 1.