# COMMISSION

## COMMISSION DECISION
## of 3 March 1999
## concerning aid granted by Italy to firms affected by the bankruptcy of Sirap SpA

*(notified under document number C(1999) 584)*

**(Only the Italian text is authentic)**

**(Text with EEA relevance)**

(1999/678/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(2)(a) thereof,

Having, in accordance with the abovementioned provisions, given interested parties notice to submit their comments,

Whereas:

I

By letter dated 9 March 1995, the Italian authorities, in accordance with Article 93(3) of the EC Treaty, notified measures to assist firms affected by the winding-up of Sirap SpA, a publicly-owned company responsible for the economic development of the Region.

The notification was incomplete inasmuch as the Italian authorities announced that the list describing the aid measures planned for the firms would be communicated to the Commission as soon as possible. When it acknowledged receipt of the letter, the Commission informed the Italian authorities that the two-month period within which it had to reach a decision on the aid would start to run when the promised information was received.

Despite several reminders, the Italian authorities did not supply the information requested. The most recent reminder was sent on 20 November 1995, when the Commission stated that, failing a reply from the Italian authorities within ten working days, the aid would be removed from the register of notified aid and entered in the register of unnotified aid in view of the fact that draft Law No 835 of the Region of Sicily provided for a first aid tranche for 1995. As no reply was received, the aid was entered in the register of unnotified aid under NN 196/95.

By letters dated 15 May and 3 June 1996, the Italian authorities indicated that the draft Law had been enacted on 24 March 1996 and provided some of the information requested.

By decision of 3 July 1996, the Commission initiated Article 93(2) proceedings in respect of the aid. The Italian authorities were informed of the commencement decision by letter dated 17 July 1996. Following publication of the letter in the *Official Journal of the European Communities* [1], comments were received from a third party, a lawyer representing one of the shareholders of Sirap SpA. The comments were forwarded to the Italian authorities on 14 March 1997. Despite several reminders, the Italian authorities gave the Commission their views on the comments only on 5 May and 22 September 1997.

Finally, on 8 October 1997, the Italian authorities notified a new aid scheme to the Commission relating to the regeneration and setting-up of craft centres, which were to have been carried out by Sirap SpA. The scheme is being examined separately by the Commission. As the new measure also provides for financial assistance for companies and/or persons having carried out work on behalf of Sirap SpA, the Commission questioned the Italian authorities about the connection between the new measure and the measures concerned by these proceedings. The reply from the Italian authorities was received on 15 January 1998.

II

The reasons why the Commission initiated the proceedings may be summarised as follows.

[1] OJ C 359, 28.11.1996, p. 3.

The scheme allows suppliers and creditors of Sirap SpA or firms having carried out work on its behalf to apply to credit institutions for loans of up to ITL 700 million, subject to a ceiling which must not exceed their claims on Sirap SpA.

The loans are granted over a period of five years, with a one-year grace period. The interest rate is 4 %, the difference as compared with the reference rate applied in the relevant market sector being covered by the Region. The loans are guaranteed by the transfer to the banks of any claims the firms may have against Sirap SpA and by an additional guarantee from the Region.

The guarantee from the Region should be regarded as aid to the firms as they would probably not have obtained the loans without it. Given that Sirap SpA is bankrupt, it is unlikely that the claims will be met in full and, therefore, recovered by the banks.

The Commission took the view that the aid element in the guarantee should therefore be regarded as corresponding to the amount guaranteed. It was, however, unable to calculate the aid element in the loans as it did not know the reference rates applied in the various sectors concerned. However, taking as a basis the reference rate applied to calculated regional aid, the Commission estimated an aid intensity of 20 % gross.

The Italian authorities were asked to send further details as it was not possible, on the basis of the data available, to exempt the aid measures under Article 92(3) of the Treaty and Article 61(1) of the EEA Agreement.

III

The Italian authorities' response was simply to send the Commission a list of the amounts owed to firms that had carried out work on Sirap SpA's behalf.

The Italian authorities also pointed out that the total amounts in question considerably exceed the maximum amount provided for in the regional law. They also stated that the regional guarantee is intended for firms with claims on Sirap SpA and not for Sirap SpA. This fact is sufficient, they claim, to rebut the Commission's statement that the regional guarantee has a net grant equivalent equal to the amount of guaranteed credit granted in connection with the bankruptcy of Sirap SpA.

In their most recent letter, received on 15 January 1998, the regional authorities explained that the measures in question constitute direct aid to the creditors of firms that carried out work on behalf of Sirap SpA. As those firms had been unable to obtain payment of their claims owing to the bankruptcy of Sirap SpA, they in turn had been unable to pay their own creditors.

In view of the delay in the application of the measures in question, most of the firms that carried out work for Sirap SpA have filed for bankruptcy on account of insolvency resulting from the suspension of payments by Sirap SpA. As a result, the creditors of those firms will have to wait for the liquidation of their debtors' assets in order to recover the amounts owed to them.

Lastly, no comments were made by the Italian authorities concerning the only response received by the Commission from a third party in this case.

IV

As part of the procedure, the Commission received comments from the legal representative of Finanziaria Meridionale SpA (hereinafter referred to as 'FIME'), one of the shareholders of Sirap SpA.

FIME wished to draw the Commission's attention to the financial prejudice it had suffered as a result of a negative decision taken by the Commission in 1994 concerning various aid measures promised by the Region of Sicily to a number of regional holding companies (aid No C 12/92, ref. SG(94)D/4720). One of the measures which the Commission declared incompatible with the Treaty was aid of ITL 4 billion to Ente Siciliano per la Promozione Industriale SpA (hereinafter 'ESPI') intended to cover the losses of its subsidiary Sirap SpA. The Commission accordingly prohibited the Italian Government from granting the aid.

FIME considers that the Commission based its decision on the wrong assumptions and without seeking clarification from the Region. It alleges that the Commission wrongly believed that Sirap SpA was engaged in the engineering industry, whereas FIME regards it as a firm aiming to achieve 'the industrial development of the territory of Sicily through the creation and development of enterprises'.

More specifically, Sirap SpA's activities were limited to planning, carrying out and managing the creation of the infrastructure and other facilities which would encourage productive investments. It also provided specialised services for the production, organisation and management of small and medium-sized firms.

Sirap SpA was set up with capital subscribed equally by FIME and ESPI. The capital was fully guaranteed by the Region, which undertook to cover the expenditure incurred by the firm in the course of its activities.

FIME considers that, although Sirap SpA was technically a public limited company, it did not constitute a normal business structure since it acted on behalf of the Region.

The decision of the Sicilian Regional Government in 1991 and 1992 no longer to cover the entire capital, and the negative Commission decision of 1994 resulted, it is claimed, in the demise of Sirap SpA. As a result, FIME's shareholding no longer has any financial value. FIME therefore asks the Commission to review where possible its position on the matter or, alternatively, to take steps to allow the Region to fulfil its obligations for 1991 and 1992 to guarantee the entire capital of Sirap SpA.

V

The notified measures constitute aid to the suppliers and creditors of Sirap SpA or firms which carried out work on its behalf since they attempt to limit the damage caused by the bankruptcy of Sirap SpA to such persons and/or firms. In practice, they constitute a temporary measure aimed at preventing recipients from having to suspend payments owing to the delay or the impossibility of recovering the sums owed by Sirap SpA or by the firms that carried out work on its behalf.

The aid in question is therefore aimed at cushioning the normal impact of the liquidation of Sirap SpA, where creditors and suppliers would await the final winding-up in order to recover all or part of their claims. Pending the outcome, those firms are unable in their turn to pay their creditors, and this is liable to trigger a chain of bankruptcies. According to the Italian authorities, because of the delay in applying the measures, most of the firms that worked on behalf of Sirap SpA are themselves being wound up, having become insolvent as a result of the suspension of payments by Sirap SpA.

On the basis of the information received, it must be concluded that the measures constitute operating aid aimed at ensuring the survival of the recipient firms by enabling them to bear the financial charges resulting from their normal business activities. Furthermore, the Italian authorities have never claimed that the measure in question constitutes regional investment aid or rescue or restructuring aid for firms in difficulty.

It is worth noting in this respect that, although a number of aid recipients have in turn filed for bankruptcy, the Italian authorities have not at any stage in these proceedings invoked the application of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [1]. Furthermore, they have not provided any information indicating compliance with the Guidelines, for example by submitting restructuring plans aimed at restoring the long-term viability of the recipient firms.

The direct recipients of the aid are engaged in a wide range of activities, as evidenced by the measure forming the subject of these proceedings, the interest subsidy being granted on the basis of the reference rates applied in the different sectors of the economy. The Commission has no information on the specific sector of each recipient. However, it concludes from the information submitted by the Italian authorities that, as Sirap SpA's creditors are firms which carried out work on its behalf, they are firms in the building and public works sector.

In addition, according to information received by the Commission in connection with State aid No N 693/97 concerning the redevelopment of areas equipped for craft activities which was to have been carried out by Sirap SpA, the latter's creditors include professional firms, architects and engineers to design and oversee the work.

The aid to Sirap SpA's creditors is therefore sectoral, as it is limited to one or more sectors. However, no information is available on the suppliers and creditors of firms which carried out work on behalf of Sirap SpA.

VI

State aid must be examined to determine whether it affects intra-Community trade or distorts or threatens to distort competition.

According to the Panorama of EU Industry for 1997 [2], building is inherently a local or regional activity, with most firms not usually moving far from their local area. Consequently, transnational activities do not usually result in exports of goods as such, but rather take the form of exports of capital or services through international mergers, acquisitions and joint ventures.

Nonetheless, whereas small firms tend not to move far from their region of origin, larger ones do so.

In the present case, distance does not appear to have acted as an inhibiting factor. The local nature of the activity is thus somewhat mitigated by the fact that the firms which carried out work for Sirap SpA include Italian firms located some distance from Sicily, notably Bologna and Udine. They took part in the work through consortia which also included firms located in Sicily. According to those firms, the value of such work was the fact that it was supported and funded by the State, as well as the absence of any risk to the solvency of Sirap SpA.

The fact that several recipient firms came from a long way away because of the absence of risk does not rule out the possibility that foreign firms might have been interested in taking part in the work and that there was trade between the Member States on the market in question. The Italian authorities have not, indeed, provided any evidence that no such trade took place.

As regards the planning of the work, the Panorama of EU Industry for 1997 points out that, whilst the architectural profession does not as yet have a sufficient number of economic observations to allow a satisfactory assessment of the wide and varied range of its numerous activities, architects do supply services in other Member States. Furthermore, as regards 'engineering' services in the Community, the Panorama states that, with the exception of Italy and the United Kingdom, which both have higher percentages, an average of 25 % of annual turnover in that sector is derived from contracts performed in other countries.

[1] OJ C 368, 23.12.1994, p. 12.

[2] Published by the Office for Official Publications of the European Communities.

It cannot therefore be concluded (nor have the Italian authorities, during the proceedings, made any claim to the contrary) that aid to such recipients does not distort trade between Member States.

The measure in question allows the recipients partially to avoid the consequences of the bankruptcy of the promoter. The firms are thus artificially placed in a more favourable position than similar firms in Italy and other Member States that are unable to rely on State aid in similar circumstances. It must therefore be concluded that the aid distorts or is liable to distort competition.

Accordingly, as the measure satisfies the tests of Article 92(1) of the Treaty, it constitutes State aid within the meaning of that Article. The next step is to determine whether the aid is lawful and compatible with the Treaty.

VII

As to whether the aid is lawful, it is necessary to consider the timing of the various legislative documents. The Italian authorities informed the Commission that the notified draft Law had been approved by the Region of Sicily on 24 March 1996 but had been the subject of a legal action brought by the *Commissario dello Stato* (Government representative). The Law was adopted on 22 March 1997 (Law No 8/97) and published in the Official Journal of the Region of Sicily of 29 March 1997. The difference between the second version of the Law and the first is the removal of one of the articles concerning the employment by the Region of Italter staff — a matter not covered by these proceedings (in the second version, the article in question was removed by Order No 60 of the Constitutional Court, sitting on 26 February to 4 March 1997).

For the reasons given above, the Commission entered the notified aid in the register of unnotified aid. Although the Italian authorities subsequently informed the Commission that the law had been approved and adopted one year later, they did not challenge the classification of the measure as unnotified aid.

Furthermore, although they were specifically requested to do so when these proceedings were initiated, the Italian authorities did not confirm that the implementation of the measures had been suspended pending the outcome of the Commission's assessment. The most that can be concluded from the recent correspondence concerning aid N 693/97 is that the delay in implementing Regional Law No 8/97 frustrated the intentions of the legislator.

This, however, is not enough to rule out completely the possibility that the measures concerned by these proceedings were implemented before the Commission took a decision and that they are, therefore, illegal.

VIII

With regard to the compatibility of the aid, it should be noted that the whole of Sicily is eligible for aid to promote regional development under Article 92(3)(a) of the Treaty.

The aid in question cannot be regarded as investment aid, as it is not intended to promote productive investment. It must therefore be regarded as operating aid.

In its communication on the method for the application of Article 92(3)(a) and (c) to regional aid [1], the Commission provided for the possibility of operating aid being granted under certain conditions, namely:

1. The aid is limited in time and designed to overcome the structural handicaps of enterprises located in Article 92(3)(a) regions.

2. The aid is designed to promote a durable and balanced development of economic activity and does not give rise to a sectoral overcapacity at the Community level such that the resulting Community sectoral problem produced is more serious than the original regional problem.

3. Such aid must not be granted in violation of the specific rules on aid granted to companies in difficulty.

4. An annual report on the application of the aid must be sent to the Commission, indicating total expenditure by type of aid and the sectors concerned.

5. Aid designed to promote exports to other Member States must be excluded.

As regards the first condition, it is worth noting that, although the aid is limited in time, it is not intended to overcome the structural handicaps of enterprises located in Sicily. First, at least two of the firms having participated in the temporary associations of undertakings responsible for the work are located outside the region. To grant aid to such enterprises would be tantamount to removing the distinction between assisted and non-assisted areas as regards regional development.

Furthermore, the aid is not intended to overcome the structural handicaps of the economic situation in Sicily, since it is aimed at helping the victims of the bankruptcy to stay afloat until the liquidation procedure has been completed. Such situations can occur throughout the Community, and no evidence has been adduced by the Italian authorities to show that the structural situation is worse because it is in Sicily.

As for the second condition, neither the object nor the effect of the aid can be regarded as promoting a durable and balanced development of economic activity. The aid is not intended to assist marketing or to cover the extra transport or communication costs which might be justified by the physical distance preventing firms from participating in the Community internal market.

As regards the third condition, it is unlikely that the suppliers and creditors of Sirap SpA or of firms carrying out work on its behalf could, when Sirap SpA went into liquidation, have been regarded as 'firms in difficulty'. It is, however, clear that the aid was intended to prevent the recipients, especially

[1] OJ C 212, 12.8.1988, p. 2.

the firms carrying out work on behalf of Sirap SpA, from having to suspend payments. This is confirmed by the Italian authorities, which acknowledged that, because of delays in granting the aid, most of the firms which had carried out work for Sirap SpA filed for bankruptcy owing to the latter's cessation of payments.

The aid is thus tantamount to rescue or restructuring aid for firms in difficulty. However, as was stated above, the Italian authorities have not invoked the application of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.

Yet, even had they done so, the aid does not qualify as a rescue measure since the loans were not granted at market rates, the Region having borne part of the interest, and were granted for more than the six months which the Commission regards as the period normally necessary for them to be defined as a recovery measure. Similarly, the aid does not qualify as restructuring aid since, among other things, the Commission did not receive any restructuring plan guaranteeing the long-term viability of the firm.

Although the last two conditions do not appear to be applicable in the present case, the failure to comply with the other conditions is already sufficient to rule out the possibility of exemption under Article 92(3)(a).

Exemption under Article 92(3)(b) is not possible as the aid is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Italian economy.

The exemption provided for in Article 92(3)(c) is not applicable either because, in the context of that provision, the Commission does not authorise operating aid.

Lastly, the exemption provided for in Article 92(3)(d) is not applicable as the aid is not intended to promote culture and heritage conservation.

IX

In its letter initiating the proceedings, the Commission stated that, without the guarantee provided by the Region of Sicily, the recipients would probably not have obtained a bank loan. The only security the firms were required to provide to the banks issuing the loans were their claims on Sirap SpA, which was already bankrupt and in the process of being wound up. It therefore follows that Sirap SpA's creditors had very little chance of recovering a significant part of the claims in question. The Commission accordingly took the view that the aid element in the guarantee should be regarded as corresponding to the amount guaranteed.

The Italian authorities' rejection of that assessment is not supported by any evidence allowing the Commission to reverse its assessment. As already stated above, the purpose of the State aid is to ward off the normal effects of the liquidation of Sirap SpA by preventing a chain reaction of bankruptcies among its creditors owing to their failure to pay their own creditors.

In order to secure a loan from a bank, Sirap SpA's creditors are required to transfer their claims to that bank as a primary guarantee. Given that Sirap SpA is in liquidation, it is doubtful whether the claims have any significant value. According to information received as part of the proceedings, Sirap SpA simply acted as intermediary in the execution of development projects for the Region. It is therefore doubtful that the firm possessed any solid assets which could be sold in order to pay creditors. Even if this were to be the case, which is unlikely in view of Sirap SpA's activities, the Italian authorities have not invoked this as an argument. This is why the Region provides an additional guarantee.

It is, of course, possible that recipient firms in sound financial health could have obtained a loan on the capital market in the normal way. However, the Italian authorities have not provided any evidence that Sirap SpA's creditors could have obtained financing solely on the basis of the primary guarantee or their own financial position, i.e. without the additional guarantee provided by the Region.

It would seem, in fact, according to statements by the legal representatives of FIME which have not been denied by the Italian authorities, that the solvency of Sirap SpA was closely tied to capital injected by the Region in order to maintain the capital integrity of the firm. Indeed, the latter's difficulties began when the Region refused to contribute capital in 1991 and 1992, leading to the suspension of payments by Sirap SpA to the firms and the cessation of work.

Furthermore, FIME claims that its holding in Sirap SpA, formerly worth ITL 2 billion, should now be regarded as worthless.

In view of the foregoing, it must be concluded that the Italian authorities have not furnished any evidence that the claims on Sirap SpA, which were transferred as security in exchange for loans, had any significant financial value. As a result, apart from the healthy firms which could have obtained a loan on the market under normal conditions (the Italian authorities have not provided any evidence that such a situation constitutes the rule), the Commission has no option but to maintain its position, namely that the aid element in the guarantee must be regarded as equal to the amount guaranteed.

X

As was stated above, in the course of these proceedings the Commission received comments from a former Sirap SpA shareholder. The comments call for the following observations:

1. The information on the characteristics and activities of Sirap SpA was communicated to the Commission by the Italian authorities under proceedings initiated in respect of various aid measures promised by the Region of Sicily to several regional holding companies (aid C 12/92). In their letter of 21 July 1992, the authorities stated that Sirap SpA was a company established under Article 53 of Regional Law No 105 of 5 August 1982 in order to provide technical design services for public works and/or services on behalf of public bodies (regions, municipalities, etc.) and, accordingly, was not involved in products that could be assessed on the market.

   In its final decision on the case (ref. SG 94 D/4720), the Commission took the view that, according to the description of its activities provided by the Italian authorities, Sirap SpA operated in the engineering sector. This is also in line with the definition of engineering given in the Panorama of EU Industry for 1997, i.e. intellectual services aimed at optimising investment projects in industry, construction and infrastructure as well as at all the stages of a project, from its initial conception to its completion.

   The Commission had concluded that the amount of aid was such that, in view of the generally small size of engineering firms, it could prevent private-sector competitors of Sirap SpA from gaining access to the market or force them out of the market, both in Italy and in other Member States, as they would not benefit from State aid to cover any losses.

2. The comments made by the legal representatives of FIME to the Commission as part of the proceedings confirm that at least some of Sirap SpA's activities comprised the activities described above, as defined by the Commission in its 1994 decision.

3. It should be noted that neither Sirap SpA, nor its shareholders or their legal representatives nor the Italian authorities challenged the Commission decision of 1994 within the specified period. The decision is therefore final.

4. With regard to the preceding point, the Commission notes that the Italian authorities have not responded to the comments received as part of the proceedings, despite having been invited to do so. This constitutes further confirmation of the statements in the preceding point.

XI

In view of the foregoing, the measures to assist the firms affected by the liquidation of Sirap SpA, which are provided for in the regional law approved on 24 March 1996 (DDL 1182-1210) and adopted as Regional Law No 8 of 22 March 1997 and which take the form of guarantees and interest subsidies, constitute aid within the meaning of Article 92(1) of the Treaty.

As the budgetary resources were approved for five years from 1996, the aid is unlawful as regards the portion not covered by the rules in the Commission notice on *de minimis* aid [1], which sets a threshold of EUR 100 000 over three years, given that the Italian authorities have not confirmed that the measures were not implemented before the Commission took a decision.

The aid not covered by the *de minimis* rule is also incompatible with the common market, as it is not covered by the exemptions provided for in the Treaty for the reasons already given (see Section VIII).

Where aid is incompatible with the common market, the Commission is required, pursuant to Article 93(2) of the EC Treaty and the case-law of the Court of Justice, in particular its judgments in Cases 70/72 [2], 310/85 [3] and C 5/89 [4], to ask the Member State to recover the illegal aid from the recipients. Consequently, with regard to the portion not covered by the *de minimis* rule, the aid must be abolished and, in so far as it has already been granted, recovered by the Italian authorities.

This case concerns a guarantee where the aid element can amount to the full loan guaranteed, whilst the loan itself comprises an aid element in the form of an interest subsidy with an estimated intensity of 20 %, as was stated when they were initiated. As the Italian authorities have not communicated the sectoral interest rates applied to calculate the interest subsidies, the Commission is unable to determine the extent to which the rates correspond to those applied to calculate regional aid.

Where the financial position of the aid recipients would have enabled them to obtain the financing in question on the capital market, without the State guarantee, the aid element consists solely in the interest subsidy. Otherwise, the aid consists in the amount of the guaranteed loan and the interest subsidy.

Accordingly, in order to comply with the ceiling provided for in the *de minimis* notice, the guarantee may cover only a maximum amount of EUR 83 333, by adding the aid element contained in the interest subsidy, a total of EUR 100 000 over a three-year period is obtained,

HAS ADOPTED THIS DECISION:

*Article 1*

The measures to assist firms affected by the bankruptcy of Sirap SpA, which are provided for in the law of the Region of Sicily approved on 24 March 1996 and subsequently adopted as Regional Law No 8 of 22 March 1997 and which take the form of guarantees and interest subsidies, constitute aid within the meaning of Article 92(1) of the Treaty.

[1] OJ C 68, 6.3.1996, p. 9.
[2] [1973] ECR 813.
[3] [1987] ECR 901.
[4] [1990] ECR I-3437.

The portion of that aid which exceeds the ceiling of EUR 100 000 over three years provided for in the *de minimis* notice is illegal inasmuch as it was granted before a decision was taken by the Commission under Article 93(3) of the Treaty.

*Article 2*

The aid not covered by the *de minimis* rule referred to in Article 1 is also incompatible with the common market as it does not qualify for exemption under Article 92(2) and (3) of the Treaty.

*Article 3*

Italy shall abolish the part of the aid scheme in question that is not covered by the *de minimis* rule and shall take the necessary steps to recover the aid granted illegally and described in Article 1 of this Decision.

Where the financial position of a firm receiving aid referred to in Article 1 of this Decision would have afforded it normal access to the capital market without the State guarantee, recovery shall apply only to the interest subsidy.

Where a recipient would not have been able to obtain the loan in question without the State guarantee, the full amount of aid shall be recovered.

*Article 4*

The aid shall be recovered in accordance with the procedures and provisions of Italian law, together with interest starting to run from the date on which the aid was granted to the date on which it was repaid. The rate shall be the reference rate, applicable on the date the aid was granted, used to calculate the net grant equivalent of regional aid in Italy.

*Article 5*

The Italian Government shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply herewith.

*Article 6*

This Decision is addressed to the Italian Republic.

Done at Brussels, 3 March 1999.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*