

COMMISSION DECISION

of 8 November 2006

on State aid C 11/06 (ex N 127/05) which Italy is planning to implement for AEM Torino

(notified under document number C(2006) 5276)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2006/941/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 provision(s) cited above ⁽¹⁾,

Whereas:

PROCEDURE

- (1) By letter dated 21 March 2005, Italy notified the Commission of the aid it intended to grant to AEM Torino for the stranded costs in the energy sector. The Commission asked supplementary information with letters dated 4 May 2005, 19 July 2005, and 14 November 2005. Italy provided the Commission with further information by letters dated 27 June 2005, 5 July 2005, 3 October 2005, 1st February 2006.
- (2) By letter dated 4 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. Italy did not reply to the letter of the Commission and provided no observations in the procedure.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments.
- (4) The Commission received no comments from AEM Torino. No other interested parties submitted observation either.

DESCRIPTION OF THE MEASURE

- (5) The measure under assessment concerns the reimbursement that Italy intends to grant to AEM Torino for the stranded costs in the energy sector. AEM Torino is one of the so-called '*aziende municipalizzate*' and is active, in

particular, in the energy sector. The measure is based on a similar measure approved by the Commission on 1 December 2004 ⁽³⁾.

- (6) The amount of the aid is EUR 16,338 million, to be given in the form of grants.
- (7) Italy indicated its intention to submit an annual report on the implementation of the measure.
- (8) Italy indicated that the measure under assessment cannot be cumulated with any other aid.

CUMULATION AND THE DEGGENDORF JURISPRUDENCE

- (9) On 5 June 2002, the Commission has taken a negative decision on State aid granted by Italy to public utilities owned by local public administrative bodies (hereinafter, '*municipalizzate*') in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding ⁽⁴⁾ (State aid C 27/99, ex NN 69/98).
- (10) The Commission decision declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes ⁽⁵⁾.
- (11) The recovery process has been very slow. Italy has adopted Law 18 April 2005, n. 62 whose article 27 provides for the recovery of the aid granted to the *municipalizzate* in application of the Commission decision. However, beneficiaries can be allowed to repay the aid in instalments, over a period of 24 months. Such provision has been enforced by a decision taken by the *Agenzia delle Entrate* on 1 June 2005.
- (12) According to its own submissions in the pending Case T-297/02 *ACEA v Commission*, AEM Torino has benefited from the aid schemes assessed in the Commission Decision 2003/193/EC, both by benefiting from the tax exemptions in 1997, 1998 and 1999 and by receiving subsidised loans from the Cassa Depositi e Prestiti.

⁽³⁾ Commission decision of 1 December 2004, on case N 490/00, in particular the part on the '*stranded impianti*'.

⁽⁴⁾ OJ L 77, 24.3.2003, p. 21.

⁽⁵⁾ Article 3 of the Commission decision stipulates that all necessary measures must be taken by Italy in order to recover from the beneficiaries the unlawful aid thus granted.

⁽¹⁾ OJ C 116, 17.5.2006, p. 2.

⁽²⁾ Cf. footnote 1.

- (13) Further, according to information provided by Italy, AEM Torino has submitted information, in the ordinary procedures of tax assessment and collection, pursuant to the decision of the *Agenzia delle Entrate*. AEM Torino should pay the ascertained amount of illegal aid within 60 days as from the communication of the result of the assessment that, according to the information sent by Italian authorities, should have been notified by the *Agenzia delle Entrate* not later than 11 January 2006. No information has been provided by Italy on the effective payment by AEM Torino in the deadlines indicated.
- (14) According to the information sent by the Italian authorities in the present case, AEM Torino would not have benefited from loans granted by the *Cassa Depositi e Prestiti*.
- (15) Since the Commission cannot control cumulation between the old illegal aid received in application of the Italian scheme for the *municipalizzate* and the new aid under examination, it has asked Italy to ensure that such effect was avoided by taking the commitment to pay the aid for the stranded costs only after the previous illegal aid had been paid back. Italy declined to do so.

REASONS FOR OPENING THE PROCEDURE

- (16) The Commission has found that the measure under assessment should be considered State aid.
- (17) The Commission has then analysed the compatibility of the measure with State aid rules, in particular in light of the Commission Communication relating to the methodology for analysing State aid linked to stranded costs⁽⁶⁾. It found that the methodology used for the calculation of the amount and the calculation itself did satisfy all the elements indicated in the Communication.
- (18) However, in its judgement of 15 May 1997⁽⁷⁾, the Court of Justice has stated that 'when the Commission examines the compatibility of a State aid with the common market it must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State'. According to the Court of Justice, a new aid may not be assessed as compatible with the common market as long as the old unlawful aid has not been repaid, since the cumulative effect of the aids may distort competition in the common market to a significant extent.
- (19) Therefore, pursuant to the above case-law, the Commission assesses a new aid measure taking into account if the beneficiary of the new aid has fully repaid any previous aid
- that has to be recovered pursuant to a negative decision taken by the Commission.
- (20) By applying the principle stated in the above judgement to the present case, the Commission realizes that: a) AEM Torino has benefited from a previous aid, notably the aid granted to the *municipalizzate* (see paragraphs 9 to 15 above), that has to be recovered pursuant to the Decision 2003/193/EC; and b) the Italian authorities have not complied yet with the recovery obligation contained in the Decision 2003/193/EC. It is true that this decision concerns a scheme, but it also orders recovery of illegal and incompatible aid paid out under that scheme. Moreover, AEM Torino has expressly admitted that it had benefited from that scheme and there are no reasons to believe that, in its particular case, the measures at stake do not constitute aid, or constitute existing aid, or have been declared compatible with the common market.
- (21) After four years from the adoption of the Decision 2003/193/EC the Italian authorities still have to recover the illegal aids. They have informed the Commission that they are still in the process of fulfilling their recovery obligation by adopting and implementing the appropriate administrative measures.
- (22) In particular Italy has indicated that AEM Torino has submitted a declaration to the *Agenzia delle Entrate* committing to pay the sums that the *Agenzia* will indicate. However, they have not been able to indicate:
- The amount that AEM Torino has to pay back in the recovery process;
 - The conditions for the payment: Italy indicates that the company should pay back as of 11 March 2006, but failed to provide any assurance that the payment would be complete (including interests) and immediate (not using the 24 months delay foreseen in the Law 18 April 2005, n. 62).
- (23) Further, it is unclear if AEM Torino has benefited from the subsidised loans granted by the *Cassa Depositi e Prestiti* which were declared illegal by the previous decision, and, in case it did, if it has reimbursed them.
- (24) In conclusion, Italy has not clarified whether the previous aid that in all likelihood has been received by AEM Torino has been recovered yet. Based on the above mentioned information, it should be inferred that AEM Torino may have received and not yet reimbursed certain aid amounts granted under the scheme declared incompatible by the Decision 2003/193/EC.

⁽⁶⁾ Adopted by the Commission on 26.7.2001. Available on the Commission's Competition Directorate General's web site at the following address: http://europa.eu.int/comm/competition/state_aid/legislation/stranded_costs/pt.pdf. Communicated to Member States by letter ref. SG(2001) D/290869 of 6.8.2001.

⁽⁷⁾ Court of Justice, 15.05.1997, *TWD/Commission, C-355/93, Rec., I-2549*, par. 25-26 (the 'Degendorff' judgement).

- (25) The Commission is unable to determine the amount of aid which AEM Torino had already received prior to the new aid under examination and which still has to be reimbursed and cannot assess the cumulative effect of both the 'old' and 'new' aid accruing to AEM Torino and its likely distortionary impact on the common market.
- (26) The Commission, pursuant to the Deggendorf judgement, must take into account the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State and cannot decide upon the compatibility with the common market of a new aid as long as the old unlawful aid has not been repaid.
- (27) Further, aid to reimburse stranded costs cannot be cumulated with any other aid.
- (28) Only a commitment to ensure that the payment of the new aid would follow after the full reimbursement of the previous aid would have avoided any risk of cumulative effect of the two aid measures and any distortion of competition, under the principle established by the Court in the Deggendorf judgement.
- (29) Italy has been asked repeatedly to take such commitment but has refused to do so.
- (30) Thus, the cumulative effect of the two aids was present but could not be fully assessed by the Commission. Therefore, at that stage, the notified aid could not be declared compatible with the common market.
- (33) Italy has not provided any information that would allow the Commission to assess the potential cumulation. Furthermore, the recovery process has been particularly slow and difficult. Therefore, the Commission decided on 19 January 2005 to refer the matter to the Court of Justice under art. 88(2) of the EC Treaty, in order to ensure an immediate and effective execution of the Decision 2003/193/EC.
- (34) On 1st June 2006, the Court ruled ⁽⁸⁾ that, by failing to take within the prescribed period all the measures necessary for repayment of the aid found to be unlawful and incompatible with the common market, Italy has failed to fulfil its obligations under that article.
- (35) The Commission has to ensure that the granting of the new aid takes place only at a time when this risk of cumulation can be excluded, that is only after AEM Torino has fully reimbursed the illegal and incompatible aid received.
- (36) As a consequence, the Commission has to follow closely that the condition mentioned above is fully respected.
- (37) Consequently, Italy should be allowed to grant the new aid only after having submitted evidence to the Commission about the full recovery from AEM Torino.

CONCLUSIONS

OBSERVATION BY THE ITALY AND AEM TORINO

- (31) Neither Italy nor the beneficiary dispelled the doubts in the decision to open the procedure. Italy did not reply to the letter opening this procedure. AEM Torino neither submitted any information.

ASSESSMENT OF THE MEASURE

- (32) The grounds on which the Commission opened the procedure have not been disputed. The measure constitutes an aid that can be declared compatible on the basis of the methodology for the stranded costs. However, because of the potential cumulation with a previous aid that the beneficiary has not reimbursed, the Commission cannot control the combined effect of the two aids.

- (38) In light of the foregoing, the Commission confirms its assessment that the notified measure concerning aid for stranded costs that Italy intends to grant to AEM Torino is to be considered an aid which is compatible with the EC Treaty.
- (39) However, the investigation has confirmed that the Commission is unable to control that the combined effect of the new aid and the previous illegal and incompatible aid brings about undue distortion of competition which could be contrary to the EC Treaty.
- (40) Henceforth, acting on the basis of article 7 (4) of Regulation (EC) n. 659/1999 ⁽⁹⁾, the Commission concludes that the notified aid shall not be granted to the beneficiary before it will have reimbursed the previous illegal and incompatible aid.
- (41) Finally, before granting the aid under assessment, Italy has to submit to the Commission evidence that the previous aid has been fully reimbursed by AEM Torino,

⁽⁸⁾ ECJ, 1.6.2006, C-207/05, Commission v. Italy, (nyr).

⁽⁹⁾ OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The aid which Italy is planning to implement for AEM Torino amounting to EUR 16,338 million for the stranded costs is compatible with the common market, subject to the conditions set out in Article 2.

Article 2

The aid referred to in article 1 may not be granted before Italy has submitted evidence to the Commission that AEM Torino either has not benefited from previous aid granted under the 'municipalizzate' scheme declared illegal and incompatible by the Decision 2003/193/EC or that it has reimbursed with interests the previous aid received under the above-mentioned scheme.

Article 3

Italy shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to Italy.

Done at Brussels, 8 November 2006.

For the Commission

Neelie KROES

Member of the Commission