

# DECISIONS

## COMMISSION DECISION (EU) 2018/1498

of 21 December 2017

**on the State aid and the measures SA.38613 (2016/C) (ex 2015/NN) implemented by Italy for Ilva SpA in Amministrazione Straordinaria**

(notified under document C(2017) 8391)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 cited above <sup>(1)</sup>, and having regard to their comments,

Whereas:

### 1. PROCEDURE

- (1) Following two formal complaints on 11 and 14 April 2014 by competitors (who wish their identities not to be disclosed), the Commission opened a preliminary investigation regarding alleged support measures in favour of Italian steelmaker Ilva SpA in Amministrazione Straordinaria ('Ilva'). Wirtschaftsvereinigung Stahl (the German Steel Federation — 'WV Stahl') and Eurofer (the European Steel Association) also submitted formal complaints on 10 April 2015 and 24 June 2015, respectively. These complainants were supported on 25 June 2015 by the British Steel Association.
- (2) By letter dated 20 January 2016, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereafter, 'TFEU') in respect of four support measures granted in favour of Ilva. By letter dated 13 May 2016, the Commission informed Italy of the extension of this procedure to a fifth support measure.
- (3) The Commission decision to initiate the formal investigation procedure (hereafter, 'the Opening Decision') and the Commission decision to extend this procedure to a fifth measure (hereafter, 'the Extension Decision') were both published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measures.
- (4) Italy submitted comments on the Opening and Extension Decisions by letters of 3 March and 26 July 2016.
- (5) The Commission also received comments from interested parties. It forwarded them to Italy, which was given the opportunity to react. Its comments were received by letter of 29 July 2016.
- (6) The Commission requested additional information from Italy by letters of 24 February 2016, 4 May 2016, 30 September 2016, 1 February 2017 and 8 September 2017. Italy replied to these requests for information, respectively, on 10 March 2016, 13 May 2016, 8 November 2016, 10 March 2017 and 16 October 2017.
- (7) Having been informed of Italy's decision to offer Ilva's assets for sale, the Commission asked Italy to appoint an independent monitoring trustee, whose role has been to report to the Commission on the organisation and implementation of the sale process. The monitoring trustee sent reports to the Commission on 15 June 2016, 3 October 2016, 13 and 14 December 2016, 1 February 2017, 22 February 2017, 30 June 2017 and submitted his final report on the sale process on 20 July 2017. The Italian authorities also informed the Commission of the result of tender process by letter of 7 June 2017 and submitted further information concerning the sale process on 24 July 2017.

<sup>(1)</sup> OJ C 142, 22.4.2016, p. 37 and OJ C 241, 1.7.2016, p. 12.

<sup>(2)</sup> Cf. footnote 1.

## 2. DESCRIPTION

### 2.1. The beneficiary

- (8) Ilva is one of Europe's largest steelmakers, operating in the production, processing and sale of carbon steel products, inter alia, by managing industrial establishments of national strategic interest as defined in Article 1 of Law Decree No 207 of 3 December 2012, converted with amendments by Law No 231 of 24 December 2012 ('Law Decree No 207/2012'). It has been owned by the Riva family since 1996 and previously under the control of the Italian State through the *Istituto per la Ricostruzione Industriale* ('IRI'). By 2016, Ilva was employing around 14 000 people overall, of which around 11 000 employees in its main production site in Taranto (Apulia Region). Ilva has also other production units in Italy and commercial sites in France, Tunisia, and Greece.
- (9) Ilva produces carbon steel products included in the list of products, which defines the steel sector as provided in Annex IV to the Guidelines on regional State aid for 2014-2020, points (a) to (e) <sup>(3)</sup>.
- (10) With [...] <sup>(\*)</sup> tonnes annual production capacity, Ilva's plant in Taranto accounts for ca. 9,8 % of Union total production capacity for carbon steel <sup>(4)</sup>. Under the current extraordinary administration and environmental constraints, Ilva has been running at [...] of its nominal capacity (three furnaces working out of five). It produced 5,8 million tonnes of carbon steel in 2016 <sup>(5)</sup>, accounting for ca. 65 % of Italian and ca. 7 % of Union carbon steel production. Ilva sells primarily in Italy ([...]), then in other European ([...]) and third countries ([...]) <sup>(6)</sup>.
- (11) The Taranto area where Ilva operates its main production site is heavily polluted. Tests have shown heavy pollution of the air, soil, surface and ground waters both at the Ilva site and in nearby inhabited areas of the city of Taranto, with serious consequences for human health and the environment <sup>(7)</sup>. Ilva as well as its main shareholders and former management have been indicted in Italy for alleged environmental disaster <sup>(8)</sup>. Ilva is also at the centre of an infringement procedure opened by the Commission against Italy <sup>(9)</sup>. Following two letters of formal notice <sup>(10)</sup>, on 16 October 2014 the Commission sent its reasoned opinion ('the Reasoned Opinion') to Italy for breach of Directive 2008/1/EC of the European Parliament and of the Council <sup>(11)</sup> and Directive 2010/75/EU of the European Parliament and of the Council <sup>(12)</sup>, which set rules for Member States in granting environmental permits to industrial installations.
- (12) In the midst of this environmental issue, Ilva's former management had to step aside from running the company and was replaced in June 2013 by a government-appointed Extraordinary Commissioner <sup>(13)</sup>. The Extraordinary Commissioner's mandate was to guarantee the continuation of the industrial activity while using the company's resources to cover the costs of the health and environmental damages caused by past breaches of Ilva's environmental permit. In this context, the Council of Ministers approved on 14 March 2014 an 'Environmental Plan' designed to prevent pollution and upgrade the plant in compliance with the environmental permit <sup>(14)</sup>. According to this plan, in 2014 the total cost of the investments needed to bring the Taranto plant in line with the requirements of the environmental permit was EUR [...].
- (13) Considering Ilva's increasingly fragile financial situation, on 5 January 2015, the Italian Government adopted Law Decree No 1/2015, by which it introduced an ad hoc insolvency procedure for Ilva. This ad hoc procedure was modelled on the so-called *Marzano* law, a special insolvency law organising the extraordinary administration of large undertakings in difficulty that are entrusted with essential public services. As a result, the Court of Milan

<sup>(3)</sup> OJ C 209, 23.7.2013, p. 1.

<sup>(\*)</sup> [...] confidential information.

<sup>(4)</sup> Production capacity estimates by Ilva and Eurofer.

<sup>(5)</sup> According to the presentation given by Ilva's Extraordinary Commissioners to the Italian Chamber of Deputies on 10 January 2017: <http://www.gruppoilva.com/it/media/media/comunicazioni-dei-commissari>

<sup>(6)</sup> According to Ilva's internal data for the year 2015.

<sup>(7)</sup> See [http://europa.eu/rapid/press-release\\_IP-14-1151\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1151_en.htm)

<sup>(8)</sup> Criminal proceeding No 938/2010 R.G.

<sup>(9)</sup> Infringement procedure No 2013/2177.

<sup>(10)</sup> In September 2013 and in April 2014.

<sup>(11)</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ L 24, 29.1.2008, p. 8).

<sup>(12)</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (OJ L 334, 17.12.2010, p. 17).

<sup>(13)</sup> Based on Law Decree No 61/2013 of 4 June 2013, converted into Law No 89/2013 on 3 August 2013. Law No 89/2013 was further amended on 10 December 2013 by Article 7 of Law Decree No 136/2013, converted into Law No 6/2014 on 6 February 2014.

<sup>(14)</sup> See Official Journal No 105 of 8 May 2014, available at: <http://www.gazzettaufficiale.it/eli/id/2014/05/08/14A03637/sg>

declared Ilva insolvent on 30 January 2015 <sup>(15)</sup>. The total debt indicated in the declaration of insolvency was EUR 2,9 billion. The Government appointed three Extraordinary Commissioners for the management of the company. Law Decree No 1/2015 was converted into Law No 20/2015 on 3 March 2015, with amendments <sup>(16)</sup>.

- (14) On 4 December 2015, the Italian authorities informed the Commission of the adoption on the same day of Law Decree No 191/2015 entitled '*Disposizioni urgenti per la cessione a terzi dei complessi aziendali del Gruppo Ilva*'. The Law Decree was converted into Law No 13/2016 on 1 February 2016 with modifications <sup>(17)</sup>. Article 1 of the Law Decree provides for the sale of Ilva's assets through a transparent and non-discriminatory public procedure by 30 June 2016 to ensure discontinuity with the previous company. On 5 January 2016, Ilva's Extraordinary Commissioners published a call for expressions of interest in relation to the transfer of businesses owned by Ilva and other companies of the same group. 25 interested parties were accepted to the preliminary due diligence phase, following which acquisition consortia were formed for the submission of formal offers by 30 June 2016. On 30 June 2016, two bidders were accepted to the final phase of the tender process: (i) a consortium led by the global steel company ArcelorMittal, in addition to the Italian steel producer Marcegaglia and the bank Intesa Sanpaolo as members ('the AM Consortium'); and (ii) the so-called Acciaitalia consortium ('the Acciaitalia Consortium') formed, inter alia, by the Italian steelmaker Arvedi, the Indian steel company Jindal Steel and the State-owned investment bank Cassa Depositi e Prestiti ('CDP').
- (15) The sale process encountered some delays. At the end, on 26 May 2017, Ilva's Commissioners recommended to award Ilva's assets to the AM Consortium, who offered a price of EUR 1,8 billion <sup>(18)</sup>. This recommendation was followed by the Minister of Economic Development, who issued the final adjudication decree in favour of the AM Consortium on 5 June 2017 <sup>(19)</sup>. The closing of the transaction is still pending merger clearance by the Commission. In this respect, on 21 September 2017 the AM Consortium notified the transaction to the Commission, which on 8 November 2017 decided to open an in-depth investigation <sup>(20)</sup>.

## 2.2. The measures under assessment

- (16) The Italian authorities have adopted and amended various measures to support Ilva. This Decision concerns the five measures that have been subject to the Opening and Extension Decisions:
- (a) measure 1: the transfer of the assets seized during criminal proceedings against Ilva's previous owners;
  - (b) measure 2: the law on pre-deductible loans as applied to a private EUR 250 million loan;
  - (c) measure 3: the State guarantee on a EUR 400 million loan;
  - (d) measure 4: the settlement agreement with Fintecna;
  - (e) measure 5: the EUR 300 million State loan.

### 2.2.1. Measure 1: the transfer of the assets seized during criminal proceedings against Ilva's previous owners

- (17) Some members of the Riva family previously involved in the management of Ilva have been indicted before the Italian courts for various fraud-related offenses. In May 2013, the national judge seized (*sequestro preventivo*) EUR [...] in liquid assets owned by the Riva family ('the Riva assets'), pending criminal proceedings against them.

<sup>(15)</sup> [http://www.gruppoilva.com/sites/ilvacorp/files/document\\_attachments/acq\\_res.pdf](http://www.gruppoilva.com/sites/ilvacorp/files/document_attachments/acq_res.pdf)

<sup>(16)</sup> The text of the Law Decree, as converted into law, is available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2015-01-05;1!vig=>

<sup>(17)</sup> The text of the Law Decree, as converted into law, is available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2015-12-04;191!vig=>

<sup>(18)</sup> <http://www.gruppoilva.com/it/press-release/2017-05-26/comunicato-stampa>

<sup>(19)</sup> <http://www.sviluppoeconomico.gov.it/index.php/it/194-comunicati-stampa/2036649-calenda-firma-il-decreto-di-aggiudicazione-del-complesso-industriale-del-gruppo-ilva-ad-am-investco-italy>

<sup>(20)</sup> [http://europa.eu/rapid/press-release\\_IP-17-4485\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4485_en.htm)

- (18) Under general criminal procedural law in Italy, assets seized in the context of criminal proceedings must be transferred to the so-called Justice Fund (*Fondo Unico di Giustizia*), a fund of the Italian Ministry of Justice that has the role of ‘custodian’ (*custode ex lege*) until the criminal proceedings come to an end. The management of the fund is ensured by Equitalia Giustizia SpA (‘Equitalia’) <sup>(21)</sup>. According to Equitalia’s investment mandate, liquid assets held by the *Fondo Unico di Giustizia* may only be deposited on current accounts showing adequate levels of solidity and reliability, or be invested in Italian State bonds <sup>(22)</sup>. Throughout court proceedings, the seized amounts keep belonging to the original owners, who cannot dispose of them.
- (19) In the case of the Riva assets, Article 3, paragraph 1, of Law Decree No 1/2015 introduced an ad hoc provision, by which these assets could be transferred to Ilva before the end of the criminal proceedings <sup>(23)</sup>. Pursuant to this provision, the transfer had to take place under specific terms and conditions. Ilva would first issue bonds amounting to the value of the Riva assets. The *Fondo Unico di Giustizia* would then use the Riva assets under its custody to subscribe to these bonds. As a result, Ilva’s bonds would replace the Riva assets in the accounts of the *Fondo Unico di Giustizia* as collateral in the context of the pending criminal proceedings. The same Law Decree specified that money received by Ilva following this transfer had to be earmarked for the implementation of its Environmental Plan.
- (20) On 11 May 2015, by means of a judicial decree (*Decreto di Trasferimento*), the national judge ordered the transfer of the Riva assets. However, the transfer to the *Fondo Unico di Giustizia* could not take place because the Riva assets were kept by the Riva family on bank accounts located outside of Italy <sup>(24)</sup>, and the foreign courts having jurisdiction on these accounts consistently refused to transfer the assets to Italy <sup>(25)</sup>.
- (21) The situation unlocked when, in December 2016, the Riva family and Ilva reached a settlement agreement, by which the concerned members of the Riva family gave their consent to making the Riva assets held by them on their foreign bank accounts definitely available to Ilva in the legal form provided for by Article 3, paragraph 1, of Law Decree No 1/2015. [...]. According to the Italian authorities, Ilva’s damage claims against the Riva family could have reached ca. EUR [...]. In addition to the EUR 1,1 billion which were object of the seizure and earmarked by law for the Environmental Plan, the Riva family also agreed to make available to Ilva a further amount of EUR 145 million in order to support its business operations. As a result of this settlement agreement, the Riva assets were repatriated to Italy <sup>(26)</sup> and transferred to the *Fondo Unico di Giustizia*, which on 13 and 22 June 2017 subscribed in total to EUR [...] of bonds newly issued by Ilva.

#### 2.2.2. Measure 2: the law on pre-deductible loans

- (22) According to the press, in May 2014 Ilva was facing difficulties in paying salaries and suppliers <sup>(27)</sup>. The press reported that banks appeared reluctant to grant any bridge loan to cover the company’s liquidity needs <sup>(28)</sup>. It also appears that throughout 2014 the Italian authorities (in particular via the Ministry of Economic Development and the regional authorities of Puglia) were fully involved in the meetings and discussions with financial institutions regarding the granting of such loan <sup>(29)</sup>.

<sup>(21)</sup> Pursuant to Article 2, paragraph 4 of Law Decree No 143/2008.

<sup>(22)</sup> In this respect, see [http://www.giustizia.it/giustizia/it/mg\\_2\\_9\\_1.wp](http://www.giustizia.it/giustizia/it/mg_2_9_1.wp)

<sup>(23)</sup> The legal basis was first set out in Article 1, paragraph 11 *quinquies* of Law Decree No 61/2013, which was amended in December 2013, in August 2014 and finally in March 2015.

<sup>(24)</sup> [...]

<sup>(25)</sup> See <http://www.ilsole24ore.com/art/notizie/2015-11-24/ilva-giudici-svizzeri-no-rientro-italia-12-miliardi-riva-171441.shtml> and <http://www.repubblica.it/economia/finanza/2015/11/24/news/ilva annullato il sequestro da un miliardo in svizzera-128062132/>

<sup>(26)</sup> See <http://www.ilsole24ore.com/art/impresa-e-territori/2017-05-24/ilva-firmata-transazione-il-rientro-fondi-svizzera-131344.shtml>

<sup>(27)</sup> See <http://www.ilsole24ore.com/art/impresa-e-territori/2014-05-12/ilva-taranto-stipendi-salvi-ma-resta-crisi-finanziaria-123429.shtml?uid=ABUglaHB>.

<sup>(28)</sup> See [http://www.ilsole24ore.com/art/impresa-e-territori/2014-07-03/ilva-aggrappata-prestito-ponte-063934\\_PRV.shtml?uid=ABpE6DXB&fromSearch](http://www.ilsole24ore.com/art/impresa-e-territori/2014-07-03/ilva-aggrappata-prestito-ponte-063934_PRV.shtml?uid=ABpE6DXB&fromSearch).

<sup>(29)</sup> See ‘L’incontro di ieri a Palazzo Chigi tra rappresentanti degli istituti di credito e Governo — il sottosegretario alla presidenza, Graziano Del Rio, il ministro e il vice ministro dello Sviluppo economico, rispettivamente Federica Guidi e Claudio De Vincenti — non ha portato i segnali che l’azienda attende in modo da attenuare la propria crisi finanziaria’ as reported by <http://www.ilsole24ore.com/art/notizie/2014-05-14/ilva-nessuna-concessione-un-prestito-ponte-132300.shtml?uid=ABPqs9HB>; See also the article from May 2014: <http://www.ilsole24ore.com/art/impresa-e-territori/2014-05-12/ilva-taranto-stipendi-salvi-ma-resta-crisi-finanziaria-123429.shtml?uid=ABUglaHB>: ‘L’Ilva ha avanzato la richiesta ed ha avviato la trattativa con le banche che viene seguita anche dal Governo’.

- (23) On 11 August 2014, Italy amended Article 12, paragraph 5, of Law Decree No 101/2013 so that loans granted to undertakings of strategic national interest placed under extraordinary administration for the implementation of environmental and health remediation plans are exceptionally qualified as pre-deductible <sup>(30)</sup>. Pre-deductible loans are granted a privilege of prior recovery in the liquidation mass of an insolvent undertaking, with priority over other loans and liabilities from creditors of the undertaking. Ilva's situation corresponded to the definition set out in the law and, accordingly, loans to Ilva could henceforth be qualified as pre-deductible <sup>(31)</sup>.
- (24) A month after this amendment to the Law, on 11 September 2014, three private banks agreed to provide a EUR 250 million loan to Ilva <sup>(32)</sup>. At its expiry on 28 February 2015, Ilva did not reimburse the loan.

#### 2.2.3. Measure 3: the State guarantee on a EUR 400 million loan

- (25) Article 3, paragraph 1ter of Law Decree No 1/2015 allowed Ilva to negotiate with interested banks a EUR 400 million pre-deductible loan secured by a State guarantee. The loan was to be used for the implementation of Ilva's Environmental Plan <sup>(33)</sup>.
- (26) By means of a Decree, on 30 April 2015 the Minister of Economy and Finance issued the State guarantee with a premium of 3,12 % per year.
- (27) Following the issuance of the State guarantee, on 27 May 2015, three financing institutions agreed to grant a loan of EUR 400 million to Ilva, broken down as follows: EUR 330 million from CDP, EUR 50 million from Intesa Sanpaolo, and EUR 20 million from Banco Popolare. Intesa Sanpaolo and Banco Popolare are the same two private banks, which were involved in measure 2.
- (28) The EUR 400 million loan was disbursed in four successive instalments of EUR 100 million, respectively on 10 June, 9 October, 10 December and 28 December 2015. It bears interest at annual Euribor 6 months + [...] payable per semester and it is due to be reimbursed [...] after disbursement with an initial [...] grace period.

#### 2.2.4. Measure 4: the settlement agreement with Fintecna

- (29) During Ilva's privatisation in 1995, the State-owned IRI agreed under Article 17.7 of the privatisation contract to guarantee future claims for environmental damages that occurred before the privatisation up to LIT [...], plus interests (i.e. around EUR [...] at that time and EUR [...], excluding interests, or EUR [...], including interests, on 31 December 2014). The privatisation contract set the final deadline for the quantification of these environmental damages at 31 December 1996. On 16 April 1996, IRI launched an arbitration procedure concerning the sale price. This procedure was concluded in 2000 without settling the dispute over the environmental responsibility. On 6 May 1996, Ilva started a parallel arbitration procedure on the environmental responsibility, which however was not concluded.
- (30) In 2002, the State-owned Fintecna became IRI's legal successor. Since 2012, Fintecna is 100 % owned by CDP, which is 100 % owned by the State. Fintecna's financial statements and assets management are subject to checks by a magistrate appointed by the Italian Court of Auditors, who attends the meetings of the management and supervisory bodies pursuant to Articles 7 and 12 of Law No 259/1958.
- (31) In the context of the transition from IRI to Fintecna in 2002, the former IRI management decided to set aside an amount of EUR [...] as an estimate of the environmental damages due to Ilva.
- (32) On 12 June 2008, Ilva and Fintecna signed the minutes of a meeting (*verbale di incontro*), in which they agreed that the main open environmental issues concerned the plant in Taranto. In that context, the parties agreed that the split of costs between them could only occur once those costs would be determined. In the meantime, through a draft agreement of 3 December 2008, the Ministry of Environment, together with other public entities, planned a settlement on the basis of cost estimates for the clean-up of the underground water and environmental damage. That quantification explicitly excluded the damages deriving from air pollution to third parties.

<sup>(30)</sup> Article 22-quater of Law No 116/2014 amending and converting into law Law Decree No 91/2014 of 24 June 2014.

<sup>(31)</sup> Based on Article 1, paragraph 1, of Law Decree No 61/2013 in conjunction with Article 1 of Law Decree No 207/2012 of 3 December 2012, converted into law on 24 December 2012 by Law No 231/2012.

<sup>(32)</sup> Intesa Sanpaolo SpA, Unicredit SpA and Banco Popolare Società Cooperativa.

<sup>(33)</sup> L'organo commissariale di ILVA SpA al fine della realizzazione degli investimenti necessari al risanamento ambientale, nonché di quelli destinati ad interventi a favore di ricerca, sviluppo e innovazione, formazione e occupazione, nel rispetto della normativa dell'Unione europea in materia, è autorizzato a contrarre finanziamenti per un ammontare complessivo fino a 400 milioni di euro, assistiti dalla garanzia dello Stato. Il predetto finanziamento è rimborsato dall'organo commissariale in prededuzione rispetto agli altri debiti [...].

- (33) Ilva sent several notices to Fintecna, the latest on 2 May 2011 and 10 June 2013. Fintecna contested any responsibility, particularly concerning damages to third parties linked to air pollution.
- (34) During the preparation of the 2011 financial statements, the competent Fintecna services estimated damages due to Ilva at EUR [...], adjusted to EUR [...] in 2014.
- (35) On 19 December 2013, the Minister of Environment adopted a ministerial act (*provvedimento*) against Fintecna with an injunction to dispose of waste located on Ilva's premises. The ministerial act was challenged before the Regional Administrative Court (*Tribunale Amministrativo Regionale*) of Puglia. The ministerial act was annulled on procedural grounds on 14 November 2014. However, the Court concluded, on substance, that the polluting activity certainly predated 1995 and therefore fell within Fintecna's responsibility.
- (36) Article 3, paragraph 5, of Law Decree No 1/2015 authorised Ilva's Extraordinary Commissioner to settle the dispute with Fintecna concerning the environmental damages referred to in Article 17.7 of the 1995 privatisation contract, within 60 days of the entry into force of Law Decree No 1/2015. The same article set the amount of the settlement at EUR 156 million and specified that such settlement should be final and definitive <sup>(34)</sup>.
- (37) On 12 January 2015, Fintecna hired an independent legal consultant to assist it in the negotiation of the settlement agreement with Ilva. This expert issued its legal opinion on 3 March 2015, in which he confirmed that the settlement of the dispute against the payment of EUR 156 million was within the maximum limit set out in the privatisation contract and also below Fintecna's own estimates.
- (38) Fintecna requested a legal opinion from a second consultant concerning (i) any previous payments already made to Ilva in the context of the past arbitration; and (ii) the starting date for the calculation of interests on the guaranteed amount. This opinion was issued on 16 February 2015. According to it, (i) Fintecna did not make any payments to Ilva in the context of past arbitration procedures concerning the application of Article 17.7 of the privatisation contract; and (ii) interests should be due from 1996.
- (39) After the conversion into law of Law Decree No 1/2015, on 4 March 2015, Fintecna's Board of Directors decided to settle the dispute, taking into account the legal opinions of the two consultants. The Board of Directors stressed the final character of the settlement also *vis-à-vis* third parties (e.g. *vis-à-vis* Ilva's creditors in case of bankruptcy and other potential environmental claims towards Fintecna) and the fact that the maximum exposure deriving from the privatisation contract would correspond to EUR [...], excluding interests, or EUR [...], including interests. The Board of Directors' decision took note of the favourable opinion of Fintecna's shareholder CDP, in compliance with point 8.3.2 of the Regulation for the exercise of the controlling activity in the CDP group (*Regolamento per l'esercizio dell'attività di direzione e coordinamento sulle società partecipate del gruppo CDP*).
- (40) Fintecna therefore settled the dispute with Ilva on 5 March 2015. On 6 March 2015, EUR 156 million were transferred to Ilva.
- (41) According to the joint press release issued by CDP and Fintecna on 11 March 2015, the transaction occurred 'to implement Article 3, paragraph 5 of Law Decree 5 January 2015 No 1, as converted with amendments into Law 4 March 2015, No 20 (Ilva Decree)' <sup>(35)</sup>.

#### 2.2.5. Measure 5: the EUR 300 million State loan

- (42) As explained in recital 14, on 4 December 2015 the Italian authorities informed the Commission of the adoption on the same day of Law Decree No 191/2015. In addition to provisions concerning the sale of Ilva's assets, this

<sup>(34)</sup> 'Allo scopo di definire tempestivamente le pendenze tuttora aperte, il commissario straordinario, entro sessanta giorni dell'entrata in vigore del presente decreto, è autorizzato a sottoscrivere con FINTECNA SpA, in qualità di avente causa dell'IRI, un atto convenzionale di liquidazione dell'obbligazione contenuta nell'articolo 17.7 del contratto di cessione dell'ILVA Laminati Piani (oggi ILVA SpA). La liquidazione è determinata nell'importo di 156.000.000 di euro, ha carattere definitivo, non è soggetta ad azione revocatoria e preclude ogni azione concernente il danno ambientale generatosi, relativamente agli stabilimenti produttivi ceduti dall'IRI in sede di privatizzazione dell'ILVA Laminati Piani (oggi ILVA SpA), antecedentemente al 16 marzo 1995. Le somme rinvenienti di detta operazione affluiscono nella contabilità ordinaria del Commissario straordinario'.

<sup>(35)</sup> The press release is available at: [http://www.cdp.it/static/upload/com/0000/comunicato-n.-12-del-11-03-2015\\_fintecna-ilva.pdf](http://www.cdp.it/static/upload/com/0000/comunicato-n.-12-del-11-03-2015_fintecna-ilva.pdf)

Law Decree in its Article 1, paragraph 3, authorised the State to grant a EUR 300 million loan to Ilva by means of a Ministerial Decree, at an annual interest rate of Euribor 6 months + 300 basis points, with a view to support Ilva's urgent liquidity needs. Pursuant to the Law Decree, the loan would have to be repaid by the acquirer of Ilva's assets, 60 days after the declaration by the competent national court of the cessation of Ilva's activity pursuant to Article 73 of Law Decree No 270/99, following the final divestiture of the company's assets.

- (43) The Ministerial Decree granting the loan to Ilva was adopted on 15 December 2015 and the amount was paid out on 23 December 2015. The Ministerial Decree specified that the loan was granted to Ilva's extraordinary administration.
- (44) On 9 June 2016, the Italian Government adopted Law Decree No 98/2016 amending Law Decree No 191/2015. Pursuant to Article 1(1)(a) of the Law Decree, the repayment obligation of the EUR 300 million loan was transferred from the acquirer of Ilva's assets to Ilva itself. The Law Decree was converted into Law No 151/2016 on 1 August 2016 with modifications <sup>(36)</sup>.
- (45) On 29 December 2016, the Italian Government adopted Law Decree No 243/2016, converted into Law No 18/2017 on 27 February 2017 with modifications <sup>(37)</sup>. Article 1(1)(b) of the Law Decree extended the duration of Ilva's extraordinary administration beyond the date of completion of the transfer of assets, so as to allow Ilva's Extraordinary Commissioners to identify and implement further clean-up measures in areas not taken over by the acquirer. As a result, the adoption of the decree declaring the cessation of Ilva's activity pursuant to Article 73 of Legislative Decree No 270/99 was postponed to the future date of full completion of the aforesaid clean-up activities. However, to avoid postponing at the same time the final repayment date of the EUR 300 million loan, Article 1(1)(a) of the Law Decree changed the loan repayment date to 60 days after the final divestiture of Ilva's assets, thereby disconnecting it from the decree declaring the cessation of Ilva's activity.

### 2.3. Grounds for initiating the formal investigation procedure

- (46) Following the preliminary investigation referred to in recital 1, the Commission raised doubts about the compliance of the support measures with Union State aid rules. The Commission's preliminary view was that the measures appeared to constitute State aid and that there did not seem to be grounds on which this aid could be declared compatible with the internal market.

#### 2.3.1. Qualification as State aid

- (47) In the Opening Decision, the Commission preliminarily considered that all measures object of the in-depth investigation had the potential to distort competition and affect trade between Member States due to the presence of competitors on the steel markets where Ilva is active and the levels of intra-Union trade on steel products, to which Ilva contributes.
- (48) The Commission's preliminary assessment of the other State aid criteria (imputability to the State, State resources, selectivity, and economic advantage) is summarised, measure by measure, in Sections 2.3.1.1 to 2.3.1.5 .

##### 2.3.1.1. Measure 1

- (49) As regards the imputability to the State of measure 1, in the Opening Decision the Commission preliminarily concluded that the decision to transfer the Riva assets to Ilva by means of a bond subscription is imputable to the Italian government, which included this provision in Law Decree No 1/2015. The Commission also took the preliminary view that the *Fondo Unico di Giustizia* executing this decision (through Equitalia) would be acting on the basis of the instructions given by the judicial authority, which is an organ of that State and is therefore bound by the duty of sincere cooperation <sup>(38)</sup>.

<sup>(36)</sup> The text of the Law Decree, as converted into law, is available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2016-06-09;98:vig=>

<sup>(37)</sup> The text of the Law Decree, as converted into law, is available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2016-12-29;243:vig=>

<sup>(38)</sup> Judgment of the Court of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56. See also the Judgment of the Court of 18 July 2007, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, C-119/05, ECLI:EU:C:2007:434, paragraph 59.

- (50) Based on the facts established at the time of the Opening Decision, the Commission's preliminary view was that measure 1 involves State resources due to the fact that the Riva assets have to be considered as being under the control of the State during the time of their custody by the *Fondo Unico di Giustizia*. Moreover, the Commission could not exclude that the State (through the *Fondo Unico di Giustizia*) would forego possible revenues by investing the Riva assets in risky Ilva bonds without a proper remuneration, instead of seeking a safe return in bank deposits or State bonds.
- (51) According to the Commission's Opening Decision, the granting of a selective economic advantage derives from the fact that based on an ad hoc derogation to standard criminal procedure, the Riva assets would be made available to Ilva before the end of the criminal proceedings, providing the company with liquidity against bonds to be issued at an unknown, non-necessarily market based rate.

#### 2.3.1.2. Measure 2

- (52) Despite the fact that the EUR 250 million loan had been granted by private banks, the Commission preliminarily considered that the measure is imputable to the State in light of the sequence of events, i.e. the amendment of Law Decree No 101/2013 and the State's involvement in Ilva's negotiations with the banks, which eventually led to the granting of the loan.
- (53) The Commission's preliminary view was that, if the State or other public bodies were among Ilva's chief creditors, by granting a higher priority of repayment to the newly issued EUR 250 million private loan, measure 2 would constitute *de facto* a waiver of public debts <sup>(39)</sup>. In that case, measure 2 would involve State resources.
- (54) According to the Commission, despite the general wording of the amended law, at that point the measure was applied only to Ilva and is therefore *de facto* selective. By allowing Ilva to meet its liquidity needs, the measure seemed to have conferred an advantage that Ilva would not have been able to obtain under normal market conditions. Therefore, the Commission preliminarily considered that the measure confers a selective economic advantage to Ilva.

#### 2.3.1.3. Measure 3

- (55) Considering that the State guarantee was issued by Ministerial Decree pursuant to the provisions of a Government Law Decree, the Commission's preliminary view was that measure 3 is imputable to the State. The risk on State resources could be deducted from the fact that, if triggered, a State guarantee is paid through the State budget.
- (56) As regards the presence of a selective economic advantage, the Commission questioned the market conformity of the State guarantee. First, it was unclear whether a market operator would have agreed to grant any guarantee at all to Ilva, just two months after it defaulted on a previous loan. Second, even assuming that Ilva could have potentially had access to external sources of financing and/or external guarantees, the Commission doubted that the premium charged by the Italian State would adequately remunerate the credit risk borne by the State.

#### 2.3.1.4. Measure 4

- (57) Based on the relevant set of indicators indicated by the Union Court's case-law <sup>(40)</sup>, the Commission preliminarily considered that measure 4 implemented by Fintecna is imputable to the Italian State. As to the origin of the resources involved, the Commission noted that Fintecna qualifies as a public undertaking. Therefore its resources are deemed to be State resources.
- (58) As regards the presence of a selective economic advantage, whilst noting that, on its principle, the capped guarantee by the State for environmental damages agreed at the time when the company was State owned before Ilva was privatised and sold to the Riva family was market practice and not objectionable, the Commission questioned both the amount and the timing of the settlement agreement and wondered whether a market economy operator would have behaved similarly in a comparable situation.

<sup>(39)</sup> Judgment of the Court of 1 December 1998, *Ecotrade Srl v Altiformi e Ferriere di Servola SpA* (AFS), C-200/97, ECLI:EU:C:1998:579 and the Judgment of the Court of 17 June 1999, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA* (Ifitalia), *Dornier Luftfahrt GmbH and Ministero della Difesa*, C-295/97, ECLI:EU:C:1999:313.

<sup>(40)</sup> Judgment of the Court of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs in *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2001:685, paragraphs 65 to 68.



#### 2.3.1.5. Measure 5

- (59) As the measure consists in a loan granted by the Ministry of Economic Development and the Ministry of Economy and Finance, out of resources of the budget of the Italian State, the Commission preliminarily considered that it is imputable to the State and involves State resources.
- (60) As regards the presence of a selective economic advantage, the Commission wondered whether any private market operator would have agreed to lend EUR 300 million to Ilva at the same conditions as Italy, if at all, considering Ilva's financial difficulties.

#### 2.3.2. Compatibility grounds

- (61) As the Commission did not see any grounds on which State aid in favour of Ilva would be compatible with the internal market, it invited Italy to substantiate any such grounds and indicate to the Commission the relevant legal basis, if any.

#### 2.3.3. On the possible economic continuity between Ilva and the new entity acquiring its assets

- (62) In recital 107 of the Opening Decision, the Commission recalled that in case of economic continuity between the recipient of aid that the Commission declares incompatible with the internal market and its acquirer, the latter may be called to pay it back.
- (63) The final scope of the sale may still evolve as a result of the ongoing merger review referred to in recital 15 above. Italy and Peacelink have submitted their observations on the issue of economic (dis)continuity between the current Ilva and the buyer of Ilva's assets, however at this stage it would be premature for the Commission to take a final view and this issue is therefore not further assessed in this Decision.

#### 2.3.4. No objection to urgent environmental and health interventions

- (64) In recital 114 of the Opening Decision, the Commission clarified that it would not oppose to any immediate action, which the Italian authorities may consider necessary in order to protect the health of citizens due to the officially recognised environmental and health emergency situation in Taranto portrayed in recital 11. Therefore, the opening of formal proceedings was without prejudice to any public support to expenditure on works needed to clean up Ilva's site and the surrounding areas, to the extent that such works would be urgently necessary to cope with existing pollution and to guarantee public health in the city of Taranto, pending the identification of the polluter to requisite standard in compliance with the applicable rules.
- (65) In this respect, the Commission noted in recital 115 of the Opening Decision that the Italian authorities had taken the necessary steps to identify the polluter. Pending the outcome of the judicial proceedings, the Commission considered that the Italian State was justifiably acting with a view to ensuring that pollution accumulated so far would not harm the health of citizens and the environment in the area of Taranto. The Commission clarified that, in case any polluter were to be identified in the ongoing judicial proceedings, it should reimburse with interests, in compliance with applicable rules establishing or implementing the 'polluter pays' principle, the amounts already spent by the State for clean-up.
- (66) Since the Italian judicial authorities are taking appropriate steps to identify the polluter and the financial responsibilities derived from its actions, this Decision is without prejudice to financial consequences as to allocation of costs that were incurred to remedy existing pollution already borne between the State or other public or private entities and the polluter(s) in application of the polluter pays principle set out in Article 191(2) of the TFEU. As regards future clean-up costs, the Commission notes that EUR 1,1 billion of funds transferred by the current shareholders of Ilva are earmarked by law to the Environmental Plan (recital 21), in addition to any further investments for upgrading the environmental performance of the Taranto plant which the possible future owner and manager may implement (see recitals 15 and 63).

### 3. COMMENTS FROM ITALY

#### 3.1. General comments on the purpose of the measures

- (67) According to Italy, the measures adopted by the Italian Government were necessary to preserve public interests and they do not fall within the scope of application of Article 107 TFEU. Italy submits that recitals 114 and 115 of the Opening Decision concern situations described by Directive 2004/35/CE of the European Parliament and of the Council <sup>(41)</sup> and Article 250 of the Italian Environmental Code <sup>(42)</sup>, pursuant to which the public administration has to proceed itself with the necessary works to remedy environmental damage pending the identification of the polluter. In line with these legal provisions, Law Decree No 1/2015 and the Decree of the President of the Council of Ministers (*Decreto del Presidente del Consiglio dei Ministri*) of 14 March 2014 adopting the Environmental Plan have therefore entrusted Ilva's Extraordinary Commissioners with powers of public nature to act on behalf of the State for the environmental clean-up of Ilva.
- (68) Against this background, environmental works amounting to EUR [...] should be considered as permissible according to recitals 114 and 115 of the Opening Decision. These works include:
- (a) Clean-up works (clean-up of waters and contaminated areas, waste management, asbestos removal) and works included in the Commission Reasoned Opinion <sup>(43)</sup>. The total amount of this category is EUR [...].
  - (b) Additional works required by the Commission in its Reasoned Opinion to remedy the violations of Directive 2008/1/EC until 7 January 2014 and Directive 2010/75/EU as from the same date. The total amount of this category is EUR [...].
- (69) The Italian authorities note that the total amount of those permissible works exceeds the combined amount of measures 2, 3, and 4.
- (70) The Italian authorities also underline that the Commission's State aid procedure is intrinsically linked to its parallel infringement procedure. The Commission's Reasoned Opinion acknowledges that Ilva's difficulties in finding financial resources could delay the implementation of the works that are necessary to meet the prescriptions of its environmental permit in Taranto. In this context, the granting of public resources to Ilva's Extraordinary Commissioners has been the way chosen by the Italian authorities to comply with the obligations set out in the Reasoned Opinion, and to implement the necessary works. According to the Italian authorities, recitals 114 and 115 of the Opening Decision imply that the Commission would not oppose to this type of measures.
- (71) Last, Italy stresses the socioeconomic importance of the Taranto plant, which employs directly and indirectly around 24 % of the total employed population in the Taranto province, in a Region where unemployment raised from 15,5 % in 2013 to 18,5 % in 2014.

#### 3.2. Measure 1

##### 3.2.1. State resources

- (72) According to the Italian authorities, measure 1 does not involve State resources. The Italian authorities provided a first set of arguments before the settlement agreement between the Riva family and Ilva, referred to in recital 21 above, was reached. Those arguments are presented in recitals 73-77. After the settlement agreement, the Italian authorities complemented their observations with additional arguments to demonstrate the absence of State resources (see recital 78).
- (73) First, the Italian authorities are of the opinion that the jurisprudence quoted in the Opening Decision, in particular the *Doux Elevage* <sup>(44)</sup> judgement, was developed in completely different circumstances. In this respect, Italy quotes paragraphs 208 and 209 of the judgment of the General Court of 24 September 2015 in case T-674/11 to stress that resources from private parties can be considered as State resources only if: (i) those

<sup>(41)</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56), Article 6, paragraph 3, and Article 8, paragraph 2.

<sup>(42)</sup> Article 250 of Legislative Decree No 152/2006 implements the provision of Article 6, paragraph 3 of Directive 2004/35/CE.

<sup>(43)</sup> Prescriptions No 4, 5, 6-16i, 40, 51, 58, 65, 67.

<sup>(44)</sup> Judgment of the Court of 30 May 2013, *Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF)*, C-677/11, ECLI:EU:C:2013:348, paragraph 35.

resources were placed at the disposal of the State by their owners; or (ii) have been abandoned by their owners, the State having assumed management of them by virtue of its sovereign powers <sup>(45)</sup>. It cannot be held that resources are under public control and therefore constitute State resources in the above sense simply on the basis that, by legislative action, the State requires a third party to use its own resources in a particular way.

- (74) According to Italy, those conditions are not met in the case of measure 1, as the EUR 1,1 billion belonged to Ilva's main shareholders and former management. In other words, the law at issue merely imposed a certain use of assets that were owned by Ilva's main shareholders and former management and not by the State.
- (75) Allegedly, the measure does not qualify as an expropriation in favour of the State. It would be a mere implementation of a general rule of law from article 2497 of Civil Code which provides for liability of the parent company vis-à-vis shareholders and creditors of its subsidiaries, in case of maladministration (*responsabilità patrimoniale dell'impresa-holding*), as stated in a judicial decree of 28 October 2014 rendered on the matter).
- (76) Furthermore, the *Fondo Unico di Giustizia* is a mere custodian (*custode ex lege*) who is bound to respect the applicable legal provisions (e.g. the Ministerial Decree of 30 July 2009) and the indications from the judicial authority. It does not have the amounts at its free disposal. The sum in question will be used solely for restoring the environmental damage caused, in line with the 'polluter pays' principle.
- (77) In addition, the initial owners of the seized assets will not lose their property rights since, in case of acquittal, they receive the bonds and a relevant right to cash-in the relevant value plus interests.
- (78) After the settlement agreement referred to in recital 21 was signed, the Italian authorities presented the following additional arguments. Through the settlement agreement, the members of the Riva family formally gave their consent to making the seized amounts (still held by them in Switzerland) definitely available to Ilva, including in case of acquittal. As a result, the amounts have been voluntarily transferred from the Riva family to Ilva, once and for all, without the *Fondo Unico di Giustizia* exercising any control on them.

### 3.2.2. Effect on State budget

- (79) According to Italy, for the purposes of determining the existence of State aid, it is necessary to establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget <sup>(46)</sup>. In this regard, the Commission's argument in the Opening Decision that, by investing the seized amounts in Ilva's bonds rather than in State bonds the State may forego possible revenues, is merely hypothetical and not founded.
- (80) First, there is no reason to believe that, in a counterfactual scenario, the seized amounts would have been invested in State bonds and not simply deposited on a bank account held by the *Fondo Unico di Giustizia*.
- (81) Second, the Commission has not demonstrated a sufficiently direct link between the decision not to invest the seized amounts in State bonds and a potential negative effect on the State budget.
- (82) Therefore, the Italian authorities conclude that measure 1 does not have any negative effect on the State budget. On the contrary, it may have a positive effect on it.

### 3.2.3. Selective advantage

- (83) Italy also argues that no selective advantage has been conferred to Ilva.

<sup>(45)</sup> Judgment of the General Court of 24 September 2015, *TV2/Danmark v Commission*, T-674/11, ECLI:EU:T:2015:684.

<sup>(46)</sup> Judgment of the Court of 14 January 2015, *The Queen, on the application from Eventech Ltd v Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, point 34.

- (84) The amounts at issue are intended to be placed in a separate account and dedicated to the Environmental Plan, including the works prescribed in the Reasoned Opinion. Therefore, the measure merely complies with the 'polluter pays' principle by striking the correct balance between constitutional interests of protection of health, employment and environment. In fact, it aims at: (i) facilitating Ilva's extraordinary administration by putting at its disposal the funds necessary to comply with the works that the Commission itself imposed on Italy in the Reasoned Opinion; and (ii) preserving the legal rights of the individuals undergoing the criminal investigation.
- (85) More generally, in light of its peculiar nature, the measure at issue cannot be considered as conferring a selective advantage for at least two reasons. First, Member States are free to decide how they manage the situation pending the conclusion of criminal proceedings (*res controversa*), this issue being outside the Commission's scrutiny under State aid rules. Second, the anticipation on the provisional basis of the outcome of the pending criminal proceedings is a general principle shared by a large part of the European legal systems and cannot as such confer a selective advantage on the undertaking that benefits from this anticipation.
- (86) Last, as to the financial conditions of the bonds issued by Ilva, the Italian authorities explain that the bonds would be issued at the average interest rate applied to accounts in the name of the *Fondo Unico di Giustizia*, for instance [...] in the year 2015. They also stress that it is not unusual for undertakings in difficulty or placed under extraordinary administration to issue bonds to cover their financial needs.

### 3.3. Measure 2

#### 3.3.1. Selectivity

- (87) According to Italy, the legislative provision in question merely implements a general principle of law that allows for the pre-deductibility status of credits if this is necessary to preserve the value of an undertaking and the management of its assets. The sacrifice imposed on certain creditors is compensated by the preservation of the undertaking's assets. No other undertaking has benefitted from this provision yet only because this legislative provision was introduced recently.

#### 3.3.2. State resources and impact on State budget

- (88) According to Italy, measure 2 does not involve State resources. The legal provision in question did not grant to the competent authority 'the power to direct or influence the administration of the funds' <sup>(47)</sup>. In this case, the Italian authorities were not involved in the relationship between the financing institutions and Ilva.
- (89) In addition, the measure has no negative impact on the State budget also with respect to State credits vis-à-vis Ilva.
- (90) Apart from fiscal measures, the Commission has to demonstrate a sufficiently direct link between the advantage given to the beneficiary and a concrete economic risk of burden on the State budget <sup>(48)</sup>.
- (91) In this case, the link is inexistent. First, the State does not waive any resources, from whatever source (taxes, contributions or others), which should be paid by Ilva to the State. Second, the measure does not reduce the possibility for the State to collect its credits and it does not disadvantage State credits more than other credits. On the contrary, by safeguarding Ilva's assets the measure had positive effects on all creditors, including the State, who will satisfy their claims from those assets.
- (92) Moreover, in the *Piaggio* judgement the Court considered that the potential impact on public creditors is not an essential aspect, but rather an indicator among others, to establish the existence of a selective advantage financed through State resources <sup>(49)</sup>. That judgement also requires the Commission to prove that the State or public entities are among the chief creditors of the undertaking in difficulty, which according to Italy is not the case here. Finally, Italy stresses that the contested measure merely implements in the present case a general principle

<sup>(47)</sup> Judgment of the Court of 30 May 2013, *Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF)*, C-677/11, ECLI:EU:C:2013:348, paragraph 38.

<sup>(48)</sup> Judgment of the Court of 19 March 2013, *Bouygues SA and Bouygues Télécom SA v Commission*, C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 109.

<sup>(49)</sup> Judgment of the Court of 17 June 1999, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa*, C-295/97, ECLI:EU:C:1999:313.

of Italian law enshrined in Article 111 of the Insolvency law (*Legge Fallimentare*, *Regio decreto* 16 March 1942, No 267), which is also present in other provisions thereof such as Article 182-quarter and *quinquies*, which give competence to ordinary judges to grant privilege of pre-deductibility to certain loans, notably if such loans are indispensable for the continuation of the activities of the company and ensure that creditors are better served.

### 3.3.3. *Economic advantage*

- (93) The Italian authorities are of the opinion that the conditions of the loan are normal market conditions for a loan granted with low collateral. The loan granted by the financing institutions has an interest rate of Euribor 3 months + [...] basis points per year. The duration of the loan is from 11 September 2014 to 28 February 2015. The contract has all the usual conditions. Since in the meantime Ilva entered into extraordinary administration, during which creditors are not entitled to enforce their claims, the loan was not reimbursed at its expiry. During the extraordinary administration all debts have to be reimbursed according to the applicable rules.
- (94) As to the question whether the granting of the loan was made possible through the granting of a pre-deductibility, the Italian authorities claim that the recognition of the pre-deductible nature will only occur after the competent national court verifies that the loan complies with all the conditions required by Article 12, paragraph 5, of Law Decree No 101/2013, following the procedure to complete the list of creditors (*accertamento del passivo*). Therefore, at the time of granting the qualification of the credit as pre-deductible was merely hypothetical.

## 3.4. **Measure 3**

- (95) The Italian authorities first note that the guaranteed loan is by law exclusively earmarked for the investments included in the Environmental Plan. Therefore, it is meant to address the Commission's concerns included in the Reasoned Opinion.

### 3.4.1. *State resources and economic advantage*

- (96) According to the Italian authorities, the use of State resources does not derive from the fact that State guarantees put State resources at risk in case they are called. Instead, State resources are only impacted if the potential loss for the State is not properly remunerated.
- (97) In this respect, the Italian authorities consider that the 3,12 % guarantee premium is a market oriented one, for several reasons.
- (98) First, the Italian authorities commissioned an expert study (hereafter, 'the [...] opinion') to determine this premium. The [...] opinion relies on a methodology established in line with point 3.2(d) of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ('the Guarantee Notice') <sup>(50)</sup>:
- (a) the credit risk of the borrower was analysed through a model allowing the assignment of a credit score on the basis of the available information;
  - (b) considering that credit score, a benchmarking analysis was carried out to select a reasonable range of market values for the guarantee premium on the basis of the various methodologies used by the international practice;
  - (c) the results obtained were further corroborated with additional evaluation criteria;
  - (d) the result was Euribor 6 months + a range between 2,5 % to 3,12 %;
  - (e) the highest percentage was selected.
- (99) Second, the guarantee premium and the loan interest rate paid by Ilva overall fall within the range indicated at recital 90 of the Opening Decision (i.e. that the margin for a loan to a technically insolvent company with a rating below CCC would be between 400 and 1 000 basis points). In this respect, the pre-deductible nature of the guaranteed loan should be taken into account when assessing the credit risk attached to it.

<sup>(50)</sup> Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

- (100) Third, the risk taken by the State has to be assessed against the State's overall profitability objectives. In this respect, it should be stressed that the measure was earmarked for the expenditures needed to comply with the environmental obligations of the Italian State deriving from the Commission Reasoned Opinion. The market economy investor principle should therefore be assessed globally against all relevant considerations for the State, including the fact that the final burden on State resources would be lower if the environmental investments are performed thanks to measure 3 <sup>(51)</sup>.
- (101) In summary, Italy believes that: (i) the guarantee is remunerated at market conditions; and (ii) the risk taken by the State as guarantor is economically rational and coherent with the overall profitability objectives of the State.
- (102) Last, Italy stresses that it is not uncommon that credit institutions already exposed to a company undergoing insolvency proceedings provide additional pre-deductible interim financing to this company, even in cases where such financing is not backed by any State guarantee. Therefore, the behaviour of the banks Intesa Sanpaolo and Banco Popolare with respect to measure 3 is not unusual. These banks as well as other banks already exposed to Ilva have been keeping credit lines open for the benefit of Ilva, despite the lack of State guarantees on these credit lines.

### 3.5. Measure 4

- (103) The Italian authorities stress that the legal provision in Article 3, paragraph 5, of Law Decree No 1/2015 did not impose on the undertakings any obligation to find an agreement but was merely procedural, allowing Ilva's Extraordinary Commissioners to use the funds from the settlement in the context of the extraordinary administration procedure. The settlement was freely and voluntarily concluded by Ilva and Fintecna.

#### 3.5.1. Market economy operator principle

- (104) The Italian authorities repeat that in their view Fintecna, a State owned corporation, generally operates as any other market economy operator <sup>(52)</sup>. This was confirmed by the Opening Decision itself which, according to the Italian authorities, states that the 1996 contract clause was a commitment that a private vendor would have undertaken and that the amount paid by Fintecna was coherent with a rational decision taken by a private investor <sup>(53)</sup>.
- (105) However, the Opening Decision seemed to question whether a private operator would have waited a more advanced phase of Ilva's restructuring before fulfilling its obligation. The Italian authorities are of the opinion that the transaction represents the mere fulfilment of a contractual obligation for environmental damages. Therefore, the financial burden for Fintecna does not confer a particular advantage on the undertakings concerned, as defined by the Court judgments in *Sloman Neptun* <sup>(54)</sup> and *Ecotrade* <sup>(55)</sup>.
- (106) The Italian authorities recall the thorough preliminary procedure, including expert opinions and reports, followed by Fintecna before taking the final decision to settle on 4 March 2015. By concluding the settlement, Fintecna put an end to any legal responsibility that could have triggered even higher costs for damages in the future. The alternative behaviour mentioned at recital 96 of the Opening Decision (i.e. non-payment or less immediate payment in the perspective of Ilva's management changes) would have represented an opportunistic and risky attitude that would not have been compatible with that of a market economy operator as defined by the Court <sup>(56)</sup>.

<sup>(51)</sup> Judgment of the Court of 5 June 2012, *Commission v Électricité de France (EDF)*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 86-87.

<sup>(52)</sup> Commission Decision of 7 June 2005 in case C2/2005 Alitalia — Plan industriel de restructuration, recitals 207 and 217-218.

<sup>(53)</sup> Recitals 93 and 94 of the Opening Decision.

<sup>(54)</sup> Judgment of the Court of 17 March 1993, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, C-72/91, ECLI:EU:C:1993:97, paragraph 21.

<sup>(55)</sup> Judgment of the Court of 1 December 1998, *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)*, C-200/97, ECLI:EU:C:1998:579, paragraph 36.

<sup>(56)</sup> See, among others, the judgment of the Court of 19 March 2013, *Bouygues SA and Bouygues Télécom SA v Commission*, in Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175.

### 3.6. Measure 5

#### 3.6.1. *Selective economic advantage*

- (107) The Italian authorities are of the opinion that the conditions of the loan are normal market conditions. The loan granted by the State bears interest at the annual rate of Euribor 6 months + 300 basis points. One working day before the granting of the loan, Euribor 6 month was at – 0,04 %. Therefore, the interest rate was set at 2,96 %.
- (108) Italy submits that this rate is in line with the [...] opinion prepared for the purpose of granting measure 3 (see recital 98). The [...] opinion indicates that an interest rate in the range of 2,50 % to 3,12 % would be market conform. In the absence of significant changes in Ilva's situation between the granting of measure 3 and the granting of measure 5 (April 2015 v December 2015), the Italian authorities consider that the [...] opinion can be used to assess the market conformity of measure 5.
- (109) In addition, Italy stresses that the loan is pre-deductible — an important additional fact that the Commission should take into account when assessing the credit risk attached to it.
- (110) Furthermore, Italy submits that measure 5 serves the purpose of facilitating the sale process of Ilva and guarantees in the meantime the operations in a way compatible with the requirements of environmental protection, health and employment.
- (111) Finally, Italy recalls that on 9 June 2016, Law Decree No 98/2016 amended the repayment obligation of the loan transferring it from the acquirer of Ilva's assets to Ilva itself. Furthermore, due to changes in the sale process and to avoid postponing the final repayment date of the loan beyond the final divestiture of Ilva's assets, Article 1(1)(a) of Law Decree No 243/2016 changed the loan repayment date to 60 days after the final divestiture of Ilva's assets, thereby disconnecting it from the decree declaring the cessation of Ilva's activity.

## 4. COMMENTS FROM INTERESTED PARTIES

### 4.1. Comments from Ilva

- (112) Ilva informed the Commission that it fully subscribes to the observations submitted by the Italian authorities, which are summarised in Section 3 of this Decision.

### 4.2. Comments from Peacelink

- (113) Peacelink is an Italian non-government organisation, which seeks to provide transparent information to citizens on various topics, such as military or environmental conflicts.
- (114) Peacelink considers that the doubts expressed by the Commission in its Opening Decision are fully justified. Regarding measure 1, they submit that the anticipated payment of judicially seized amounts would result in the State having to bear the risk of the outcome of the judicial procedure. No private operator would accept to bear such risk. Regarding measure 2, Peacelink is of the view that no market operator would have granted any loan to Ilva without the intervention of the State. Moreover, this intervention entails a risk on State resources since it affects the order of repayment of public credits. Regarding measure 3, Peacelink believes that no market creditor would have granted a loan at the terms, which were offered to Ilva. And regarding measure 4, Peacelink considers that there is State aid because Fintecna only agreed to settle its claim due to the provisions set out in Law Decree No 1/2015. Moreover, the fact that Fintecna is publicly owned casts doubt on its ability to behave like a private operator.
- (115) Peacelink also asked the Commission to extend the scope of its in-depth investigation to public support provided by Law Decree No 191/2015 in the form of a EUR 300 million loan and another EUR 800 million one.
- (116) Last, Peacelink provided observations on environmental aspects of Ilva, which are of no relevance for the present State aid procedure.

### 4.3. Comments from WF Stahl

- (117) WV Stahl is the trade association of the steel industry in Germany. It is based in Düsseldorf.

- (118) WV Stahl agrees with the doubts expressed by the Commission in its Opening Decision. As regards measure 1, WV Stahl considers that the advanced payment of judicially seized amounts would confer an economic advantage on Ilva. Regarding measure 2, they consider that the pre-deductibility works as a form of guarantee and is therefore vector of unlawful aid. The presence of State aid in measure 3 is according to them self-evident. As regards measure 4, WV Stahl explains that a market economy operator would not have accepted such a deal.
- (119) WV Stahl warned the Commission about the potential granting of additional State support in the form of two loans, worth respectively EUR 300 million and EUR 800 million. They ask the Commission to ensure that no further public support is granted to Ilva. In particular, any State expenditure for measures, which are urgently necessary to cope with existing pollution and to guarantee public health in Taranto, should remain compliant with the polluter-pays principle and be no pretext for the upgrade of Ilva's steelworks.
- (120) Last, WV Stahl asks the Commission to ensure a quick recovery of any aid, which may be found incompatible following the in-depth investigation. As regards State aid in the form of loans, the aid amount should be computed based on the difference between the interest rate charged by the State, and what should be considered as a market rate at the time of granting of the aid.

#### **4.4. Comments from Riva Fire SpA**

- (121) Riva Fire SpA ('Riva Fire') was in control of Ilva from 1995, when it acquired the company from IRI, until 4 June 2013, when the management of Ilva's steelworks was transferred to a Government-appointed Commissioner pursuant to Law Decree No 61/2013.
- (122) Riva Fire's observations aim at restoring what Riva Fire considers as the true version of the company's history until the latter entered into insolvency proceedings pursuant to Law Decree No 1/2015. In particular, Riva Fire claims that it was unduly dismissed from Ilva's management through a series of measures stemming from the Italian judiciary and executive powers, without having been able to defend its views in a proper contradictory procedure ensuring its rights of defense.
- (123) Riva Fire does not specifically comment on any of the measures, which are the object of the Opening or Extension Decisions.
- (124) However, it lays stress on what it sees as a contradiction in the presentation of the facts by the Italian authorities. According to Riva Fire, on the one hand the Italian authorities have claimed in the context of the Commission's State aid investigation that public resources granted to Ilva did not constitute State aid due to the fact that they were bound to be used for environmental remediation, while on the other hand they have claimed in the context of the Commission's environmental infringement procedure that there was no environmental or health-related risk linked to Ilva's facility in Taranto.

#### **4.5. Comments from Italy on interested parties' comments**

- (125) The Commission forwarded the observations of Riva Fire, Peacelink, WV Stahl and Ilva to the Italian authorities.
- (126) The Italian authorities consider these observations as either generic in their formulation, or irrelevant for the present procedure. According to them, the generic arguments contained in this set of observations are already addressed by the comments submitted by the Italian authorities in response to the Opening and Extension Decisions.
- (127) Moreover, the Italian authorities consider that Riva Fire's position regarding the apparent contradiction described in recital 124 is unfounded. The Italian authorities have unequivocally recognised the health and environmental emergency in the Taranto area. The quote singled out by Riva Fire regarding the alleged lack of environmental and health-related risks in Taranto would have been taken out of its context and would not in any event reflect the Italian authorities' official position.



## 5. ASSESSMENT OF THE AID

### 5.1. Regarding the alleged contradiction between the State aid proceedings and the proceedings for infringement of Union environmental legislation

- (128) In general, the Italian authorities claim that the various State interventions in favour of Ilva have aimed primarily to address the concerns expressed by the Commission in its Reasoned Opinion. Riva Fire, in their observations to the opening decision, notes a contradiction in the allegations of the Italian authorities in the infringement and the State aid procedure (see recital 124 and counter-argument from Italy in recital 127). According to Italy, the Commission would be contradicting itself when, on the one hand, it requires from Italy the speedy implementation of the works needed to bring the Taranto plant in conformity with applicable environmental rules and, on the other hand, it prevents the Italian authorities from funding those works.
- (129) The Commission rejects this argument. As a matter of principle, bringing to an end an infringement of a given set of rules does not justify infringing another set of rules. In the case at hand, bringing Ilva in compliance with the applicable Union environmental rules should not be done in breach of Union State aid rules by providing public support that is not available to Ilva's competitors, which also have to comply with Union environmental rules without benefitting from similar illegal State support.
- (130) Then, the Italian authorities argue that the public support measures earmarked for the implementation of the Environmental Plan fall outside the scope of Article 107(1) TFEU as they are intended to remedy environmental damages pending the identification of the polluter, in line with Directive 2004/35/CE and Article 250 of the Italian Environmental Code, as well as with recitals 114 and 115 of the Commission Opening Decision.
- (131) The Commission considers that the reasoning developed by the Italian authorities is flawed for the following reasons.
- (132) As a preliminary remark, the Commission recalls that only measures 1 and 3 have been earmarked by law for the implementation of the Environmental Plan.
- (133) Most importantly, only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention <sup>(57)</sup>. Since only the effect of the measure on the undertaking matters, any environmental or other aim behind the measure is as such irrelevant. It is also irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it <sup>(58)</sup>.
- (134) Therefore, public interventions carried out pursuant to Article 6(3) of Directive 2004/35/CE do not fall outside the scope of Article 107(1) TFEU. Article 107(1) TFEU equally applies to both different scenarios: (i) when the polluter has not been identified yet; and (ii) when the polluter has been identified but it fails to take the necessary remedial actions. In both scenarios, clean-up actions taken by the State become State aid if the State alleviates the burden which is normally incumbent on a beneficiary such as Ilva to bear and does not try to claim back from the identified polluter the resources it employed for the clean-up.
- (135) In the case at hand, the Opening Decision allows merely for a temporary coverage by the State of urgent clean-up measures, only until the moment the polluter is identified, and under condition that Italy claims back the costs from the polluter <sup>(59)</sup>. The Opening Decision gives therefore no absolute and unconditional permission to use State funds to implement the requirements raised in the Reasoned Opinion and/or in the Environmental Plan of Ilva.
- (136) In this respect for example the Commission notes that, the Environmental Plan, to which Italy refers, includes a series of measures that cannot be classified as 'urgent clean-up measures' but rather as upgrades aiming at improving Ilva's performance in line with the environmental standards applicable to steel production, as set out in Ilva's environmental permit.

<sup>(57)</sup> Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.

<sup>(58)</sup> Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1, recital 69; Opinion of Advocate General Fennelly of 26 November 1998, *France v Commission*, C-251/97, ECLI:EU:C:1998:572, paragraph 26.

<sup>(59)</sup> Recitals 114 and 115 of the Opening Decision.

- (137) Most importantly, given that only the effects of State measures matter (and not their causes or objectives), it cannot be inferred that measures which as such constitute State aid would cease to be aid just because they would be used for the Environmental Plan of Ilva. The Opening Decision does not allow (and could not have allowed) that.
- (138) In conclusion, Italy cannot rely on the requirements brought forward in the Reasoned Opinion as well as on the wording of recitals 114 and 115 of the Commission's Opening Decision to qualify the State funding of Ilva's current operations as well as environmental costs as non-aid.

## 5.2. Existence of aid

- (139) According to Article 107(1) TFEU, '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 shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (140) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) TFEU, all of the following conditions need to be fulfilled:
- (a) the beneficiary is an undertaking within the meaning of Article 107(1) TFEU, which implies that it engages in an economic activity;
  - (b) the measure is financed by State resources and is imputable to the State;
  - (c) the measure confers an economic advantage;
  - (d) this advantage is selective;
  - (e) the measure distorts or threatens to distort competition and may affect trade between Member States.
- (141) When it comes to fulfilment of the condition that the beneficiary must be an undertaking within the meaning of Article 107(1) TFEU, the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed <sup>(60)</sup> whereas any activity consisting in offering goods and services on a market is an economic activity <sup>(61)</sup>. The Commission notes that Ilva produces and sells steel on the Union market and abroad, which qualifies as an economic activity. Therefore the Commission concludes that Ilva, irrespective of its ownership or status under extraordinary administration pursuant to Italian law, is an undertaking within the meaning of Article 107(1) TFEU.
- (142) The Commission has to analyse whether the measures at stake distort or threaten to distort competition and are liable to have an effect on trade between the Member States. There is an assumption that when aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid <sup>(62)</sup>. Thereby it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition <sup>(63)</sup>. The carbon steel markets where Ilva operates are subject to intense competition and intra-Union trade <sup>(64)</sup> and Ilva sells its products in Italy and other Member States. As a result, all measures under assessment distort or threaten to distort competition and may affect trade between Member States.
- (143) For the other criteria set out in Article 107(1) TFEU and listed above in recital 140, points (b), (c) and (d), the Commission will proceed with a measure by measure assessment.

<sup>(60)</sup> Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

<sup>(61)</sup> See Judgment of the Court of Justice of 16 June 1987, *Commission v Italy*, C-118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission v Italy*, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75.

<sup>(62)</sup> See, in particular, Judgment of the Court of 17 September 1980, *Philip Morris v Commission*, C-730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 21; Judgment of the Court of Justice of 29 April 2004, *Italy v Commission*, C-372/97, ECLI:EU:C:2004:234, paragraph 44.

<sup>(63)</sup> Judgment of the General Court of 30 April 1998, *Het Vlaamse Gewest v Commission*, T-214/95, ECLI:EU:T:1998:77.

<sup>(64)</sup> See for instance Commission decision of 2 June 2006 regarding the Mittal/Arcelor merger (M.4137), in which the Commission considered that the relevant geographic definition for carbon steel markets was at least EEA-wide.

## 5.2.1. Measure 1

- (144) As explained in recital 21, on 24 May 2017 the Riva family and Ilva reached a settlement agreement, through which the ongoing dispute between Ilva's extraordinary administration and the members of the Riva family was resolved.
- (145) The settlement agreement is purely an agreement between private parties, namely certain Riva family members acting in their capacity as shareholders of Ilva and the current management of Ilva under extraordinary administration. [...]. Ilva is not a party to those criminal proceedings. The amounts to be transferred to Ilva under the settlement agreement include: (i) the Riva assets held by the Riva family on their foreign bank accounts, which are to be made definitely available to Ilva in the legal form provided for by Article 3, paragraph 1, of Law Decree No 1/2015, i.e. in the form of bonds to be subscribed by the *Fondo Unico di Giustizia*, without the bonds having to be returned to the Riva family members even in case of their acquittal; and (ii) a further amount of EUR 145 million.
- (146) As compared to the situation at the time of the Opening Decision, this settlement agreement constitutes a new fact that needs to be taken into account in the Commission's final assessment of measure 1, in particular as regards the possible advantage granted to Ilva and the imputability of the measure to the State.
- (147) In this respect, it is not disputed that the intention of having the Riva assets transferred to Ilva before the end of the criminal proceedings was originally that of the Italian authorities, as explained in the Opening Decision. Nevertheless it is a fact that, despite the provisions of Law Decree No 1/2015 and the subsequent *Decreto di Trasferimento*, the transfer of the Riva assets did not take place due to the steady opposition of the Swiss court to execute the order without prior consent of the putative owners of the assets — the Riva family members. The situation could only be unlocked when the members of the Riva family decided themselves, by means of a purely private settlement agreement, to transfer the assets under their control to Ilva <sup>(65)</sup>. It is also a fact that the scope of the settlement agreement does not perfectly match the whole construction designed by the Italian authorities in Law Decree No 1/2015: first, the amounts transferred to Ilva are in fact higher than provided for by this Law Decree and, second, there are important counterparts given to the Riva family in exchange for the transfer of the amounts.
- (148) The existence of this private settlement agreement and the fact that the situation only unlocked after this agreement was reached, constitute evidence that the decision to transfer the Riva assets to Ilva was eventually (i) part of a broader deal that was reconciling the private interests of both the Riva family and Ilva; and (ii) in the hands of the Riva family and Ilva (not of the State). This has to be taken into account to determine whether the Commission's initial doubts that the transaction would confer an economic advantage on Ilva and be imputable to the State remain.
- (149) As regards the imputability to the State of the transfer to Ilva of the Riva assets, the Commission takes note that this transfer took place as part of a broader deal which was decided by the Riva family and Ilva. Again, it is not disputed that the initial intention to transfer assets from the Riva family to Ilva before the end of the criminal proceedings was that of the Italian authorities. Nevertheless, the final decision was made by the Riva family by means of the settlement agreement, in implementation of which a letter from the Riva family instructing the foreign banks to release the funds effectively allowed the transfer to Ilva. Therefore, the basis for the transfer of the Riva assets to Ilva is the private settlement agreement between the Riva family and Ilva, which is not imputable to the State.
- (150) In addition, the Commission observes, as regards the existence of an economic advantage, that in the settlement agreement with the Riva family Ilva does not appear to have received any benefit that it would not have been able to receive under normal market conditions. The Riva family had an incentive to enter into settlement negotiations as it was exposed to the risk of owing Ilva up to EUR [...] in damage claims under the assumption that all of Ilva's claims would be upheld by the national judge. On its side, Ilva was in rather urgent need for liquidity, be it to finance current operations or the clean-up measures defined in the Environmental Plan. Ilva therefore agreed to renounce to any future claims (potentially worth up to EUR [...]) in exchange for the immediate transfer of ca. EUR 1,2 billion, part of it being the Riva assets targeted by Law Decree No 1/2015. This behaviour reflects the fact that prudent loss-averse operators may prefer to settle a dispute amicably rather

<sup>(65)</sup> In this respect, it is worth noting that the Riva assets stayed on the Riva family members' bank accounts outside of Italy until the final execution of the settlement agreement in June 2017.

than resorting to a judge or arbitrator after continued litigation. Against this background, nothing indicates that the settlement agreement reached by Ilva and the Riva family was not decided in the mutual interests of both private parties. Therefore, since the settlement agreement as a whole has taken place under normal market conditions between Ilva and its shareholders and thus does not confer any economic advantage on Ilva, the transfer of the Riva assets which is part of this global settlement does not confer any economic advantage on Ilva either.

- (151) In light of the above, the Commission considers that the transfer to Ilva of the Riva assets in the legal form provided for by Law Decree No 1/2015 neither confers an economic advantage to Ilva, nor is imputable to the Italian State.

#### 5.2.1.1. Conclusion on measure 1

- (152) Based on the above facts, the Commission concludes that the implemented measure is not imputable to the State. Since the criteria laid down in Article 107(1) TFEU are cumulative, the Commission concludes that measure 1 does not constitute State aid.

#### 5.2.2. Measure 2

##### 5.2.2.1. Economic advantage stemming from State resources

- (153) In order to assess whether measure 2 confers an economic advantage on Ilva, the Commission first analysed Italy's arguments presented in recital 87 as to the regulatory character of this measure. According to Italy, the legislative provision in question merely implements a general principle of law that allows for the pre-deductibility status of credits if this is necessary to preserve the value of an undertaking and the management of its assets.
- (154) By adopting measure 2, Italy placed all nearly insolvent companies, such as Ilva, which are of national strategic interest under the pre-deductibility regime, which is a common characteristic of insolvency proceedings. It is an essential characteristic of the general insolvency law framework applicable to all undertakings subject to or close to insolvency operating in Italy ('*Legge Fallimentare*' set out in *Regio decreto* 16 March 1942, No 267 (see recital 92).
- (155) The Commission considers that, since Italy acted as a public regulatory authority rather than as an investor, there are no grounds to apply the market economy operator test to measure 2<sup>(66)</sup>. In other words, by adopting measure 2, Italy acted in the exercise of its regulatory State powers to preserve the value of assets of undertakings faced with the risk of insolvency and not as a market operator. Indeed, via measure 2, Italy unilaterally re-determined the priority of Ilva's creditors, which is an action not comparable with actions that private persons can undertake. Only the State has the power to subordinate all existing claims (including senior debt) to the newer ones, such a power not being available to private creditors, or private persons in general. Therefore, the market economy operator test is not applicable for measure 2.
- (156) It follows from the non-applicability of the market economy operator test that the decisive criterion for the existence of advantage in measure 2 is not whether the State maximises the return or minimises the loss of State resources stemming from the measure. Nevertheless, the Commission still needs to assess whether measure 2 involves any other form of advantage stemming from State resources.
- (157) In the above circumstances, the possibly lower likelihood for the State to recover debts owed to some public entities after new debt is granted pre-deductibility status is a mere side effect of the regulatory measure in question. The main purpose and effect of the amendment of the law in question was not to forego Ilva's debt owed to the State thus favouring Ilva. In addition, as noted by the Italian authorities, pre-deductibility status for loans can also be granted under general insolvency law (recital 92) and there is empirical evidence of increasing use in Italy for credits to companies in insolvency situations concluding Court supervised composition agreements, after some reforms were introduced since 2010 which have progressively extended the scope of pre-deductible credit<sup>(67)</sup>. As confirmed by the Court, a negative indirect effect on State revenues stemming from

<sup>(66)</sup> Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 80-81.

<sup>(67)</sup> 'Finanziamenti Alle Imprese in Crisi E Priorità Nel Rimborso: Gli Effetti Della Prededucibilità Nel Concordato Preventivo' E.Brodi, L. Casolaro; Bank Of Italy, Occasional Paper No 387, September 2017.

regulatory measures does not constitute a transfer of State resources where it is an inherent feature of the measure <sup>(68)</sup>. Therefore, since a possible negative effect on State credits towards Ilva is an inherent feature of the pre-deductibility regime of insolvency proceedings in Italy, it cannot be a means of granting a particular advantage from State resources to Ilva.

#### 5.2.2.2. Conclusion on measure 2

- (158) The Commission concludes that measure 2 does not confer an economic advantage on Ilva stemming from State resources. Since the criteria laid down in Article 107(1) TFEU are cumulative, the Commission concludes that measure 2 does not constitute State aid.

#### 5.2.3. Measure 3

##### 5.2.3.1. State resources and imputability

- (159) As regards the State origin of the measure, the Commission observes that the measure consists in a loan guarantee granted by the Ministry of Economy and Finance.
- (160) Given that the notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority, the Commission concludes that the measure is imputable to the State.
- (161) State guarantees put State resources at risk, as their call is paid through the State budget. For this very reason, and contrary to the argument of the Italian authorities, even properly remunerated State guarantees involve State resources. In addition, as further shown below, the Commission also finds in the present case that, since the guarantee fee charged by Italy is below market conditions, the Italian State also forewent — and still foregoes — resources that would have accrued to it with a higher, market-based guarantee fee. The assessment of the terms of a State guarantee, including the fee charged for it, can only preclude the finding of an economic advantage (if they do not correspond to market terms), not the finding of State resources which is not disputable. Therefore, the Commission concludes that measure 3 involves State resources.

##### 5.2.3.2. Economic advantage

- (162) It is settled case-law that, in order to determine whether a State measure constitutes aid within the meaning of Article 107(1) TFEU, it is necessary to establish, among others, whether the recipient undertaking received an economic advantage which it would not have obtained under normal market conditions <sup>(69)</sup>.
- (163) An economic advantage exists whenever the financial situation of an undertaking is improved as a result of a State intervention on terms differing from normal market conditions <sup>(70)</sup>. However, an intervention by a public authority does not necessarily confer an advantage on the beneficiary, and as such does not constitute aid, if it is carried out under normal market conditions. In other words, if the public authority acts as a prudent operator in a market economy would do in similar circumstances, no State aid is involved.
- (164) In this respect, the Italian authorities argue that the premium charged by the Italian authorities for the State guarantee was set according to the recommendation of the [...] expert <sup>(71)</sup>. As such, the remuneration of the risk taken by the State is according to them in line with the remuneration that a prudent market economy operator would have required, and the guarantee does not confer an economic advantage on Ilva.
- (165) For their part, the interested parties having commented on measure 3 consider that a market economy operator would have not accepted such financial conditions. WV Stahl, in particular, asks the Commission to establish the applicable market rate and recover the amount of incompatible aid in the form of the difference between this market rate and the actual rate charged to Ilva by the Italian authorities.

<sup>(68)</sup> Judgment of the Court of Justice of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160, paragraph 62. Judgment of the Court of Justice of 17 March 1993, *Sloman Neptun Schiffahrts AG*, Joined Cases C-72/91 and C-73/91, ECLI:EU:C:1993:97, paragraphs 20 and 21. See also Judgment of the Court of Justice of 7 May 1998, *Viscido et al.*, Joined Cases C-52/97, C-53/97 and C-54/97, ECLI:EU:C:1998:209, paragraphs 13 and 14 and Judgment of the Court of Justice of 30 November 1993, *Kirsammer-Hack*, C-189/91, ECLI:EU:C:1993:907, paragraphs 17 and 18, on the fact that the non-application of certain provisions of employment law does not constitute a transfer of State resources.

<sup>(69)</sup> Judgment of the Court of Justice of 29 June 1999, *DMT*, C-256/97, ECLI:EU:C:1999:332, paragraph 22.

<sup>(70)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

<sup>(71)</sup> See recital 98 of the present decision.

- (166) As a preliminary remark, the Commission would like to point that, at the time of granting of the State guarantee at issue, Ilva was undergoing insolvency proceedings. As such, it qualified as an undertaking in difficulty according to point 20(c) of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ('R&R Guidelines') <sup>(72)</sup>.
- (167) In Section 4.1 of the Guarantee Notice, the Commission explains that 'for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee' <sup>(73)</sup>. This approach is also the one adopted by the Court, who ruled that where a State grants a guarantee for a bank loan to a company in difficulty 'without adequate consideration', the guarantees must be regarded as aid equal to the amount of the loan guaranteed <sup>(74)</sup>.
- (168) Against this background, the Commission first assessed whether the case at hand presents circumstances in which the likelihood that the borrower will not be able to repay the loan is so high that the guaranteed loan amount in full constitutes aid. An undertaking in difficulty is an undertaking experiencing serious economic and financial distress, which, without intervention by the State, will almost certainly go out of business in the short or medium term. In these circumstances, it is likely that no market operator would provide a loan or guarantee to such undertaking at any rate, so that any loan or guarantee by the State to such undertaking should in principle amount to aid equal to the full amount of the (guaranteed) loan. Nevertheless, this central assumption requires to be checked against the facts of each case and, when the beneficiary is undergoing insolvency proceedings, against the insolvency rules applicable in the relevant Member State.
- (169) In respect of the latter, the Commission takes note that Italian insolvency law for large undertakings gives a priority of repayment on the liquidation mass (*pre-deduzione*) to any new loan granted during the time of the insolvency proceedings, over loans granted before the declaration of insolvency. Moreover, unlike loans granted before the declaration of insolvency, interest continues to accrue for loans granted during the time of the insolvency proceedings. These provisions aim at incentivizing potential creditors to support the undertaking during the time of its insolvency proceedings in order to preserve the economic value of its assets, pending the outcome of the proceedings (turnaround, sale or liquidation).
- (170) The mere existence of those provisions indicates that lenders in some instances do agree to lend new money to undertakings undergoing insolvency proceedings (i.e. to undertakings in difficulty).
- (171) This also suggests that the reasoning of a lender or guarantor dealing with a borrower in difficulty may be slightly different than in a business-as-usual situation. On the one hand, in both situations the lender or guarantor will assess the likelihood that the borrower will not be able to repay the loan. On the other hand, emphasis may be laid in the first place on the probability of default of the borrower in a business-as-usual situation, whereas more attention might be paid to the loss-given-default ('LGD') on the loan or guarantee when it comes to borrowers that are likely to default at some point.
- (172) For companies undergoing insolvency proceedings, unless there is a high probability that the company will be successfully restructured on its own or acquired by a new investor together with its liabilities, the LGD on a new loan will mainly depend on the expected liquidation value of the company, for which the lender will have a priority of repayment pursuant to applicable pre-deductibility rules. In some cases, the expected liquidation value may be low as compared to the amount of the company's pre-deductible debts. In those cases, the company might have difficulties to access private finance and a public guarantee is more likely to confer an advantage equal to the entire guaranteed amount. However, in cases where there is a high expected value of the liquidation mass, there can be a business case for private lenders (or guarantors) used to dealing with risky credits.
- (173) In the case of Ilva, the successful outcome of the sale process shows that the market value of Ilva's assets in continued operation stayed high despite the economic difficulties of the company: those assets were indeed sold at a price of EUR 1,8 billion. This amount is not particularly surprising in light of Ilva's competitive strengths: the Taranto site is the largest integrated steelmaking site in Southern Europe and Ilva's sites are strategically located on important import and export routes and close to the heart of Europe's second largest steel market (Italy).

<sup>(72)</sup> OJ C 249, 31.7.2014, p. 1.

<sup>(73)</sup> OJ C 155, 20.6.2008, p. 10.

<sup>(74)</sup> Judgment of the Court of 28 January 2003, *Germany v Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 138.

- (174) The discrepancy between the market value of Ilva's assets and its poor economic performance can be explained by several case-specific factors, including the two below:
- (a) Ilva's production has been administratively capped at 6 million tonnes, well below its total production capacity, due to environmental harm that would ensue if the company run its full production capacity with the current environmental equipment. As steelmaking facilities like Taranto plant are extremely capital-intensive with high fixed costs, they require to be operated close to their full capacity to be profitable. The production cap imposed on Ilva for valid environmental reasons inevitably led to a deterioration of its profitability. However, with the right environmental investments, Ilva may go back to more optimal production levels. This potential explains that Ilva's assets remained valuable in the eyes of potential investors ready to make the appropriate investments.
  - (b) Ilva has been under extraordinary administration for five years — at a first stage because of environmental issues, and then because of its financial difficulties. As Ilva's assets were not operated under normal market conditions for several years, the company encountered financial difficulties without this implying that the same assets could not be operated in a profitable way under normal market conditions and with the right level of private investments.
- (175) The reasons for Ilva's financial difficulties were known for a long time. As they were not related to the intrinsic value of Ilva's assets, they did not discourage market players from expressing interest in acquiring Ilva's assets not only during the recent sale process, but also long before it <sup>(75)</sup>.
- (176) It follows that, already at the time of granting of the State guarantee in April 2015, a reasonably high price could be expected from the sale or liquidation of Ilva's assets. As according to Italian insolvency law for large undertakings, new loans are pre-deductible, this sale price feeding the liquidation mass would be used in priority to repay new loans (or guarantees on these loans, if called). Based on information provided by the Italian authorities, the sequence of repayment of Ilva's debts was expected to be the following at the time of granting of measure 3 <sup>(76)</sup>:

*Graph 1*

**Sequence of repayment of Ilva's debt in April 2015**

[...]

- (177) Considering the difference in magnitude between, on the one hand, the amount of the guaranteed loan at issue (EUR 400 million) and, on the other hand, the amount of other debts with a same or higher priority of repayment (ca. EUR [...]) and the value of Ilva's liquidation mass (EUR 1.8 billion if one considers the price offered by the highest bidder in the recent sale process), the Commission concludes that a market economy operator could have granted a loan or guarantee at an adequate rate to Ilva during the period of its difficulties.
- (178) This conclusion is supported by the fact that Ilva kept access to private finance during the time of its insolvency proceedings. At the time of granting of the State guarantee (end of April 2015), Ilva had at least three lines of credit opened with private banks: EUR [...] with [...] <sup>(77)</sup>, EUR [...] with [...] and EUR [...] with [...]. Those credits were factoring lines, which have a different risk profile than the EUR 400 million loan guaranteed by the Italian State. Nevertheless, the existence of these credit lines constitutes an additional indicator that Ilva was not in a situation such that no creditor would at any rate have ever agreed to finance its operations.
- (179) From the above evidence, it follows that the present case does not present circumstances in which access of the beneficiary to private finance can be ruled out so that the aid element in any public loan or guarantee should be considered State aid for the amount of the entire loan or guarantee.

<sup>(75)</sup> According to the press, ArcelorMittal, Marcegaglia and Arvedi, all steel producers, for instance, showed interest in acquiring Ilva's assets as early as Autumn 2014; see <http://www.ilsale24ore.com/art/impresa-e-territori/2014-11-13/ilva-decisivo-ruolo-stato-063904.shtml?uuiid=ABDP2MDC>

<sup>(76)</sup> This information was provided by the Italian authorities based on an internal analysis performed by Ilva and its financial advisors, without prejudice to the final conclusions of the Court of Milan concerning the priority of repayment of each debt.

<sup>(77)</sup> Following Ilva's entering into insolvency proceedings, [...] reduced the line to [...] of its initial amount of EUR [...].

- (180) The Commission then assessed whether the financial terms of the public guarantee on the EUR 400 million granted to Ilva adequately remunerate the risk taken by the State. In this respect, the Commission recalls the Guarantee Notice: 'for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default.'
- (181) In the present case, the State guarantee was granted with an annual premium of 3,12 %. This premium was set on the basis of the [...] opinion.
- (182) Contrary to the Italian authorities, the Commission considers that the [...] opinion does not estimate properly the remuneration that a prudent market economy operator would have asked in exchange for its guarantee, as the [...] opinion does not provide an adequate estimate of the likelihood that the guarantee may be called, and repaid if called. In fact, the [...] opinion entirely relies on the flawed assumption that the EUR 400 million loan granted to Ilva would be transferred to a new company ('NewCo') operating Ilva's assets under better conditions. The [...] opinion makes an in-depth assessment of the creditworthiness of this hypothetical NewCo and concludes, based on NewCo's estimated credit score, that the Italian State should apply a guarantee premium in the range of 1,53 % to 3,12 %. However, at the time of granting of the guarantee, there was no reason to assume that the EUR 400 million loan would be automatically transferred to a hypothetical new owner of Ilva's assets <sup>(78)</sup>. In this context, the Italian authorities should have assessed the creditworthiness of Ilva (not of a hypothetical acquirer) and estimated the loan LGD on that basis.
- (183) Since the [...] opinion could not be used to assess whether the premium charged by the Italian State adequately remunerates the risk, the Commission had to look for benchmarks of rates applied to entities in a similar financial situation as Ilva. In line with established and recent decisional practice on firms undergoing insolvency proceedings and earmarked for sale <sup>(79)</sup>, the Commission considers that, without any available alternative credit rating and in light of its qualification as undertaking in difficulty, Ilva's rating is at best CCC (see also recital 189). Consequently, the Commission collected financial data from the database *S&P Capital IQ Platform* <sup>(80)</sup> on credit default swaps ('CDS') spreads as well as bond yields for companies with a rating of CCC+, D or SD at the date of granting of measure 3.
- (184) The CDS is a financial swap agreement that the seller of the CDS will compensate the buyer (usually the creditor of the reference loan) in the event of a loan default (by the debtor). In other words, the seller of the CDS insures the buyer against some reference loan defaulting. This instrument is as such very relevant to give an indication of what would be the risk premium/guarantee fee a market operator would require to ensure the risk of default of a loan. The data collected on 11 observations available in May 2015 shows CDS spreads for maturities of 10 years varying from 6,3 % to 277,7 % with a median value of 17,6 %.
- (185) The bond yields give a good indication of the 'all-in' cost of borrowing for a company, that is interest rate and guarantee premium altogether in percentage. The data collected on 8 observations available in May 2015 indicates rates between 5,3 % and 35,6 % with a median value of 17,0 % for 10-year maturity bonds. Only two observations were available for 25-year maturity bonds: these observations present a rate of 14,2 %.
- (186) As the analysed data shows, the cost of financing for companies rated CCC+, D or SD at the date of granting of measure 3 was substantially higher than what Ilva obtained thanks to the State guarantee. Indeed, Ilva was able to get a loan at a total cost (interest rate of [...] + guarantee premium of 3,12 %) of [...] while the market indications show a total cost close to 17 % during the same period.
- (187) This plausibility check demonstrates that the State guarantee defined as measure 3 confers an economic advantage on Ilva, which Ilva would not have obtained at market conditions. This finding is in line with the opinion of competitors (see recital 118). Having established the existence of an economic advantage not available at market conditions, comes the question of its quantification.

<sup>(78)</sup> As a matter of fact, the loan will not be transferred to the acquirer of Ilva's assets, ArcelorMittal.

<sup>(79)</sup> See *ex multis* and for the most recent ones Commission final decisions in Cases: SA.38544 Kem One (28 July 2015), SA 38545 Mory Global (6 November 2015), SA.38644 Brandt Groupe (21 March 2016).

<sup>(80)</sup> <https://www.capitaliq.com>



- (188) As explained above, the Commission was able to collect some indications of market rates of guarantees for the given period. However, these data have been retrieved from entities which are not fully comparable to Ilva and from financial instruments which are different from the loan and guarantee contracted by Ilva and can, therefore, not serve of themselves as a proper benchmark for establishing the exact market rate for the guarantee in question to requisite level of accuracy. Nor has the investigation revealed contemporary quotes of interest rates for loans of a similar nature to Ilva with or without the State guarantee or market quotes for the latter guarantee. Under such circumstances, the Guarantee Notice declares that the potential advantage linked to the granting of a guarantee (corresponding to the potential aid element) should be calculated as the difference between the specific market interest rate that the beneficiary would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account.
- (189) The Commission considers it prudent to take also into account the 2008 Communication on the reference and discount rates for the purposes of estimating a proxy of the market-conform interest rate for the loan in question. In that respect, Ilva's creditworthiness (rating) appears to be at the lowest of the five possible ratings provided for in the 2008 Communication, namely 'Bad/Financial difficulties (CCC and below)'. Moreover, no collateral was attached to the loan, providing the lenders (or the guarantor) a sufficiently liquid, possibly transferable and immediately actionable right over Ilva's assets in case of default. On that basis, the Commission takes the view that the market interest rate of the loan plus guarantee constituting measure 3 must be calculated for the loan as the result of the sum of an appropriate base rate plus 1 000 basis points as defined in the 2008 Communication.
- (190) As regards the appropriate base rate, the 2008 Communication recommends to use 1-year money market rates (i.e. in the case of Italy: the Euribor 1-year rate), the Commission reserving the right to use shorter or longer maturities adapted to certain cases. In the present case, the Commission considers that the very long maturity of the EUR 400 million loan object of the State guarantee justifies choosing a base rate in adequacy with this long maturity. The Commission therefore decides to apply a swap rate corresponding to the weighted average life of the guaranteed loan. As the repayment profile of the EUR 400 million loan gives a weighted average life of 14,86 years, the appropriate base rate should be the 15-year swap rate. On 27 May 2015, i.e. at the time of granting by the three private lenders of the EUR 400 million loan, the swap rate for 15-year maturities was 1,18 % <sup>(81)</sup>. On that basis, the market interest rate given by the 2008 Communication is 1,18 % + 1 000 bps, i.e. 11,18 %.
- (191) The amount of the advantage linked to the guarantee granted by the State must be calculated separately for the loan according to the following methodology: the difference between (i) the interest rate calculated as explained in recital 190 applied to the loan principal; and (ii) the total financial cost of the guaranteed loan calculated as the sum of the interest rate applied by the banks to the loan principal and the guarantee premium applied by the State, calculated and charged for the period during which the amounts were made available to Ilva.

#### 5.2.3.3. Selectivity

- (192) The State guarantee defined as measure 3 is an ad hoc support measure granted in favour of one single undertaking: Ilva. As such, measure 3 is selective.

#### 5.2.3.4. Conclusion on measure 3

- (193) Since measure 3 meets all the criteria laid down in Article 107(1) TFEU, the Commission concludes that it constitutes State aid, the amount of which can be determined based on the methodology described in recital 191.

#### 5.2.4. Measure 4

- (194) In the Opening Decision the Commission took the preliminary view that the dispute settlement agreed between Fintecna and Ilva is imputable to the Italian State and involves State resources. The Commission also raised doubts as to whether by accepting to settle a long dispute in March 2015, just after Ilva was declared insolvent, Fintecna took a rational decision that a market economy operator would have taken in a similar situation.
- (195) Based on the observations received during the formal proceedings, the Commission first assessed whether the decision to settle the dispute was indeed rational from a market operator point of view, i.e. whether this decision confers an economic advantage on Ilva.

<sup>(81)</sup> According to data collected by the Commission in the S&P Capital IQ database.

#### 5.2.4.1. Economic advantage

- (196) As already stated in recital 163, an intervention by a public authority does not necessarily confer an advantage on the beneficiary, and as such does not constitute aid, if it is carried out under normal market conditions, in other words, if the public authority acted as a prudent operator in a market economy would have done in similar circumstances.
- (197) First of all, in the in-depth assessment the Commission evaluated the circumstances under which Fintecna made a decision to settle the dispute with Ilva after long period of time by paying EUR 156 million. While making its decision to settle Fintecna must have taken into account the economic situation at the time at which it decided to settle, the level of risk and future expectations <sup>(82)</sup>.
- (198) In this respect, the Commission takes note that the liability incurred and assumed by the State as seller before the privatisation took place is not contestable on its principle and that, as regards the settlement amount i.e. EUR 156 million, Fintecna, as a prudent creditor, undertook the estimations of its exposure towards Ilva in 2011 and adjusted those in 2014. The calculations revealed the exposure of EUR [...], i.e. the adjusted amount of EUR [...] in 2014. In order to properly assess the legal risks, Fintecna ordered two legal opinions both of which independently confirmed that EUR 156 million was an acceptable amount, within the maximum cap agreed in the privatisation contract (EUR [...], excluding interests, or EUR [...], including interests) and the estimated potential exposure (EUR [...] in 2014).
- (199) Fintecna made the decision to settle in the context of Law Decree No 1/2015 which prompted the agreement between the two parties. Given the sensible estimation of the risks which occur in case of Ilva's insolvency provided by independent legal advisors, the mere fact that Fintecna decided to settle only then and not before the above Law Decree was adopted, does not change the qualification of the decision to settle as a rational decision that a market economy operator would have taken in a similar situation. Indeed, a prudent loss-averse operator may prefer to settle a dispute amicably rather than resorting to a judge or arbitrator after continued litigation in circumstances where its liability is not questionable as such and its exposure could lead to amounts between [...] and [...] higher than the immediately settled amount. Further postponing the settlement does not seem that it could have led to a better financial outcome for Fintecna.
- (200) Considering the fact that steps undertaken by Fintecna correspond to the behaviour of a rational market economy participant and that the process preceding the decision reflects the prudent approach Fintecna took towards the amount of a possible settlement to be reached with Ilva, the Commission concludes that paying less than its own estimates is in principle a reasonable decision of a private market operator in settlement and as such is not liable to confer an advantage on Ilva.

#### 5.2.4.2. Conclusion on measure 4

- (201) The Commission has shown that measure 4 does not confer an economic advantage on Ilva. Since the criteria laid down in Article 107(1) TFEU are cumulative, the Commission concludes that measure 4 does not constitute State aid.

#### 5.2.5. Measure 5

##### 5.2.5.1. State resources and imputability

- (202) As regards the State origin of the measure, the Commission observes that the measure consists in a loan granted by the Ministry of Economy and Finance through resources from the State budget.
- (203) Given that the notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority, the Commission concludes that the measure is imputable to the State and involves a transfer of State resources.

##### 5.2.5.2. Economic advantage

- (204) In its observations to the opening decision, WV Stahl requests the Commission to ensure a quick recovery of State aid granted in the form of loans to Ilva below market conditions, based on the difference between the interest rate charged and the market rate when the loans were granted (see recital 120). For the finding of an economic advantage in measure 5, the Commission considers that the same reasoning as for measure 3 can be applied despite two main factual differences between both measures.

<sup>(82)</sup> Judgment of the Court of First Instance of 29 March 2007, *Scott v Commission*, T-366/00, EU:T:2012:649, paragraph 158.

- (205) The first factual difference is that measure 5 is a public loan whereas measure 3 is a State guarantee on a syndicated loan. However, this factual difference does not affect the reasoning developed in recitals 166 to 179, which equally holds for a loan and for a guarantee.
- (206) The second factual difference is the date of granting: 30 April 2015 for measure 3 v 15 December 2015 for measure 5. However, the Commission considers that the reasoning developed in recitals 166 to 179 also holds at the granting date of measure 5: in December 2015, the liquidation value of Ilva's assets could still be expected to be high and the aggregated amount of pre-deductible claims had increased by EUR 400 million (i.e. the amount of measure 3) as compared to April 2015, reaching a total of ca. EUR [...] — still comfortably less than the EUR 1,8 billion liquidation mass which could be anticipated. Moreover, Law Decree No 191/2015 gives a higher priority of repayment to measure 5 than other pre-deductible claims, as shown in Graph 2, further increasing the potential LGD of measure 5.

Graph 2

### Sequence of repayment of Ilva's debt in December 2015

[...]

- (207) In light of the above, it appears that the LGD of the loan was still reasonably high and the Commission concludes that there could be a business case, for a private lender used to dealing with risky credits, in granting a loan to Ilva.
- (208) Like for measure 3, the Commission then assessed whether the financial terms of the public loan adequately remunerate the risk taken by the State. For the same reasons as for measure 3, the Commission considers that the [...] opinion does not provide an appropriate method for determining whether the annual interest rate charged by the State (2,94 %) is appropriate. Therefore, the Commission collected similar public data as for measure 3 (CDS spreads and bond yields) from the database *S&P Capital IQ Platform* <sup>(83)</sup>, corresponding however to the granting date of measure 5.
- (209) The data collected on 14 observations available in December 2015 shows CDS spreads for maturities of five years varying from 6,2 % to 300,5 % with a median value of 44,1 %, and CDS spreads for maturities of one year varying from 3,0 % to 648 % with a median value of 32,7 %.
- (210) The data collected on 31 observations available in December 2015 indicates bond rates between 2,2 % and 99,0 % with a median value of 17,6 % for three-year maturity bonds.
- (211) As the analysed data shows, the cost of financing for companies rated CCC+, D or SD at the date of granting of measure 5 was substantially higher than what Ilva obtained through the State. Indeed, the interest charged on the loan to Ilva was at an annual rate of 2,94 % while the market indications show a much higher total cost during the same period.
- (212) Like for measure 3, this plausibility check demonstrates that the public loan defined as measure 5 confers an economic advantage on Ilva, which Ilva would not have obtained at market conditions. Having established the existence of an economic advantage not available at market conditions, comes the question of its quantification.
- (213) Following the same reasoning as for measure 3 *mutatis mutandis*, the Commission decided to take into account also the 2008 Communication. This led the Commission to establish the appropriate market rate for the quantification of the aid element of the loan granted without collateral at 10,06 %, calculated as the sum of a base rate of 0,06 % corresponding to the Euribor 1-year on 15 December 2015, and a credit margin of 1 000 bps.
- (214) The amount of the advantage linked to the public loan defined as measure 5 must be calculated as the difference between (i) the interest rate calculated as explained in recital 213 applied to the loan principal; and (ii) the actual interest rate due by Ilva, calculated and charged for the period during which the amounts were made available to Ilva.

#### 5.2.5.3. Selectivity

- (215) The State loan defined as measure 5 is an ad hoc support measure granted in favour of one single undertaking: Ilva. As such, measure 5 is selective.

<sup>(83)</sup> <https://www.capitaliq.com>

#### 5.2.5.4. Conclusion on measure 5

- (216) Since measure 5 meets all the criteria laid down in Article 107(1) TFEU, the Commission concludes that it constitutes State aid, the amount of which can be determined based on the methodology described in recital 214.

### 5.3. Unlawfulness of the aid

- (217) Measures 3 and 5 constitute State aid within the meaning of Article 107(1) TFEU, which were implemented without prior notification to the Commission in breach of Article 108(3) TFEU. As such, those measures have been unlawfully implemented.

### 5.4. Compatibility of the aid with the internal market

- (218) The prohibition on State aid is neither absolute nor unconditional. In particular, paragraphs 2 and 3 of Article 107 TFEU constitute legal bases allowing some aid measures to be considered compatible with the internal market. Since they consider that the measures under investigation do not constitute State aid, the Italian authorities did not put forward any reason relating to their compatibility.
- (219) Therefore, the Commission will assess on its own motion whether the State aid measures granted to Ilva, i.e. measures 3 and 5, can be declared compatible with the internal market under any of these possible legal bases.
- (220) The Commission observes that the derogations in Article 107(2) TFEU are clearly inapplicable. Of the derogations in paragraph 3 of this Article, only points (a) and (c) could prove useful. Point (a) provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the internal market. Point (c) states that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may also be considered to be compatible with the internal market.
- (221) As regards point (a) of Article 107(3) TFEU, undertakings active in the steel sector, like Ilva, are not eligible for regional aid pursuant to point 9 of the Guidelines on regional State aid <sup>(84)</sup>. Therefore, this legal basis cannot be applied to the measures under investigation.
- (222) As regards point (c) of Article 107(3) TFEU, the Commission cannot see any framework or guidelines concerning the application of Article 107(3), which could apply to the measures under assessment. In particular, undertakings active in the steel sector, like Ilva, are not eligible for rescue and restructuring aid pursuant to point 18 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty <sup>(85)</sup>. Since it qualifies as an undertaking in difficulty pursuant to point 20(c) of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Ilva is also not eligible for environmental aid pursuant to point 16 of the Guidelines on State aid for environmental protection and energy <sup>(86)</sup>.
- (223) In light of the above, the Commission concludes that the State aid measures granted to Ilva are not compatible with the internal market.

### 5.5. Recovery of aid incompatible with the internal market

- (224) According to the TFEU and the settled case-law of the Court of Justice, the Commission is competent, when it has found that aid is incompatible with the internal market, to decide that the State concerned must abolish or alter it <sup>(87)</sup>. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation <sup>(88)</sup>.
- (225) In this context, the Court has established that this aim is achieved once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored <sup>(89)</sup>.

<sup>(84)</sup> OJ C 209, 23.7.2013, p. 1.

<sup>(85)</sup> OJ C 249, 31.7.2014, p. 1.

<sup>(86)</sup> Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1).

<sup>(87)</sup> Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

<sup>(88)</sup> Judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, paragraph 75.

<sup>(89)</sup> Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

- (226) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 <sup>(90)</sup> lays down: ‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary’.
- (227) Thus, given that the measures in question were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.
- (228) Based on the assessment above in Sections 5.2.3 and 5.2.5, the aid element contained in measures 3 and 5 must be recovered as follows:
- (a) For measure 3, the difference between (i) the interest rate calculated as explained in recital 190 applied to the loan principal; and (ii) the total financial cost of the guaranteed loan calculated as the sum of the interest rate applied by the banks to the loan principal and the guarantee premium applied by the State, calculated and charged for the period during which the amounts were made available to Ilva.
  - (b) For measures 5, the difference between (i) the interest rate calculated as explained in recital 213 applied to the loan principal; and (ii) the actual interest rate due by Ilva, calculated and charged for the period during which the amounts were made available to Ilva.
- (229) Pursuant to the principle of sincere cooperation under Article 4(3) TFEU, Italy must provide the Commission within two months from the date of notification of this Decision with the exact amount of aid granted to Ilva, taking into account, in particular, for the aid in the form of loans, the actual dates of payments or repayments as well as all other relevant circumstance reported by Italy. In each case, the amounts to be recovered must include interest due until recovery takes place.
- (230) Within the same two-month deadline, Italy must inform the Commission of the removal of future economic advantages deriving from measures 3 and 5. For this purpose, Italy should ensure that the relevant total financing costs and interest rates at least match, respectively, the market driven interest rates cited in recitals 190 and 213. Any amount made available until the adjustment of the interest rates will remain aid incompatible with the internal market and as such subject to recovery, together with the recovery interest accrued until the date of recovery.

## 6. CONCLUSION

- (231) The Commission finds that Italy has unlawfully implemented measures 3 and 5 referred to in Sections 2.2.3 and 2.2.5 of this Decision, in breach of Article 108(3) TFEU.
- (232) The Commission concludes that the aid element under measures 3 and 5 is incompatible with the internal market and must be recovered from the beneficiary, Ilva, together with recovery interest,

HAS ADOPTED THIS DECISION:

### *Article 1*

The following measures subject to this Decision do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

- (a) the transfer of the assets in the amount of EUR 1,1 billion seized during criminal proceedings against Ilva's previous owners implemented by the private settlement agreement reached with Ilva;
- (b) the Law Decree No 101/2013 of 11 August 2014 and its Article 12, paragraph 5, on pre-deductible loans as applied to a private EUR 250 million loan;
- (c) the settlement agreement concerning the amount of EUR 156 million reached between Fintecna and Ilva on 5 March 2015 based on Law Decree No 1/2015 from 4 March 2015.

<sup>(90)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

*Article 2*

The other measures subject to this Decision, unlawfully put into effect by Italy in breach of Article 108(3) of the Treaty on the Functioning of the European Union, constitute State aid incompatible with the internal market:

- (a) the granting to Ilva, by Ministerial Decree of 30 April 2015 pursuant to Law Decree No 1/2015, of the State guarantee on a EUR 400 million loan;
- (b) the granting to Ilva, by Ministerial Decree of 15 December 2015 pursuant to Law Decree No 191/2015, of a EUR 300 million State loan.

*Article 3*

- 1. Italy shall recover the incompatible aid granted under the measures referred to in Article 2 from the beneficiary.
- 2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
- 3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(91)</sup> and to Commission Regulation (EC) No 271/2008 <sup>(92)</sup> amending Regulation (EC) No 794/2004.
- 4. Italy shall adjust all outstanding payments of aid under the measures referred to in Article 2 to the market driven terms set out in recitals 190 and 213 of this Decision, within two months from the date of notification of this Decision.

*Article 4*

- 1. Recovery of the aid granted under the measures referred to in Article 2 shall be immediate and effective.
- 2. Italy shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

*Article 5*

- 1. Within two months following notification of this Decision, Italy shall submit the following information:
  - (a) a detailed description of the measures already taken and planned to comply with this Decision;
  - (b) documents demonstrating that the beneficiary has been ordered to repay the aid;
  - (c) documents demonstrating that the adjustments cited in Article 3(4) of this Decision have been implemented.
- 2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the measures referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

<sup>(91)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

<sup>(92)</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

*Article 6*

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 December 2017.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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