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([1]) Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 October 2003

on the measures implemented by Italy for RAI SpA

(notified under document number C(2003) 3528)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2004/339/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By way of a complaint lodged with it on 17 June 1996 by RTI SpA (Reti Televisive Italiane), an undertaking controlling three Italian national television channels and belonging to the Mediaset group [2], the Commission was informed that Italy had implemented a number of measures in favour of RAI-Radiotelevisione Italiana SpA (the national public broadcaster, hereinafter RAI). The complaint focused on the licence fee granted to RAI and on a set of measures adopted by the Italian Government in the first half of the 1990s in favour of RAI.

(2) The Commission requested information from the Italian authorities by letters of 15 July and 4 September 1996, to which the Italian authorities replied by letters of 30 August and 4 November 1996 respectively.

(3) On 23 May 1997 Mediaset took over its complaint as its own and submitted further documents.

(4) Another letter requesting information was sent by the Commission to the Italian authorities on 1 July 1998. The Italian authorities provided some of the information requested at a meeting on 31 July and by letter of 7 August 1998. Meetings with the complainant were held on several occasions.

(5) On 19 October 1998 Mediaset lodged an additional complaint with the Commission concerning the same aid measures mentioned in the original complaint. Mediaset presented further documents by letter of 8 January 1999 and had a meeting at the Commission on 15 February 1999.

(6) On 3 February 1999 the Commission enjoined Italy to provide all the information necessary to assess whether

[1] OJ C 351, 4.12.1999, p. 20.

[2] In the present decision the Commission will refer to the complainant as 'Mediaset' since it is Mediaset SpA that has participated in the Commission's State aid investigation and since it has made the complaint originally lodged by RTI SpA its own.

the measures had to be considered as existing or new aid (hereinafter the injunction). This decision was communicated to Italy by letter of 26 February. Italy provided some of the information requested and submitted observations by letter of 26 March. The Commission requested additional information by letter of 28 April, to which the Italian authorities replied by letter of 16 June.

(7) Mediaset wrote to the Commission on 17 May 1999 on the question of whether the measures had to be considered as existing or new aid and had a meeting at the Commission on 18 May.

(8) By letter dated 27 September 1999, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of some of the ad hoc measures indicated by Mediaset as State aid (hereinafter the decision to initiate the procedure).

(9) The decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission invited interested parties to submit their comments on the measures.

(10) The Commission received comments from Italy on 2 December 1999.

(11) The Commission received comments from interested parties as follows:

— by letter dated 2 December 1999, comments from RAI (forwarded to Italy by letter of 6 December 1999),

— by letter dated 19 January 2000, comments from Federazione Radio Televisioni (FRT),

— by letter dated 1 February 2000, comments from Association of Commercial Televisions (ACT),

— by letter dated 28 January 2000, comments from Mediaset.

(12) Comments from interested parties were forwarded to Italy by letters of 6 December 1999 and 23 February 2000. Italy was thus given the opportunity to react; its comments were received by letter dated 5 May 2000.

(13) Late comments were received by letter dated 12 June 2000 from Codacons (Coordination group for associations for the protection of the environment and of the rights of users and consumers).

(14) Meetings with RAI were held at the Commission on 26 January and 4 December 2000.

(15) A meeting with the Italian authorities was held at the Commission on 5 June 2000.

(16) Meetings with Mediaset were held at the Commission on 20 March 2000, 20 June 2000, 2 May 2001, 20 June 2001 and 25 October 2001 and letters from the complainant dated 8 November 2000 and 25 May 2001 were received. At the meeting on 20 June 2001 Mediaset submitted a study on the restructuring of RAI prepared by Charles River Associates. Mediaset also wrote to the Commission on 12 June 2002 and 20 April 2003.

(17) With the entry into force of the Amsterdam Treaty an interpretative protocol on the system of public broadcasting was annexed to the EC Treaty (hereinafter the Amsterdam Protocol).

(18) The Commission communication on the application of state aid rules to public service broadcasting ([4]) (hereinafter the communication) sets out the principles to be followed by the Commission in applying State aid rules to State funding of public service broadcasting.

(19) In the light of the communication, the Commission requested new information from Italy by letter dated 13 September 2002. A meeting with the Italian authorities was held at the Commission on 8 December 2002 and some of the information requested was received on 3 and 11 December 2002.

(20) The Commission also wrote to the Italian authorities on 14 November 2002 requesting a number of documents. The Italian authorities replied on 5 May 2003.

([3]) See footnote 1.

([4]) OJ C 320, 15.11.2001, p. 5.

2. NATIONAL BACKGROUND

2.1. Historical development of the legal basis for public service broadcasting in Italy

(21) After 1910 the Italian State reserved for itself the exploitation of radiotelegraphic services and the right to grant concessions and licences to private or public operators. In 1924 the public radio service was entrusted on the basis of an exclusive licence to URI, which subsequently became EIAR and then RAI. From 1927 the law justified the State monopoly of broadcasting services by reference to their public utility and their educational, artistic and cultural objectives that are in the interests of everyone.

(22) In 1948 the Republican Constitution entered into force and public service broadcasting was given a constitutional foundation in the principle of freedom of speech and in the right of individuals to be informed so as to be able to participate in the democratic life of the country. Radio and television broadcasting continued to be the prerogative of the State on the basis of Article 43 of the Constitution, which refers to essential public services of overriding general interest. RAI was the sole concessionaire by virtue of a series of conventions.

(23) Law No 103 of 14 April 1975 (Nuove norme in materia di diffusione radiofonica e televisiva, hereinafter Law 103/75) codified this situation. It stressed the link between public service broadcasting, Article 43 of the Constitution, the concept of essential public service of overriding general interest and the State monopoly in this sector. Article 15 of Law 103/75, which confirms the substance of Article 7 of Presidential Decree No 180 of 26 January 1952 (hereinafter Decree 180/1952), provided for RAI to be financed through the licence fee, advertising and other revenues established pursuant to the Law.

(24) The broadcasting market changed gradually. During the second half of the 1970s private operators started broadcasting, first at local level and then at national level.

(25) The Constitutional Court endorsed this development. It is not disputed, and it has been stressed by Mediaset itself, that Judgment No 202/1976 was the first judgment by the Constitutional Court that contributed substantially to opening up the Italian broadcasting market to competition. In the case at issue, the Court held that the monopoly of local television and radio broadcasting was unconstitutional, while it confirmed that the State monopoly of national broadcasting was legitimate since this was an essential public service of overriding general interest. Following Judgment No 202/1976 local broadcasters appeared throughout the country. After a number of years, thanks to the use of videotapes or radio connections, they would broadcast the same programme at the same time over a wide area (so-called syndication). The legality of the national broadcasting monopoly was again confirmed on a temporary basis (i.e. until the adoption of an appropriate antitrust law for the broadcasting sector) by the Constitutional Court in 1981 with Judgment No 148/1981, relying on the argument that national broadcasting constituted an essential public service of overriding general interest. During the 1980s the national monopoly basically existed alongside private operators that broadcast at national level through the syndication system.

(26) Law No 223 of 6 August 1990 (Disciplina del sistema radiotelevisivo pubblico e privato, hereinafter Law 223/90), which is the first general law regulating public and private broadcasting, took note of and codified the situation that developed in the broadcasting market during the 1980s. It provided for the possibility for private concessionaires too to engage in broadcasting at national level (and not only at local level), in addition to the public service concessionaire.

(27) Other important provisions of the Law relate to advertising. Article 8(6) established the limit on advertising for RAI and for private concessionaires: advertising on RAI may not exceed 4 % of its weekly broadcasting time and 12 % of any hour, while national private concessionaires cannot exceed 15 % of daily broadcasting time and 18 % of any hour. Article 8(16) imposed a ceiling on RAI's advertising revenues that was removed by Decree-Law 408/1992 with effect from 1 January 1994 ([5]).

2.2. Description of RAI

(28) RAI was originally set up in 1924 as URI (Unione Radiofonica Italiana) and later transformed into EIAR in 1927, RAI (Radio Audizioni Italia) in 1944 and finally, RAI-Radiotelevisione Italiana SpA in 1954. It began its

([5]) Garante per la radiodiffusione e l'editoria, 1995 report, p. 140.

television broadcasting activities on 3 January 1954, with its channel RAI 1, on the basis of Decree 180/1952, which entrusted RAI with broadcasting. Since 1957 its broadcasting signal has covered the whole of Italy. In 1961 it launched a second channel, RAI 2, followed in 1979 by a regional channel, RAI 3. Since 1934 radio broadcasting has been based on a subdivision into three channels: the Primo, Secondo and Terzo programma.

(29) The object of the company, as described in RAI's by-laws, consists in broadcasting, distributing and transferring radio or television programmes and signals over the air, by satellite or by any other means, in establishing, managing, developing and using equipment and other means for the above activity, in producing, acquiring and marketing works, programmes and services capable of constituting the object of the above activity and in carrying out any other operations useful to the conduct of the above activity.

(30) RAI is a public limited company of national importance within the meaning of Article 2461 of the Italian Civil Code. In the period covered by the present decision, its share capital is held entirely by the public sector ([6]). Even though RAI is a public limited company, it is subject to specific regulations. For instance, it is subject to supervision by and directives of the Italian Parliament by way of a dedicated parliamentary commission and, since the entry into force of Law No 203 of 25 June 1993, RAI's board of directors has been appointed by the Presidents of the two chambers of Parliament.

(31) The Convention between the State and RAI of 1 August 1988 (approved by DPR No 367 of that same date and hereinafter the 1988 Convention) lays down that RAI is to operate at least three radio channels and three television channels. One of the television channels may also be used for regional or subregional broadcasting. The Convention between the State and RAI of 1994 (approved by the DPR of 28 March 1994 and hereinafter the 1994 Convention) contains similar provisions, with RAI being required to operate three radio channels and three television channels as well as to devise the necessary means for linking production and distribution. One of the television channels may also be used for regional or subregional broadcasting.

(32) From 1992 to 1995 RAI was entrusted with the provision of public service broadcasting. It also carried out commercial activities not falling within the definition of public service, essentially through separate legal entities, the most important of which were Sipra, Nuova Fonit, Nuova Eri and Sacis.

([6]) The Treasury Ministry currently holds 99,45 % of the share capital.

3. DETAILED DESCRIPTION OF THE MEASURES

3.1. Purpose of the present decision

(33) In its injunction, the Commission mentioned different measures that, according to Mediaset, were contrary to Article 87 of the Treaty, namely:

(a) the licence fee;

(b) the tax exemption on the revaluation of RAI assets;

(c) the conversion of the 1992 and 1993 concession fee into a Cassa depositi e prestiti (hereinafter CDDPP) loan in 1995;

(d) the capital injection for RAI in 1992;

(e) the reduction in the concession fee paid by RAI to the State (from ITL 154 billion to ITL 40 billion);

(f) the factoring operation by Cofiri Factor in 1990;

(g) the Cofiri loan of 1997.

(34) The information received following the injunction led the Commission to the conclusion that the measure at (a) constituted existing aid and that the measures at (e), (f), and (g) did not constitute State aid, while the measures at (b), (c) and (d) are new and may qualify for State aid. Accordingly, with the decision to initiate the procedure, the Commission launched a formal investigation procedure under Article 88(2) in respect of the tax exemption on the revaluation of RAI assets, the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995, and the capital injection for RAI in 1992 ([7]) (hereinafter the ad hoc measures). At the same time, in its decision, the Commission explained in detail why the measures at (e), (f), and (g) did not constitute State aid. The conclusions concerning the measures at (e), (f) and (g) were not challenged before the Court. As the licence fee could rank as existing aid, it was explicitly excluded from the scope of the decision to initiate the procedure.

([7]) Point 74 of the decision to initiate the procedure.

(35) The ad hoc measures covered by the Commission's formal investigation were adopted over the period 1992 to 1995. The present decision thus focuses on the financial relations between RAI and the Italian State during that period.

(36) Like the decision to initiate the procedure, the present decision does not deal with the legal classification of the licence fee or its compatibility with the Treaty. Since the licence fee is considered on a preliminary basis as existing aid, these matters are being dealt with in a separate procedure under Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([8]). However, in order to have a complete picture of the financial relations between the Italian State and RAI over the period covered by the present investigation, the Commission has to take into consideration not only the ad hoc measures but also the financial support granted to RAI by means of the licence fee mechanism. Therefore, it will refer here to the licence fee only to the extent necessary to clarify its reasoning regarding the ad hoc measures.

(37) In addition to the statutory instruments already mentioned, during the period covered by the present investigation relations between the Italian State and RAI were governed by the 1988 Convention, which remained in force until August 1994, and by the 1994 Convention, which entered into force on 1 September 1994.

3.1.1. *Licence fee*

(38) The licence fee is the most important funding mechanism for RAI. The law clearly links the licence fee to the assignment of the public broadcasting service to the concessionaire, RAI. The licence has its origins in RDL No 246 of 1938, converted into Law No 880 of 1938, which introduced the obligation for all owners of an appliance capable of receiving the signal broadcast to pay to the State a licence fee the proceeds from which were allocated by the State to the entity entrusted with the public broadcasting service.

([8]) OJ L 83, 27.3.1999, p. 1.

3.1.2. *Tax exemption on the revaluation of RAI assets*

(39) Decree Law No 558 of 30 December 1993 (Disposizioni urgenti per il risanamento e il riordino della RAI — SpA and hereinafter DL 558/1993) laid down a series of measures for reforming RAI. Its provisions were reproduced in later decrees and eventually converted into Law No 650/1996.

(40) According to Articles 2, 3 and 5 of DL 558/1993, RAI is to revalue the assets entered in its 1993 balance sheet. Any possible positive difference between the revalued assets and those shown in the last balance sheet can be placed in a special reserve. Such operations are exempt from tax and duties.

(41) By revaluing its assets, RAI created a revaluation reserve amounting to ITL 677 billion. It used this reserve to cover accounting losses in 1993.

3.1.3. *Conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995*

(42) As noted in the decision to initiate the procedure, the concession fee is an amount paid by all television broadcasters to the State for using a certain transmission frequency. The 1988 Convention governed the concession fee payable by RAI in 1992 and 1993. The concession fee payable by RAI in 1992 and 1993, which was determined according to Article 24 of DPR 367/1988, totalled around ITL 154 billion per year ([9]). The amount had to be paid within 30 days of RAI's annual budget being approved.

(43) Article 4 of DL 558/1993 stated that the State's credit for the 1992 and 1993 concession fee would be sold to CDDPP, which would then transform the liability into equity if certain conditions were met. Subsequently, Article 4 of DL 134/1995 provided for the possibility of converting the CDDPP credit into a loan. Accordingly, Article 4 of DL 252/1995, which was converted into

([9]) ITL 154 283 billion in 1992 and ITL 154 245 billion in 1993. However, RAI paid ITL 1 560 billion for 1992, leaving an amount outstanding of ITL 152 723 billion.

Law 650/1996, provided for the actual assignment of the State credit for the 1992 and 1993 concession fee to CDDPP and for the transformation of these credits into a loan for RAI ([10]).

(44) On 6 July 1995 CDDPP granted RAI a 10-year loan at a fixed interest rate of 9 %. On 31 December 1997 RAI repaid the entire loan thanks to another loan granted by Cofiri. In the decision to initiate the procedure, the Commission noted that the latter loan complies with market conditions.

3.1.4. *1992 capital injection for RAI*

(45) According to Article 1 of DL No 2 of 2 January 1992, converted into Law No 332 of 1 July 1992, the State granted ITL 100 billion to IRI, which was to transfer the money to RAI. In the parliamentary acts the grant is described as compensation for the insufficient increase in the licence fee for 1992 relative to inflation. On 20 February 1992 IRI transferred the ITL 100 billion to RAI ([11]).

4. COMMENTS FROM INTERESTED PARTIES

(46) The comments submitted by RAI are fundamentally the same as the arguments developed by the Italian authorities and are summarised in recitals 55 to 61. For brevity's sake, they will not be examined in this section.

(47) The arguments of the complainant may be summed up as follows: Mediaset maintains that the tax exemption on RAI's asset revaluation resulted in an advantage for RAI of some ITL 450,6 billion. Moreover, the reserve created following the revaluation was also used to reconstitute RAI's share capital, which should have been subject to a registration tax of 1 %. The exemption from registration tax conferred an advantage of ITL 1,2 billion.

(48) Mediaset is of the opinion that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 constitutes an advantage for RAI in so far as this operation made it possible to reduce the sums that RAI should have paid to the State as the concession fee for 1992 and 1993, including interest.

(49) Mediaset contends that, while the debt for the concession fee was outstanding (i.e. up to 1995), RAI should have paid interest at the statutory discount rate (tasso ufficiale di sconto) plus a penalty of 2,5 %, rising to 5 % after the first month ([12]). When the amounts due for the concession fee were converted into a loan, this penalty rate was not applied and RAI obtained an advantage. Moreover, RAI obtained other advantages because the loan itself carried an interest rate (9 %) that was lower than the market rate (12 %) ([13]).

(50) As for the capital injection, Mediaset claims that this is not consistent with the market economy investor principle and thus constitutes State aid in favour of RAI.

(51) Mediaset further argues that there should be supervision at national level of the performance of the public service task entrusted to RAI. However, in the absence of an effective national body to carry out this role, it falls to the Commission to exercise that supervision ([14]). Mediaset subsequently added that the communication would preclude a finding by the Commission that the public funding of RAI can be considered compatible with the common market simply because there are no indications that the public service is effectively supervised ([15]).

(52) Since its first complaint was lodged on 17 June 1996, Mediaset has argued that RAI is engaged in 'dumping' on the advertising market, with devastating effects for the financing of private broadcasters. In its subsequent complaint of 19 October 1998, Mediaset took the matter further, arguing that RAI was able to offer airtime at below cost in a market that is of secondary importance to it (advertising accounts for only 33 % of RAI's revenues) by financing the cost of the operation with State resources with a view to undermining Mediaset, whose only income is from advertising. This happened in 1993 and 1994 once the ceiling on RAI's advertising revenue was removed ([16]). The number of seconds of advertising broadcast by RAI increased dramatically from 2 823 000 in 1992 to 3 845 000 in 1994.

(53) The Federazione Radio Televisioni (FRT), the association of Italian private broadcasters, observed that RAI operates as a private broadcaster, seeking an audience

([10]) Letter from the Italian authorities of 16 June 1999.

([11]) As a matter of fact, this measure is more in the nature of a grant than a capital injection. Indeed, there was no corresponding increase in capital. However, since this measure has been described as a 'capital injection' from the moment the procedure was initiated, the Commission will retain the wording used.

([12]) Mediaset letter of 28 January 2000.

([13]) Mediaset letter of 8 January 1999.

([14]) Mediaset letter of 12 June 2002.

([15]) Mediaset letter of 20 April 2003.

([16]) Paragraph 10.4.1 of the letter of 19 October 1998.

and advertising revenues. The State aid allows RAI to employ anchormen and acquire interesting programmes, conferring on RAI advantages in terms of audiences and advertising revenues. RAI's behaviour on the market is that of a typical commercial operator seeking to increase its audience in order to attract advertising. Major sporting events too are used to boost already sizable advertising revenues. Other commercial programmes are bought with State resources if they are capable of guaranteeing a large audience and advertising revenues. State aid to RAI has the effect of preventing development of the local broadcasting sector. Regardless of the Amsterdam Protocol, which allows Member States to define as a public service programmes that are intrinsically commercial and to fund them with State resources, commercial television and public television should be clearly distinguished and State financing allowed only for services that are not provided by private broadcasters and are clearly described as having social utility.

(54) According to the Association of Commercial Televisions in Europe (ACT), these measures are undoubtedly capable of adversely affecting competition because some EU broadcasters are already active in Italy. All other broadcasters are potential competitors of RAI. The public broadcasters should be allowed to broadcast only programmes that the market does not provide. Even though, in accordance with the Amsterdam Protocol, the Commission cannot introduce a European measure defining the content and organisation of public service broadcasting, it should still endeavour to demarcate the concept of public service in this sector in line with the case-law of the European Court of Justice.

5. COMMENTS FROM ITALY

(55) The Italian authorities have asserted that the public service task entrusted to RAI extends to all of its programming. This situation stems from the development over time of broadcasting regulations in Italy and from the various provisions in force defining public service broadcasting.

(56) The Italian authorities have argued that the tax exemption on the revaluation of RAI's assets does not constitute State aid for the following reasons:

(a) this kind of tax exemption is a measure that has also been used in connection with the conversion of other public bodies into limited companies (such as IRI, ENEL, ENI and INA) and with certain cases of privatisation in the banking sector. It is not therefore a special measure;

(b) there is no real financial advantage for RAI, simply a recalculation of the value of assets already at its disposal;

(c) private law prohibits asset revaluation. The measure was thus compulsory for RAI, which had no reason to carry out a revaluation. Any possible advantage would therefore not have been intended;

(d) in the past, some laws have provided for optional revaluation of the assets of all undertakings and laid down specific tax treatment: either tax exemption or a substitute duty ([17]).

(e) the tax exemption on revaluation is linked to the restructuring of RAI provided for by DL 558/93.

(57) In the opinion of the Italian authorities, the conversion of the 1992 and 1993 concession fee into a CDDPP loan does not constitute State aid either. The 1995 loan to RAI was indeed granted at market conditions. Bearing in mind that in 1998 RAI obtained a EUR 150 million loan from Comit and Citibank at Libor plus 25 basis points, an interest rate of Ribor plus 60 basis points would have been appropriate for RAI in 1995 since, at that time, RAI was a healthy undertaking. This rate is very close to the rate applied by CDDPP ([18]).

(58) In any case, even if the conversion meant that RAI paid less than what was originally due for the 1992 and 1993 concession fee, a possible reduction would be justified by the disparity between the fee paid by RAI and that paid by private operators in previous years.

(59) According to the Italian authorities, the 1992 capital injection should be considered as part of the licence fee,

([17]) Letter from the Italian authorities of 12 December 2002.

([18]) According to the Italian authorities, a comparison between Ribor + 60 and the interest rate applied by CDDPP shows that RAI saved ITL 5 billion thanks to the CDDPP loan.

because the latter was not adjusted for inflation, and as a measure aimed at covering the cost of the public service task entrusted to RAI. The Italian authorities have also argued that the capital injection complies with the market economy investor principle because after 1993 RAI's economic situation began to improve ([19]). Accordingly, the capital injection is not to be regarded as State aid.

(60) In their letter of 2 December 1999 the Italian authorities contested the fact that RAI advertising prices were higher than those of competitors. RAI has limited advertising time compared with private broadcasters and so has to apply higher prices in order to survive in this competitive market. According to a table annexed to that letter, RAI's average advertising prices in 1993 were consistently and significantly higher than those of Mediaset (30 seconds of advertising at prime times, both day and night).

(61) The Italian authorities and RAI have also claimed that the measures under investigation do not constitute State aid because they are not capable of affecting trade between Member States and compensate RAI for the net additional cost of performing the general service task entrusted to it, i.e. public service broadcasting.

6. ASSESSMENT OF THE AID

6.1. Existence of aid under Article 87(1) of the Treaty

(62) For a State measure to constitute State aid within the meaning of Article 87(1), all the following conditions must be met:

(a) it must be granted by a Member State or through State resources in any form whatsoever;

(b) it must favour certain undertakings or the production of certain goods (selective advantage), thereby distorting or threatening to distort competition;

(c) it must affect trade between Member States.

([19]) The return on equity (ROE) rose from 0,0 in 1992 to 15,7 in 1997.

(63) For each measure, the Commission will examine separately whether the conditions at (a) and (b) are met. It will then consider whether the measures that meet those two conditions also meet the condition at (c). Then it will examine whether the recent case-law of the Court of Justice of the European Community ([20]) affects this analysis.

6.2. State resources, selective advantage and distortion of competition

6.2.1. *Tax exemption on revaluation of RAI assets*

(64) At the time DL 558/1993 was adopted, asset revaluation normally involved the payment of income taxes if the operation resulted in an increase in value ([21]). Accordingly, the tax exemption on the revaluation of RAI assets, while not involving a direct cash outflow, does directly affect the public budget. The State, in fact, forgoes tax revenues to which it has a statutory right and which it would normally have claimed. The Court of Justice has consistently held that: 'A measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty' ([22]). This measure is, therefore, granted through the use of State resources.

(65) This measure is capable of conferring an economic advantage on RAI as it eliminates a cost item from the undertaking's profit and loss account. Any other undertaking would have paid the normal tax rate on the revaluation of its assets and would thus have incurred a cash outflow. By virtue of DL 558/1993, RAI has been able to avoid paying such taxes, thereby benefiting directly from a financial and economic advantage not available to any other undertaking in a comparable situation. Given that competition is distorted whenever aid reinforces the competitive position of the beneficiary

([20]) Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, not yet published.

([21]) See Article 54(1)(c) of DPR No 917 of 22 December 1986: 'Approvazione del testo unico delle imposte sui redditi'. See also Leo, Monacchi and Schiavo, 'Le imposte sui redditi nel testo unico', Giuffré 1990, p. 551.

([22]) Case C-6/97 *Italian Republic* v *Commission* [1999] ECR I-2981, paragraph 16.

undertaking vis-à-vis its competitors, this advantage is capable of distorting competition between RAI and other undertakings ([23]).

(66) The arguments adduced by the Italian State and RAI as justification for the revaluation are essentially the following:

(a) this kind of tax exemption is a measure that has also been used in connection with the conversion of other public bodies into SpAs and with certain privatisation cases in the banking sector. It is not, therefore, a special measure;

(b) there is no real financial advantage for RAI, simply a recalculation of the value of assets already at its disposal;

(c) private law prohibits asset revaluation. The measure was thus compulsory for RAI, which had no reason to carry out a revaluation. Any possible advantage would therefore not have been intended;

(d) in the past, some laws enacted before DL 558/1993 provided for optional revaluation of the assets of all undertakings and laid down specific tax treatment, viz. either tax exemption or a substitute duty ([24]);

(e) the tax exemption on revaluation is linked to the restructuring of RAI provided for by DL 558/93.

(67) The argument at (a) is not pertinent in so far as the fact that a tax exemption might have been applied in other cases (which, moreover, have no similarity with the situation of RAI) does not change the selective nature of the measure at issue, unless it is demonstrated that the measure accords with the general scheme or nature of the system. The Italian authorities have not provided any such evidence.

(68) The argument at (b) cannot be accepted because the advantage lies not in the fact that RAI obtains new assets or in the fact that assets are transferred to a different legal entity, but simply in the fact that the same company (RAI) does not pay taxes that would have been normally applicable in respect of such an operation. RAI's asset revaluation improves its balance sheet and its overall economic situation. Moreover, RAI does not pay taxes that would normally be applicable in respect of revaluation and so a cost item that otherwise would have been present is eliminated from its balance sheet.

(69) Similarly, the argument at (c) cannot be accepted either. According to the case law, the concept of State aid is defined on the basis of the effects of the measure and not on the basis of other characteristics such as the objectives, the scope or the compulsory or voluntary nature of the measure. The fact that the aid is compulsory does not alter the fact that RAI receives an advantage that it would not have received under normal market conditions. In so far as RAI received an advantage from specific tax treatment provided for by the law, the fact that revaluation is not permitted under private law is likewise irrelevant.

(70) The argument at (d) confirms the Commission's analysis of this measure. Before DL 558/1993, other laws provided for favourable treatment for all undertakings in case of asset revaluation. Instead of the normal tax rules being applied, they provided for total exemption or a substitute duty. In the present case, this treatment has been offered only to RAI. Therefore, this measure is selective.

(71) The argument at (e) relates to the compatibility of the measure and does not need to be dealt with in this section.

(72) In conclusion, the tax exemption on the revaluation of RAI assets is granted through State resources, appears to confer an advantage on RAI and is capable of distorting competition.

6.2.2. *Conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995*

(73) As mentioned above, the Commission concluded in the decision to initiate the procedure that the concession fee

([23]) See Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11, and Opinion of the Advocate General, p. 2698; see also Case 259/85 *Italian Republic* v *Commission* [1987] ECR 4393, paragraph 24. See also opinion of the Advocate General in Case C-280/00 *Altmark*, not yet published in ECR, paragraph 103, where it is noted that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition.

([24]) Letter from the Italian authorities of 12 December 2002.

is a payment made by all broadcasting companies to the State for the right to use a certain broadcasting frequency ([25]).

(74) As indicated by the Italian authorities, URI and then RAI had paid a concession fee since 1924 ([26]). The amount payable by RAI for the concession fee totalled ITL 152 703 million in 1992 and ITL 154 245 million in 1993. On the other hand, private broadcasters did not pay any concession fee before Law 223/90. They have since had to pay a fee for a national concession, but the amount differs from that payable by RAI. In the same period the annual fee for a private operator amounted to around ITL 0,5 billion per frequency.

(75) In the decision to initiate the procedure, the Commission concluded that the reduction of the concession fee payable by RAI did not constitute State aid. It observed:

'RAI's concession fee was, at the time the measure was adopted, significantly higher than the fee paid by its competitors (RAI paid ITL 140 billion per year for its concession on three frequencies ([27]), while other broadcasters were charged some ITL 0,5 billion per frequency). […] The reduction in its concession fee has not conferred any economic advantage on RAI since, in fact, it has only partially reduced the burden imposed by the State on the undertaking. […] Therefore, the reduction in the concession fee from ITL 154 billion to ITL 40 billion per year, although it alleviates the burden on RAI, does not constitute State aid within the meaning of Article 87 of the Treaty as it did not confer on the beneficiary any economic advantage over its competitors' or any undertaking in comparable circumstances ([28]).

(76) In line with its conclusion above regarding the reduction in the concession fee, the Commission notes that any operation having the effect of reducing the concession fee payable by RAI in 1992 and 1993 under the 1988 Convention does not constitute State aid in so far as the reduction does not exceed what a private operator in a similar situation would have paid as the concession fee.

(77) It is therefore necessary to check whether the conversion of the 1992 and 1993 concession fee had the effect of reducing the amount payable by RAI for the concession fee in those two years and whether this reduction exceeded what a private operator in a similar situation would have paid as the concession fee. First, it has to be checked whether the amount of the CDDPP loan covers the sums payable for the 1992 and 1993 licence fee plus the interest accrued in the period during which the payment remained outstanding. Second, it has to be checked whether and to what extent the interest rate on the CDDPP loan was below the rate that RAI could have obtained on the market.

(78) As to the first element, it should be recalled that on 6 July 1995 the 1992 and 1993 concession fee was converted into a CDDPP loan granted to RAI for 10 years. The loan amounted to ITL 345 810 892 000, equivalent to the credits assigned to CDDPP and to around ITL 39 billion of interest accrued while the debt for the concession fees was outstanding. In the period during which the sums payable for the licence fee remained outstanding the tasso ufficiale di sconto fell from 9 to 7 % before rising again to 9 % ([29]). According to the Commission's calculation, the amount of interest charged to RAI is slightly higher than that resulting from the mere application of the tasso ufficiale di sconto ([30]).

(79) As mentioned in points 47 to 52, Mediaset contends that, while the debt for the concession fee was outstanding (i.e. up to 1995), RAI should have paid,

([25]) See the decision to initiate the procedure.

([26]) Letter from the Italian authorities of 16 June 1999.

([27]) This decision implicitly refers to the three television channels allocated to RAI but the conclusion would be no different if account were taken of the three radio channels also allocated to RAI.

([28]) Paragraphs 21, 23 and 24 of the decision. The Commission also noted that 'this situation might actually be considered as providing State aid to RAI's competitors as the State renounces part of the concession fee and favours these undertakings over RAI, which pays the full amount'.
It is worth recalling that the complainant did not formally contest this analysis or the amounts of the concession fee payable by RAI and by the private broadcasters. The complainant has not even suggested any justification for the disparity between the concession fee for RAI and that for the private broadcasters.

([29]) For the 1992 concession fee the period during which the debt was outstanding ran from 18 July 1993 (date of approval of the 1992 budget plus 30 days) to 6 July 1995 and for the 1993 concession fee from 23 July 1994 (date of approval of the 1993 budget plus 30 days) to 6 July 1995. The tasso ufficiale di sconto was as follows:

6.7.1993 to 9.9.1993	9,00 %,
10.9.1993 to 21.10.1993	8,50 %,
22.10.1993 to 17.2.1994	8,00 %,
18.2.1994 to 11.5.1994	7,50 %,
12.5.1994 to 11.8.1994	7,00 %,
12.8.1994 to 21.2.1995	7,50 %,
22.2.1995 to 28.5.1995	8,25 %,
29.5.1995 to 23.7.1996	9,00 %.

([30]) In the absence of precise information from the Italian authorities about the calculation of interest accrued while the debt for the concession fees was outstanding, the Commission has calculated the amount of interest on the basis of the *tasso ufficiale di sconto*.

according to Article 27 of the 1988 Convention, interest at the tasso ufficiale di sconto plus a penalty of 2,5 %, rising to 5 % after the first month ([31]). As to non-payment of the penalty, it should be stressed that the provision mentioned by the complainant stipulates that, in the event of any delay in paying the concession fee, RAI is to be subject to interest on arrears, to be added to the statutory rate, of not more than 2,5 %, rising to not more than 5 % after the first month. Therefore, nothing in this provision indicates that the maximum amount of the penalty rate has to be applied since this is at the discretion of the administration, which can apply a penalty ranging from zero to 5 %. The complainant has not provided any information in support of the argument that a given rate has to be applied. In these circumstances, the Commission cannot accept the claim of the complainant according to which, on the occasion of the conversion of the sums payable for the 1992 and 1993 concession fee into a loan granted by CDDPP, RAI obtained an advantage because it did not pay the penalty.

(80) Regarding the second element, it should be borne in mind that the interest rate on the CDDPP loan was fixed at 9 %. The loan was for 10 years but RAI repaid the loan after about two and a half years, on 31 December 1997. According to Banca d'Italia, the rate applicable to medium and long-term loans in the relevant period was: 1995: 11,71 %; 1996: 9,10 %; 1997: 8,28 % ([32]).

(81) As indicated in recital 57, following the decision to initiate the procedure, the Italian authorities argued that the CDDPP loan was granted at market conditions. Bearing in mind that in 1998 RAI secured a EUR 150 million loan from Comit and Citibank at Libor plus 25 basis points, an interest rate of Ribor plus 60 basis points would have been appropriate for RAI in 1995. This rate is very close to the rate applied by CDDPP.

(82) In view of the observations in recitals 73 to 81, it does not appear to be established that the conversion of the concession fee entailed a reduction in the sums that RAI should have paid for the concession fee in 1992 and 1993, including interest. Even if there were such a reduction, given the above circumstances, it is clear that the reduction could not be very substantial. In particular, given the disparity between the fee charged to RAI and that charged to private broadcasters, it follows that the reduction (if any) would not be such as to bring the concession fee paid by RAI for 1992 and 1993 below the concession fee payable by a private operator in a comparable situation in the same period ([33]). Since any operation having the effect of reducing the concession fee payable by RAI for 1992 and 1993 does not constitute State aid provided that the reduction does not exceed what a private operator in a similar situation would have paid as the concession fee, the Commission concludes that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 did not confer on RAI an advantage relative to any other undertaking in comparable circumstances. Accordingly, this measure does not constitute State aid within the meaning of Article 87(1).

6.2.3. *RAI capital injection of 1992*

(83) In February 1992 IRI transferred to RAI on behalf of the State an amount of ITL 100 billion. There is no doubt that this measure entails the use of State resources (the money comes directly from the State budget) and is imputable to the State (it is provided for by a law of the State).

(84) In order to establish whether the injection of capital by the public authorities confers a selective advantage on the recipient (i.e. an advantage that the undertaking would not have obtained under normal market conditions), the Commission applies the market economy investor principle. By its very nature, this principle applies to investments in commercial activities where the State can have the prospect of achieving a return. The present case involves a company whose main activity is classified by the State itself as a public service and is, therefore, financed by the State. The Commission observes that there appears to be a contradiction in the argument of the Italian authorities according to which this transfer of resources should be regarded as a commercial investment when RAI's main activity is not carried out primarily with a view to making profits and generating a return on capital invested.

(85) In any event, even assuming that the Italian authorities have good reason to put forward this argument, it must be pointed out that, in order to assess whether this

([31]) Mediaset letter of 28 January 2000.

([32]) Given the difference between the market rates and the CDDPP rate, it transpires that RAI enjoyed a reduced rate only for about half of 1995. In the most prudent and unlikely scenario (with RAI securing a loan on the market at 11,71 % for two and a half years, without refinancing it when the market rate falls), RAI would have paid about ITL 27 billion more in interest relative to the CDDPP loan.

([33]) Basically, RAI paid more than ITL 300 billion while, if it had to pay the same fee as a private broadcaster, it would not have paid more than ITL 6 billion.

capital injection complied with the market economy investor principle, it is necessary to analyse the business results obtained by RAI in the period before the measure was adopted and its financial prospects estimated on the basis of the market forecasts, as shown in the table below.

Table 1

RAI consolidated data 1990 to 1995

(ITL billion)

	1990	1991	1992	1993	1994	1995
Revenue of which	2 995	3 390	3 629	3 613	4 334	4 435
— advertising	1 026	1 130	1 247	1 193	1 264	1 321
— licence fee	1 650	1 929	2 044	2 123	2 249	2 361
Operating costs	n. a.	n. a.	n. a.	n. a.	(3 285)	(3 342)
Depreciation	(582)	(642)	(767)	(756)	(902)	(852)
Financial charges	(170)	(149)	(224)	(190)	(121)	(55)
Net profit (loss)	(54)	2	0	(479)	(14)	137

NB: 1992 data and 1993 data are not consolidated.
Source: Decision to initiate the procedure.

(86) The table shows that RAI was not a profitable concern in the years before the so-called capital increase. When the Italian authorities decided to inject the capital, a private investor would not have invested in such a company as he could have found a better return with other undertakings or investments. Nor could such a return be expected on the basis of RAI's business prospects or market forecasts.

(87) Moreover, a private investor would not have injected capital into RAI in the absence of a sound, realistic and reasonable business plan substantiating its expectations of the return on investment. In the present case, the Italian authorities have provided no evidence of the existence of such a plan. The only business plan to which the Italian authorities have referred in relation to RAI is the restructuring plan prepared by RAI's board of directors in 1993 and 1994 pursuant to Article 1 of DL 558/93 and finally approved by the Italian authorities in October 1994. The measure in question cannot, however, be linked to that plan since it was taken at the beginning of 1992. Furthermore, this measure was never presented at this time, either by the Italian authorities or by RAI as an investment from which the State expected any return. The Italian authorities indicated in the relevant parliamentary acts that the injection was necessary to compensate for the insufficient increase in the licence fee in 1992 relative to inflation. RAI itself presented the injection as a grant in accounting terms ([34]) and defined it as a *contributo a fondo perduto* ([35]) (outright grant). It should be noted though that, if this measure were to be regarded as a mere subsidy, the selective advantage condition would in any case be met in so far as only RAI received such a grant that improved its financial situation.

(88) Accordingly, the Commission confirms its preliminary conclusion contained in the decision to initiate the procedure that the injection conferred on RAI a selective advantage that it would not have obtained under normal market conditions and that improved its economic prospects by

([34]) See the 1992 profit and loss account (Contributi e/o sovvenzioni d'esercizio).
([35]) See Note sulla gestione relating to RAI's 1993 balance sheet.

providing it with additional financial resources. Given that competition is distorted whenever aid reinforces the competitive position of the beneficiary undertaking vis-à-vis its competitors, this advantage is such as to distort competition between RAI and other undertakings ([36]).

(89) Finally, the Commission is of the opinion that the Italian authorities' argument according to which the injection must be regarded as a part of the licence fee (because it is aimed at compensating for the reduction in the real value of the licence fee) cannot be followed ([37]). Indeed, the injection is clearly a measure distinct from the licence fee and its legal basis has nothing to do with the legal basis of the fee.

(90) In conclusion, the capital injection for RAI in 1992 was granted through State resources and appears such as to confer an advantage on RAI and to distort competition.

6.3. **Effect on trade between Member States**

6.3.1. *Tax exemption on the revaluation of RAI assets and RAI capital injection of 1992*

(91) 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ([38]), even if the beneficiary undertaking is itself not involved in exporting ([39]). Similarly, where a Member State grants aid to undertakings operating in the service and distributive industries, the recipient undertakings need not themselves carry on their business outside the Member State for the aid to have an effect on Community trade ([40]). In line with this case-law, the communication explains that 'State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State.' ([41])

(92) In the present case, RAI is itself active on international markets. Indeed, through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system ([42]). Furthermore, it is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure ([43]).

(93) RAI presents itself as an important international operator active in a competitive international broadcasting market ([44]).

(94) Therefore, the Commission concludes that the measures in question are such as to affect trade between Member States within the meaning of Article 87(1).

([36]) Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11, and Opinion of the Advocate-General, p. 2698; see also Case 259/85 [1987] ECR 4393, paragraph 24. See also the Opinion of the Advocate-General in Case C-280/00 *Altmark*, not yet published (footnote 20), point 103, where the Advocate-General notes that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition. It goes without saying that this conclusion is even more true if the measure in question is considered not as a capital injection but as a mere State subsidy aimed at covering RAI's financial needs (as would seem to be the case from RAI's accounts).

([37]) In the decision to initiate the procedure, the Commission calculated that, in real terms, between 1991 and 1992 RAI lost ITL 25 billion because of the failure to adjust the amount of the licence fee in line with inflation. RAI noted that the licence fee was not adjusted in 1993 either, while the inflation rate was 4,2 %. It argues that in 1993 it lost ITL 90 billion because the licence fee was not updated. However, as explained below, the question is not whether the real value of the licence fee was restored but whether the public aid granted to RAI in the period when the measures under examination were adopted exceeded the net cost of the general service task entrusted to RAI in the same period.

([38]) See *Philip Morris* (footnote 23; paragraph 11) and Case 259/85 (footnote 23; paragraph 11).

([39]) Case C-75/97 *Maribel bis/ter* [1999] ECR I-3671.

([40]) Case C-310/99 *Italy* v *Commission*, not yet reported.

([41]) See the communication, op. cit., paragraph 18.

([42]) See Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others* v *Commission*, not yet published.

([43]) For a more detailed discussion of the effect on trade between Member States, see the decision to initiate the procedure, points 43 to 57.

([44]) See, for instance, presentation of the report by the board of directors on the 1992 budget: 'la fortissima concorrenza sul mercato nazionale e su quelli internazionali …' and the reference framework (general guidelines and objectives) in the board of directors' report: 'nel contesto di forte competizione nazionale e sovranazionale che caratterizza il comparto in cui opera la RAI…'; presentation of the report by the board of directors on the 1994 budget: 'si é ampliata e arricchita nel 1994 la presenza internazionale della RAI, su molteplici fronti …'; introduction to the report by the board of directors on the 1995 budget 'riportare l'azienda ad un ruolo di primo piano sui mercati internazionali'.

6.4. **Real advantage according to the Altmark ruling**

6.4.1. *Tax exemption on the revaluation of RAI assets and RAI capital injection of 1992*

(95) As indicated below, RAI is an undertaking entrusted with the provision of a service of general economic interest (SGEI), namely public service broadcasting. Italy has argued that the measures under investigation compensate RAI for the net cost incurred in discharging the general service task entrusted to it. State measures compensating for the net additional costs of an SGEI do not qualify as State aid within the meaning of Article 87(1) if the compensation is determined in such a way that a real advantage cannot be conferred on the undertaking. In Altmark ([45]) the Court of Justice has indicated the conditions that have to be satisfied in order to escape such classification. These conditions are:

— first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;

— second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;

— fhird, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

— fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate means of production so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(96) '… (A) State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning (of Article 87(1))' ([46]).

(97) Leaving aside for a moment the first and the third condition, the Commission notes that in the present case it does not result that the parameters on the basis of which the financial support granted through these measures (i.e. the possible compensation) is calculated in advance in an objective and transparent manner so as to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Moreover, RAI has not been chosen as the public service broadcasting provider on a basis of a public procurement procedure and it does not appear that the level of compensation needed is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate means of production so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(98) Since all the conditions of Article 87(1) are met and since two of the conditions set out by the Court in Altmark are not, the Commission concludes that the tax exemption on the revaluation of RAI assets and the so-called RAI capital injection of 1992 constitute State aid within the meaning of Article 87(1) ([47]).

([45]) Case C-280/00 *Altmark Trans* (not yet published).

([46]) Op. cit., paragraph 94.

([47]) In the best-case scenario, the measures in question may be of the same kind as those mentioned by the Court in paragraph 91 of the Altmark ruling: 'Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty'.

7. COMPATIBILITY OF THE AID UNDER ARTICLE 86(2) OF THE TREATY

(99) The Court has consistently held that Article 86 may provide for a derogation from the ban on State aid for undertakings entrusted with an SGEI. It has been implicitly confirmed in Altmark that State aid designed to compensate for the costs incurred by an undertaking in providing an SGEI can be found to be compatible with the common market if it satisfies the conditions of Article 86 ([48]). The Court has made it clear that, in order for a measure to benefit from such a derogation, all the conditions of definition, entrustment and proportionality need to be fulfilled. The Commission considers that, where these principles are fulfilled, the development of trade is not affected to an extent contrary to the Community interest. The way these principles apply in the broadcasting sector is explained in the communication.

(100) Accordingly, the Commission has to assess whether or not ([49]):

— public service broadcasting is clearly defined as a service of general economic interest (public service) by the Member State (definition),

— RAI is officially entrusted by the Italian authorities with the provision of that service (entrustment),

— the State funding does not exceed the net cost of the public service, also taking into account other direct or indirect revenues derived from the public service (proportionality).

(101) In carrying out its analysis, the Commission has also to take into account the Amsterdam Protocol, according to which the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. More specifically, Member States have 'the competence to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

7.1. Definition and entrustment

(102) Definition of the public service mandate falls within the competence of the Member States. Given the specific nature of the broadcasting sector, Member States may provide for a wide definition, and the role of the Commission is limited to checking for manifest error ([50]).

(103) As has already been noted, broadcasting was, from the beginning of the 20th century, considered to be a service of general interest and thus reserved to the State. The State monopoly of broadcasting services was justified in the light of their public utility and their educational, artistic and cultural objectives that are of interest to everyone. With the entry into force of the Republican Constitution, public service broadcasting was seen as an activity directly linked to fundamental rights and freedoms and thus reserved to the State on the basis of Article 43 of the Constitution, which refers to essential public services of overriding general interest. RAI was the sole concessionaire. In line with the communication and in the light of these historical legislative elements, the Commission accepts the Italian authorities' claim that in the Italian legal system public service broadcasting was considered to be a service of general economic interest within the meaning of Article 86(2).

(104) During the period covered by the present investigation public service broadcasting was entrusted to RAI under the 1988 and 1994 Conventions.

7.1.1. *Public service concession from 1992 to August 1994*

(105) During these two years relations between the State and RAI were governed by the 1988 Convention, which remained in force until August 1994.

([48]) Altmark (see footnote 20), paragraphs 101 to 109. In those paragraphs the Court examined the question of whether State payments to transport undertakings classified as State aid could be found to be compatible with the common market within the meaning of Article 77 of the Treaty as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. *Mutatis mutandis* this reasoning must apply to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2).

([49]) See point 29 of the communication.

([50]) See points 32 to 39 of the communication.

(106) Article 1 of the 1988 Convention explicitly states that the public broadcasting service is entrusted exclusively to RAI by a concession covering the entire national territory. The service entrusted consists in broadcasting radio and television programmes over the air, by cable, by satellite and by any other means.

(107) As explained above, both the Constitutional Court and Italian legislation justified the State monopoly of national broadcasting on the basis of the concept of essential public service of overriding general interest laid down in Article 43 of the Constitution. Neither the Constitutional Court nor Law 103/75 made any distinction as to the quantity or kind of programming that would fall within the scope of this concept ([51]). Instead, the Constitutional Court referred to information, culture and entertainment in Judgment No 59/1960. By the same token, the 1988 Convention states that the broadcasting of radio and television programmes throughout Italian territory constitutes the public service entrusted to RAI (Article 1). The Commission thus concludes that, as claimed by the Italian authorities, the definition of public service broadcasting in Italy included, under the 1988 Convention, all of RAI's programming activity.

(108) A number of obligations are imposed on RAI as a corollary to its public service task. The 1988 Convention contains obligations concerning investment, quality and coverage of the signal (Articles 9, 10, 15 and 16) and research (Articles 11 and 12).

(109) Another set of obligations and special rules is contained in Law 103/75, which is still in force. It comprises the following:

— a general obligation of objectivity and pluralism (Article 1(2)),

— a specific parliamentary commission determines (Article 1(3) and (4)) the general guidelines that RAI must respect and monitors the broadcasting service provided by RAI,

— the obligation to reserve at least 5 % of total television broadcasting time and 3 % of radio broadcasting time to political parties, religious groups, and unions and the like and to provide them with technical assistance free of charge,

— RAI is required: to set up its transmission facilities and to manage third-party plants close to bilingual areas in order to be able to re-broadcast programmes of foreign operators; to provide television and radio programmes for other countries with a view of disseminating Italian culture and language abroad; and to provide television and radio programmes in German, Ladino, French and Slovenian in regions where such linguistic minorities live (Article 19) ([52]),

— RAI is required to broadcast messages by the President of the Republic, the Presidents of the two chambers of Parliament, the Constitutional Court and the Prime Minister (Article 22).

(110) Article 3 of the 1988 Convention provides for RAI to carry out other activities of a commercial nature (such as discography, sales of programmes, and the exploitation of cinema, theatre and concert rights) ancillary to the public service or in any way linked to the object of the company, in so far as they are not prejudicial to the performance of the public service task. Lastly, in recent years RAI has also been active in the advertising market.

7.1.2. *Public service remit from September 1994 to 1995*

(111) The 1994 Convention has a duration of 20 years. It entrusts public service broadcasting to RAI on an exclusive basis, referring to the service contract as the legal instrument fleshing out the provisions of the Convention itself. Article 3 of the Convention states that the service contract for the period 1994 to 1996 had to be concluded before the end of June 1994.

(112) Article 1 of the 1994 Convention explicitly states that public service broadcasting covering the entire national territory is entrusted exclusively to RAI by means of a concession. The service consists in broadcasting radio and television programmes by any means.

(113) The 1994 Convention lays down general obligations to provide objective, complete and impartial information, to recognise regional diversities, to protect national and regional cultures, and to educate. It also contains some obligations ancillary to the public service task. RAI is required: to ensure the widest possible diffusion of its signal and to respect a minimum programming time; to broadcast free of charge messages of public interest at

([51]) See Articles 1 and 2 of that Law.

([52]) Article 20 provides that RAI is to conclude contracts for valuable consideration with the administrative bodies interested in such services.

the request of the Government; to create a radio service providing traffic information for the national motorway network; to facilitate the utilisation of its services by disabled people (Article 8); to provide special programming for minors (Article 11); to carry out research activity (Article 12); and to establish state-of-the-art television and radio infrastructures that reflect the most advanced technological standards (Article 14).

(114) Even though a service contract should have been concluded before the end of June 1994, the first genuine service contract (hereinafter the '1996 contract') was signed in 1996 and entered into force around the middle of that year. The Commission therefore concludes that the 1996 contract is not relevant for the purpose of defining RAI's public service obligations in 1994 and 1995. To sum up, it appears that RAI's public service remit in 1994 and 1995 was no different from that for the previous two years.

(115) The Commission concludes that, as claimed by the Italian authorities, over the period 1992 to 1995 the definition of public service broadcasting in Italy included all of RAI's programming activity and was accompanied by a number of other ancillary obligations.

(116) As with the 1988 Convention, Article 5 of the 1994 Convention authorises RAI to carry out commercial and editorial activities linked to the diffusion of sound, images and data, as well as other activities linked to the object of the company. These activities cannot prevail over public service broadcasting.

(117) It follows that there are no doubts as to the classification of public service broadcasting as a service of general economic interest, the entrustment of RAI with public service broadcasting and the identification of public service broadcasting with the entire range of RAI's programming. Although the definition of public service broadcasting is of a qualitative and rather wide nature, the Commission, taking into account the interpretative provisions of the Amsterdam Protocol, considers such a 'wide' definition as legitimate ([53]). Moreover, such a definition does not seem to contain any abuses or manifest errors in so far as it does not explicitly include any commercial activities such as advertising or the sale of programmes.

([53]) See point 33 of the communication.

(118) As indicated in point 41 of the communication, it is not sufficient that the public service broadcaster be formally entrusted with the provision of a public service but it is also necessary that the public service be actually provided as mandatory. It is therefore desirable that an appropriate authority monitor its application, especially where the public service task is widely defined and contains quality standards. The presence of an independent monitoring mechanism provides sufficient and reliable indications that the public service is actually provided as mandated. It is therefore a guarantee for the Member States that the task is being performed and may, at the same time, enable the Commission to carry out its tasks under the State aid rules.

(119) In this respect, it is to be noted that RAI is subject to the authority of a specific parliamentary commission ([54]) and to monitoring by Garante per la radiodiffusione e l'editoria ([55]). The powers of that commission are laid down in Article 4 of Law 103/75, which provides, *inter alia*, for the commission to establish the general directives for implementation of the principles set out in Article 1 of that Law and for RAI programmes. The commission checks that these directives are complied with, establishes the general criteria for the formulation of RAI's annual and multiannual expenditure and investment plans, approves RAI's general annual and multiannual programming plans and checks that they are being implemented ([56]). The Garante carries out several tasks that help to ensure that RAI's activity complies with the relevant legal provisions; for instance, it is required to examine RAI's accounts and to monitor compliance with the limits on advertising and audience figures ([57]). Lastly, the Post and Telecommunications Ministry carries out other checks ([58]). The Commission therefore considers that in the period under examination the Italian authorities put in place a system of checks providing sufficient indications that the public service entrusted to RAI was being provided as mandated.

7.2. **Proportionality**

(120) Once it has been established that the task entrusted to RAI is a service of general economic interest and is defined as such by the Member State and that RAI is

([54]) Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi.
([55]) Now Autorità garante per la radiodiffusione e l'editoria.
([56]) See also Articles 2 and 18 of the 1988 Convention.
([57]) See also Article 17 of the 1994 Convention.
([58]) See Article 20 of the 1988 Convention and Article 17 of the 1994 Convention.

officially entrusted by the Italian authorities with the provision of that service, the Commission has to assess whether the State funding of that task exceeds what is necessary to cover the net cost of the public service, taking into account the revenues accruing from the public service task.

(121) Before such an assessment is carried out, it is appropriate to recall the criteria laid down in the communication regarding cost allocation in the broadcasting sector. The communication indicates that costs of the public service activities must be distinguished from the costs of non-public service activities. To this end, it refers to Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings ([59]) and the obligation to keep separate accounts laid down in the Directive. However, the obligation to keep separate accounts for public and non-public service activities did not apply to broadcasting in the period 1992 to 1995. Nor did it apply up to the entry into force of the revised version of the transparency Directive on 31 July 2001. Accordingly, compliance with the transparency Directive is not a matter at issue in the present procedure.

(122) The communication lays down specific rules for the costs that can be allocated to the public service activities on account of the specific characteristic of public service broadcasting. The costs that would be avoided in the hypothetical situation where the non-public service activities were to be discontinued should be allocated to the non-public service activities, separately for each of those activities. This includes the costs that are specific to the non-public service activities and the additional amount of common costs incurred through the use of resources that are also used for the public service, such as personnel, equipment, fixed installations, etc. (points 55 and 56). This method is accepted because of the peculiarities of the broadcasting sector, where a large share of the production that is part of the public service can, at the same time, be exploited commercially ([60]). This is the case with programmes that are defined as a public service but simultaneously generate an audience that permits the sale of advertising or the sale of the programmes to other broadcasters. These costs can be allocated in their entirety to the public service since a full distribution of these costs between the two activities risks being arbitrary and not meaningful ([61]). However, cost allocation with a view to transparency of the accounts should not be confused with cost recovery in the definition of pricing policies or compensation for public service obligations.

(123) Compensation is allowed only for the net costs of the public service task. This means that account must be taken of direct and indirect revenues derived from the public service. In other words, the net advertising revenues generated during the transmission of programmes falling within the scope of the public service task and the net revenues derived from the marketing of such programmes, for example, must be deducted from the total amount of public service costs as determined above.

(124) Moreover, if the revenues from public service activities are deliberately not maximised (for instance, in order to harm competitors), then the net public service costs will be greater and the amount of compensation will be higher than necessary and hence not justified. That means, for instance, that RAI's advertising prices cannot fall below the level that would allow an efficient commercial operator in a similar situation to cover its costs.

(125) The proportionality assessment that the Commission must carry out is therefore twofold. First, the Commission has to calculate the net cost of the public service task entrusted to RAI and ascertain whether or not this cost has been overcompensated. Second, it has to investigate any element at its disposal suggesting that RAI has inflated this cost by deliberately not maximising revenues from the commercial exploitation of the public service activities. In the present case, the complainant has asserted in particular that RAI was 'dumping' on the advertising market, with devastating effects on the financing of private broadcasters, in order to harm Mediaset, whose sole income is derived from advertising. Therefore, the Commission assesses below,

([59]) OJ L 195, 29.7.1980, p. 35. Directive as amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

([60]) In general, if a cost relating to a public service also benefits commercial activities, this cost must be proportionally allocated between the two activities on the basis of appropriate criteria.

([61]) This, however, does not prevent broadcasters from allocating costs on the basis of other accounting principles that are clearly explained, consistently applied and objectively justifiable.

first, whether the net cost of the public service has been overcompensated by the financial support from the State and, second, whether RAI has carried out a pricing policy in the advertising market ([62]) below the level that would allow an efficient commercial operator in a similar situation to cover its costs (hereinafter price undercutting).

7.2.1. *Calculation of the net cost of the public service task entrusted to RAI and comparison with the amount of financial support provided by the State to RAI in the period 1992 to 1995*

(126) As indicated above, in the period 1992 to 1995 RAI carried out some commercial activities through separate legal entities. Following the conclusion that in the same period the service entrusted to RAI embraced the whole of RAI's programming and was accompanied by a number of other ancillary obligations, the Commission notes that the net cost of the public service task entrusted to RAI can be identified, in principle, by deducting from RAI's costs indicated in its financial statements with regard to the public service the revenues received by RAI from its subsidiaries whose activity consists in the commercial exploitation of the public service.

(127) The Commission, in its letter of 13 September 2002, called on the Italian authorities to submit figures on such cost allocation. The Italian authorities did not provide such calculations but sent to the Commission RAI's balance sheet. The Commission has therefore calculated itself the net cost of the public service task. So as not to overestimate the cost, it has included only the costs that appear to be linked to RAI's normal broadcasting activity, excluding the costs that could be linked to the commercial exploitation of the public service or any other commercial activity (it has therefore excluded any cost linked to the activities of RAI's subsidiaries ([63]) or any other cost that appeared to be linked to the commercial exploitation of the public service). Moreover, among the revenues directly or indirectly linked to the public service that have to be deducted from the gross cost of the public service, the Commission has included all revenues derived from commercial activities ([64]).

(128) The Commission has deducted from the net cost of the public service the amount of the State financial support received by RAI in the period 1992 to 1995. This amount includes any revenues from the State identified in RAI's balance sheet. However, it does not include the financial advantage obtained by RAI thanks to the tax exemption on the asset revaluation. Indeed, in the present case that advantage can be considered as compensating for a cost that would otherwise have had to be financed ([65]). In other words, in order to calculate the proportionality of State funding to the net cost of the public service task, it is not necessary in the present case to quantify the advantage obtained by RAI thanks to the tax exemption on the revaluation of the assets specified in RAI's 1993 balance sheet because a higher tax liability would have proportionally increased the net cost of the public service entrusted to RAI (even though it is regrettable, for the sake of transparency and clarity, that this tax liability has not been included in RAI's accounts).

(129) The result of the Commission's calculation is summarised in the following table.

([62]) The Commission has focused its investigation on prices for 'spots', which represent the bulk of the advertising market (and to which the complainant appears to refer), and not for emerging forms of advertising such as 'telepromotions'.

([63]) Since, on the basis of the information contained in RAI's financial statements, it was not possible to distinguish clearly between subsidiaries involved in the provision of the public service and those involved in the commercial exploitation of that service, the Commission has taken a prudent approach, excluding all the cost items present in RAI's profit and loss account and linked to subsidiaries.

([64]) As it is not possible to verify the correctness of the transfer prices between RAI and its subsidiaries on the basis of RAI's financial statements, the Commission has adopted a prudent approach, deducting all the revenues received by RAI from its subsidiaries, including any dividend. For the reason mentioned in the previous footnote, it has made no distinction between subsidiaries involved in the provision of the public service and those involved in the commercial exploitation of that service.

([65]) See Commission aid decision C 2/03 (ex NN 22/02) — State financing of Danish public broadcaster TV2 by means of licence fee and other measures, paragraph 69 (OJ C 59, 14.3.2003, p. 2).

Table 2

Calculation of the net cost of the public service task entrusted to RAI and comparison with the total financial support granted by the State in the period 1992 to 1995

	Gross public service cost	Direct and indirect revenues linked to the public service task	Net public service cost	State funding	Overcompensation (+) or undercompensation (–)
1992	4 171	1 827	2 344	2 354	9,5
1993	4 151	1 550	2 600	2 269	– 331
1994	3 877	1 627	2 249	2 375	125
1995	4 125	1 718	2 407	2 494	87
Total					– 109

7.2.2. *RAI pricing policy in the advertising market*

(130) It should be stressed at the outset that there is general agreement that the television advertising market in Italy is characterised by a low degree of transparency ([66]). Conditions and prices often vary greatly depending on the client. Price lists are indicative in that broadcasters grant discounts that vary according to the total advertising time bought by the client. The average discount is not therefore very significant when it comes to assessing whether the public broadcaster has undercut prices ([67]). The data on advertising prices must thus be interpreted with some caution.

(131) The price of advertising is linked to the audience share of each broadcaster. In the period under investigation RAI's and Mediaset's audience shares were as follows:

Table 3

Average annual audience share as % (24 hours) (*)

	RAI I	RAI II	RAI III	Total RAI	Canale 5	Italia 1	Rete 4	Total Mediaset
1992	18,96	18,27	8,95	46,18	19,56	11,78	11,70	43,04
1993	18,13	17,74	9,34	45,21	20,52	12,48	11,74	44,74
1994	19,91	16,39	10,09	46,39	20,26	12,57	10,76	43,59
1995	22,76	15,50	9,67	47,93	21,21	12,07	9,49	42,75

(*) *Source:* Auditel and Corte dei Conti, 'Relazione sul risultato del controllo eseguito sulla gestione finanziaria della RAI per gli esercizi 1994, 1995 e 1996'.

([66]) See Decision No 6662 by the Italian antitrust authority of 10 December 1998. This view is shared by another Italian autonomous authority, Garante per la radiodiffusione e l'editoria, in its 1995 report (pp. 140 to 143), referring to the absolute opacity of this market. It also notes that radio advertising revenue represents a limited component of the market since the bulk of the market is made up of television advertising. Lastly, it points out that the advertising market is concentrated in the hands of Sipra and Publitalia, respectively RAI's and Mediaset's advertising agency.

([67]) In a letter of 25 May 2001 sent, *inter alia*, to the Commission's Competition Directorate-General, Mediaset acknowledges that it is not possible to provide significant evidence of RAI's discount practices. It further states that on some occasions RAI has granted excessive discounts but it does not identify those cases. Mediaset submitted a table on the average discounts granted by RAI, adding that it is very difficult to measure the effects of individual discounts on the basis of the data concerning average discounts (the table is reproduced below).

Table 4

Average annual audience share as % during prime time (20.30 to 22.30) (*)

	RAI I	RAI II	RAI III	Total RAI	Canale 5	Italia 1	Rete 4	Total Mediaset
1992	20,70	15,92	10,67	47,29	19,96	11,97	11,44	43,37
1993	20,51	15,73	11,74	47,98	19,66	13,04	11,13	43,83
1994	21,43	15,10	11,78	48,31	20,39	13,37	9,72	43,48
1995	24,17	14,13	10,76	49,06	22,21	12,37	8,80	43,38

(*) *Source:* Auditel and Corte dei Conti, 'Relazione sul risultato del controllo eseguito sulla gestione finanziaria della RAI per gli esercizi 1994, 1995 e 1996'.

(132) Article 8(6) of Law 223/90 established the advertising limits for RAI and for private concessionaires. RAI may not devote more than 4 % of its weekly broadcasting time and 12 % of every hour to advertising, while national private concessionaires may not exceed 15 % of daily broadcasting time and 18 % of every hour. Article 8(16) provided for the imposition of a ceiling on the overall amount of revenue that RAI could generate from advertising. This ceiling was abolished by Decree-Law 408/1992 with effect from 1 January 1994.

Table 5

Statutory advertising time for RAI and for private national broadcasters

Advertising	RAI	Private national broadcasters
Hourly	12 ± 2 %	18 ± 2 %
Daily	—	15 %
Weekly	4 %	—

(133) The above table shows clearly that RAI's hourly limit is lower than Mediaset's. Accordingly, the quantity of advertising that RAI can broadcast is also lower. In any case, advertising is an important source of revenue for RAI. Indeed, it represents more than 30 % of its total revenues ([68]). It must also be noted that the abolition of the revenue ceiling does not substantiate Mediaset's claim about RAI's policy of undercutting. Abolition of the revenue ceiling allows RAI to increase its advertising revenue. This, however, is not evidence of price undercutting. On the contrary, the fact that abolition of the ceiling was followed by a significant increase in RAI's advertising revenue seems to be the logical consequence of the removal of a measure (the ceiling on advertising revenue) that limits an operator's commercial behaviour. In fact, such developments in prices and revenue are compatible with a sound commercial strategy that is not anti-competitive.

(134) In particular, it must be pointed out that RAI's commercial strategy in the advertising market appears to have changed over time. Before 1994 RAI was subject to a revenue ceiling which it observed by selling a quantity of advertising below the time set. This suggests that RAI did not pursue a low pricing policy before 1994 but instead chose to observe the ceiling through a combination of relatively low supply and relatively high price, a strategy that influenced to a lesser extent the share of its competitors in the advertising market and was more favourable for viewers ([69]). After the removal of the revenue ceiling, RAI lowered its prices and expanded its sales of advertising space, thereby increasing its advertising revenue. Since the marginal costs of advertising space are very limited, the fact that RAI expanded its revenues from advertising by increasing the quantity does not contradict the view that, also after 1994, RAI followed a sound commercial strategy and is not sufficient to show that prices were set below the level that would allow an efficient commercial operator in a similar situation to cover its costs ([70]).

(135) Furthermore, it should be stressed that Mediaset's observations tend to demonstrate not so much that

([68]) The Garante report of 1995 indicates that between 1993 and 1995 advertising revenue represented 33 % of RAI's total revenue.

([69]) The fact that, while the advertising ceiling was in force, RAI did not sell all the advertising time that it could have sold shows that there was an opportunity for RAI to sell at lower prices and it did not do so.

([70]) The Garante report of 1995 refers to an increase in RAI's advertising spaces from 1993 to 1994, a fall in the average advertising price per minute and an increase in total advertising revenue. The average price per minute in the case of RAI's channels is still higher than that of Mediaset's channels. Its 1996 report confirms the tendency towards more advertising time and higher advertising revenue for RAI in 1994 and 1995.

RAI's pricing behaviour was one of price undercutting but rather that it adopted the rational behaviour of any commercial operator that tries to maximise its advertising revenue. For instance, in a letter of 28 January 2000 Mediaset argued that, without the ceiling, 'now RAI can raise its advertisement prices as and when it wishes with no commercial risk attached'. Second, in its complaint of 19 October 1998 Mediaset makes some statements that would indicate that RAI's advertising practices corresponded to normal commercial behaviour. In paragraph 10.5.1 Mediaset states that 'RAI has progressively modelled its advertising behaviour on Mediaset' or, in even clearer terms, 'RAI has modelled its pricing and marketing policies ever more closely on those of Mediaset's advertisement subsidiary'. Again, in paragraph 10.6.2, 'RAI is encouraged to increase its ratings and audience share through the offer of commercial programmes … in order to maximise advertisement revenues'. In a document of 8 January 1999 Mediaset stated: 'RAI continue to compete to the best of its ability in the advertisement market place, indeed, the government had abolished the ceiling on RAI's revenue from advertisement shortly before ([71]). Lastly, in a letter dated 25 May 2001, Mediaset complains again that RAI's board of directors had decided to adopt an advertisement policy based on a decisively commercial approach ([72]). Similar points were also made by FRT (an association of Italian private broadcasters) in its observations on the opening of the procedure. Now, all these statements suggest that RAI's behaviour in the advertising market has been close to that of other commercial operators and do not point to excessively low prices out of line with those of competitors.'

(136) The complainant has not submitted, despite the Commission's requests, any precise evidence of price undercutting by RAI. On the contrary, it has explicitly acknowledged that it is impossible to provide significant evidence of RAI's discount practices ([73]). The elements submitted by the complainant (two tables attached to its complaint of 19 October 1998) in support of its claim that RAI had undercut advertising prices are not decisive in this respect. The first table concerns discounts and is reproduced below:

Table 6

Average discounts on advertising

	discount Sipra (*)	discount Publitalia (*)
1992	37,28 %	37,68 %
1993	45,50 %	41,04 %
1994	45,32 %	32,99 %
1995	48,26 %	39,98 %

(*) Sipra and Publitalia are respectively RAI's and Mediaset's exclusive advertising agents.

(137) This table shows that the average RAI discount was significantly higher than Mediaset's in the years under investigation. Nevertheless, in the absence of the absolute price charged by RAI and Mediaset and in the light of the characteristics of the advertising market in Italy highlighted above, the table does not prove that RAI has practised price undercutting ([74]) (see recital 144).

(138) The other table submitted by Mediaset (entitled Costo in lire per audience) compares RAI's and Mediaset's prices in April 1998. The table is as follows:

([71]) On 18 May 1999 representatives of the Commission's Competition Directorate-General met with Mediaset, which submitted a document in which it stated that the objective of its complaint was *inter alia* to limit RAI's access to advertising resources. However, according to the communication, public service broadcasters should try to maximise advertising revenues, if only to reduce the need for State compensation. In addition, Mediaset asserted that RAI had violated its advertising limits in 1998 as it sought more financial resources.

([72]) An annex to the complaint of 19 October 1998 contains a collection of public statements by RAI's managers that tend to demonstrate RAI's intention to maintain a high audience share in order to continue to generate high advertising revenues. Indeed, it appears that the maximisation of advertising revenues is a declared policy of RAI, as reaffirmed in different circumstances by RAI's management (see, for example, the ordine di servizio of 26 June 1998 (pp. 4 and 5) attached to the correspondence from the Italian authorities of 16 June 1999). Advertising indeed became an increasingly important source of revenue for RAI in the 1990s.

([73]) Letter of 25 May 2001, mentioned above.

([74]) As admitted by Mediaset itself, the figures for the average discount are not significant when it comes to proving the existence of price undercutting (see footnote 67).

Table 7

RAI's and Mediaset's advertising prices in 1998

Channel	Peak time	Peak rate (30 seconds) (in ITL million)	Peak audience (in ITL million)
RAI I	19.30 — 22.30	104 000	6 705
RAI II	19.30 — 22.30	60 000	2 930
RAI III	19.30 — 22.30	44 000	2 839
Canale 5	20.00 — 22.30	95 000	5 007
Italia 1	20.00 — 22.30	28 000	2 850
Rete 4	20.00 — 22.30	21 000	1 345

(139) Assuming that in 1998 audience shares remained substantially similar to those prevailing in the period under investigation, table 7 does not indicate that RAI undercut prices. Indeed, every RAI channel had a price for advertising that was higher than that of its closest private competitor channel.

(140) In the light of this plurality of elements indicating that RAI did not undercut prices in the advertising market in the years under investigation and in the absence of any precise evidence submitted by the complainant, the Commission has decided that, in order to supplement its analysis, a more detailed comparison should be made of RAI's and Mediaset's advertising prices in the period 1992 to 1995. Indeed, in the light of the similarity between the respective audience shares of RAI and Mediaset and the structure of the two broadcasters (based on three channels) and given that in the relevant period Mediaset ([75]) invariably posted profits (and so should, when it comes to selling advertising space, be considered an efficient commercial operator in a situation similar to that of RAI), the Commission is of the opinion that a comparison between the prices of these two operators is a meaningful proxy for the criteria indicated in point 58 of the communication, whereby the public service broadcaster must not undercut prices in non-public service activities below what is necessary 'to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover'. Accordingly, it has compared the average daily price per contact (hereinafter daily price per contact) and the average prime time price per contact (hereinafter prime-time price per contact) of the two broadcasters. To obtain another indication of RAI's behaviour, the Commission has cross-checked the data and the results of the comparison of prices per contact with the data for the total advertising time and total advertising revenues of the two operators as well as with the amount of advertising broadcast in prime time and the advertising prime-time revenues of the two operators.

([75]) The Commission refers to the economic results of RTI SpA, the legal entity holding the three television concessions and one of RAI's competitors.

(141) Accordingly, the Commission requested the Italian authorities to submit information on the pricing of RAI and Mediaset in the advertising market. The Italian authorities provided this information on 12 December 2002 on the basis of data provided by AGB (leading company in independent audience measurement for advertising transactions) and Nielsen (leading provider of television audience measurement and related services).

(142) The Italian authorities explained that, given the different structure of the advertising limits for RAI (combination of hourly and low weekly limits) and Mediaset (combination of hourly and daily limits), Mediaset tends to reach the limit at any hour of the day, while RAI tends to concentrate advertising in the hours when its audience is higher. For the purposes of the present procedure, the Commission notes that RAI's behaviour is not inconsistent with the objective of revenue maximisation. Indeed, in the presence of a low weekly limit, it is important for maximising revenue that the broadcaster concentrates advertising in the hours when the audience is high.

(143) On the basis of the data provided by AGB, the Italian authorities have submitted two tables comparing RAI's and Mediaset's daily and prime-time price per contact. The tables refer to the price lists of RAI and Mediaset. Prices are in euro per thousand viewers.

Table 8

Daily price per contact

	1992	1993	1994	1995
RAI	2,8	2,5	2,7	2,9
Mediaset	1,9	1,7	1,7	1,9

Table 9

Prime-time price per contact

	1992	1993	1994	1995
RAI	3,2	3,3	3,5	3,7
Mediaset	2,4	2,2	1,9	2,0

(144) The Italian authorities have also provided data on the net price per contact. In order to obtain the net price per contact, they incorporated into the daily and prime-time price per contact the effects of possible discounts granted by the broadcasters, using the average discount calculated by Nielsen. Prices are in euro per thousand viewers.

Table 10

Net daily price per contact

	1992	1993	1994	1995
RAI	1,8	1,4	1,5	1,5
Mediaset	1,2	1	1,1	1,1

Table 11

Net prime-time price per contact

	1992	1993	1994	1995
RAI	2,1	1,9	2	1,9
Mediaset	1,5	1,3	1,3	1,2

(145) From the above tables it can be concluded that both the daily price per contact and the prime-time price per contact of RAI have been constantly higher than those of Mediaset.

(146) As to the data on the total advertising time and total advertising revenues of the two operators, the Italian authorities provided the following information on the basis of data compiled by AGB and Nielsen.

Table 12

Comparison between RAI's and Mediaset's total advertising time and total gross advertising revenue (including agency commissions)

	RAI total advertising time (hours)	RAI total advertising revenue (EUR million)	Mediaset total advertising time (hours)	Mediaset total advertising revenue (EUR million)
1992	794	699	2 735	1 146
1993	864	689	2 940	1 245
1994	1 003	744	3 106	1 278
1995	1 038	787	3 274	1 369

(147) These data show that, with an audience share slightly higher than that of Mediaset, RAI broadcast advertising for almost one third of the broadcasting time of Mediaset and generated revenue equal to more than half of Mediaset's revenue. To sum up, with less time RAI generated proportionally more revenue.

(148) As to the data regarding the amount of advertising broadcast in prime time and prime-time advertising revenues, the Italian authorities have provided the following information on the basis of data compiled by AGB and Nielsen.

Table 13

Comparison between RAI's and Mediaset's total prime-time advertising and total gross prime-time advertising revenue (including agency commissions)

	RAI total advertising time (hours)	RAI total advertising revenue (EUR million)	Mediaset total advertising time (hours)	Mediaset total advertising revenue (EUR million)
1992	121	208	301	370
1993	141	246	318	386
1994	160	254	326	338
1995	157	264	336	351

(149) These data show that, with an audience share slightly higher than that of Mediaset, RAI broadcast prime-time advertising for less than half the time of Mediaset and generated revenue equivalent to more than half (1992) and more than two thirds (1994 and 1995) of Mediaset's revenue. Again, with less time RAI generated proportionally more revenue.

(150) In conclusion, all the elements gathered by the Commission tend to demonstrate that RAI did not adopt a pattern of behaviour consisting in setting prices in the advertising market below the level that would allow an efficient commercial operator in a similar situation to cover its costs. Rather, it appears that this behaviour is consistent with the maximisation of advertising revenue. The complainant has not been able to provide evidence supporting its claim that RAI undercut advertising price (the complainant has not even been able to point to a single episode of price undercutting). Instead, it has supplied statements that tend to prove the opposite, i.e. that RAI operates in the advertising market as a normal commercial operator.

(151) In the light of the foregoing, the Commission concludes that in the period covered by the present investigation RAI has not undercut prices.

8. **CONCLUSION**

(152) The Commission finds that Italy has unlawfully implemented the measures provided for in Articles 2, 3 and 4 of Decree-Law No 558 of 30 December 1993 and in Article 1 of Decree-Law No 2 of 2 January 1992, which was converted into Law No 332 of 1 July 1992, in breach of Article 88(3) of the Treaty.

(153) However, the Commission considers that the aid covered by this investigation has not overcompensated RAI and, therefore, is compatible with the common market within the meaning of Article 86(2).

(154) Moreover, the Commission finds that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 does not constitute State aid within the meaning of Article 87(1),

HAS ADOPTED THIS DECISION:

Article 1

The aid provided for in Articles 2, 3 and 4 of Decree-Law No 558 of 30 December 1993 and in Article 1 of Decree-Law No 2 of 2 January 1992, which was converted into Law No 332 of 1 July 1992, and implemented by Italy for RAI-Radiotelevisione Italiana SpA over the period 1992 to 1995 is compatible with the common market within the meaning of Article 86(2) of the Treaty.

Article 2

The conversion of the 1992 and 1993 concession fee into a loan by Cassa Depositi e Prestiti in 1995 does not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 15 October 2003.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 5 November 2003

concerning aid to the company González y Díez S.A. to cover exceptional costs (aid for 2001 and incorrect use of the aid for 1998 and 2000), amending Decision No 2002/827/ECSC

(notified under document number C(2003) 3910)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2004/340/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) On 2 July 2002 the Commission adopted Decision 2002/827/ECSC ([2]) which ruled that aid to the company González y Díez S.A to cover exceptional costs was incompatible with the common market — aid in respect of 2001 and incorrect use of the aid in respect of 1998 and 2000 — and stipulated the recovery of the said aid.

(2) In a letter dated 19 February 2003 the Commission, after having reexamined the file and its Decision 2002/827/ECSC and having regard to certain arguments presented by the said company in the context of case T-291/02 heard by the Court of First Instance of the European Communities, informed Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty with a view to repealing Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacing the latter by a new final decision.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission gave interested parties the opportunity to make their representations concerning the aid in question.

(4) The Commission received representations from interested parties. It communicated these representations to Spain, providing the opportunity to comment on them, but received no comments.

2. BACKGROUND

2.1. Notification dates

(5) The notification dates prior to aid for the coverage of exceptional costs of the company González y Díez S.A. and the dates of the letters communicating the granting of aid to González y Díez S.A., are as follows:

1998:

(a) prior notification:	31 March 1998
(b) grant of aid:	16 April 1999

2000:

(a) prior notification:	5 October 1999 (supplemented by letters dated 24 July and 8 November 2000)
(b) grant of aid:	19 March 2001

([1]) OJ C 87, 10.4.2003, p. 17.
([2]) OJ L 296, 30.10.2002, p. 80.
([3]) See footnote 1.

2001:

(a) prior notification	21 November 2000 (supplemented by letters dated 19 and 21 March 2001)
(b) grant of aid:	13 May 2002

2.2. **Commission Decisions**

(6) Regarding the aid in 1998: Decision 98/637/ECSC ([4]) authorising a global amount for aid to all companies in the sector in Spain.

(7) Regarding the aid in 2000: Decision 2001/162/ECSC ([5]) authorising a global amount for aid to all companies in the sector in Spain.

(8) Regarding the aid in 2001: Decision 2002/241/ECSC ([6]) announcing that the Commission would decide at a later date on aid to González y Díez S.A.

(9) Decision 2002/827/ECSC did not authorise the aid to González y Díez S.A. notified for 2001. On the other hand the said decision considered that part of the aid granted for the years 1998 and 2000 had been used incorrectly and should be recovered.

2.3. **Letters of information concerning aid to cover exceptional costs of the company González y Díez S.A.**

(10)

Commission:	25 October 1999
Response from Spain:	2 December 1999
Commission:	17 December 1999
Commission:	7 September 2000
Response from Spain:	8 November 2000
Commission:	warning of 24 April 2001
Response from Spain:	29 June 2001
Commission:	17 July 2001
Commission:	14 December 2001
Response from Spain:	28 February 2002
Commission:	10 April 2002
Response from Spain:	24 April 2002

2.4. **Decision No 2002/827/ECSC**

(11) From a material point of view the object of Decision 2002/827/ECSC was, on the one hand, the incorrect use of certain aid received by the company González y Díez S.A. in 1998 and 2000. In effect the Commission considered that the conditions under which that aid had been authorised by Decisions 98/637/ECSC and 2001/162/ECSC had not been respected. On the other hand, Decision 2002/827/ECSC had also ruled on certain notified aid for 2001, which had been advanced by Spain to the company, and which was not considered to be compatible with the provisions of Article 5 of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ([7]). As regards form, Decision 2002/827/ECSC had been adopted on the basis of the ECSC Treaty and within the framework of the procedure laid down in Decision 3632/93/ECSC.

2.5. **Appeal for annulment**

(12) On 17 September 2002 the company González y Díez S.A. presented an appeal against Decision 2002/827/ECSC before the Court of First Instance (case T-291/02).

2.6. **Grounds justifying the reopening of the proceedings**

(13) In light of some of the arguments presented during the said appeal for annulment to the Court of First Instance and after having reexamined the file and its Decision, the Commission expressed its doubts about whether the procedural rules applicable had been fully respected. These doubts relate in particular to whether its letter of 13 December 2001 should be regarded as a letter of formal notice or as advance warning of formal notice. Even though the problems to which the case relates had been mentioned publicly in Decision 2002/241/ECSC published in the *Official Journal of the European Communities* ([8]), the addressee of the letter and the beneficiary of the aid could, in light of the letter's wording, consider that the matter had not officially reached the phase of 'formal notice'. The Commission also indicated that the procedural rules currently applicable to the sectors previously governed by the

([4]) OJ L 303, 13.11.1998, p. 57.
([5]) OJ L 58, 28.2.2001, p. 24.
([6]) OJ L 82, 26.3.2002, p. 11.
([7]) OJ L 329, 30.12.1993, p. 12.
([8]) See footnote 6.

ECSC Treaty, i.e. Article 88(2) of the EC Treaty, as set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([9]), offer better guarantees than those of the ECSC Treaty for full respect of the rights of the Member State, the beneficiary company and all other interested parties. The Commission therefore decided to reopen the formal proceedings with a view to repealing Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacing the latter by a new final decision, and informed Spain thereof in a letter dated 19 February 2003.

3. DETAILED DESCRIPTION OF THE AID

3.1. Aid to cover exceptional costs for the years 1998 and 2000, and its use

(14) Pursuant to Article 5 of Decision No 3632/93/ECSC, Spain granted the company González y Díez S.A. aid totalling 651 908 560 pesetas (EUR 3 918 049.35) for the year 1998 and 463 592 384 pesetas (EUR 2 786 246.34) for the year 2000, to cover exceptional costs resulting from the restructuring of the coal industry and unrelated to current production (liabilities inherited from the past).

(15) That aid was granted to the company González y Díez S.A. to cover the cost of closing down annual production capacities of 48 000 tonnes in 1998 and 38 000 tonnes in 2000. The company's production capacity therefore had to change from 286 000 tonnes per year at the beginning of 1998 to 238 000 tonnes per year by the end of that year and from 238 000 tonnes per year at the beginning of 2000 to 200 000 tonnes per year by the end of that year. Those production capacity cuts were to take place in 1998 at the open-cast mine of Buseiro and in 2000 at the underground mine of Sorriba (subsector Prohida) (26 000 tonnes) and at the open-cast mine of Buseiro (12 000 tonnes).

(16) The plans by the company González y Díez S.A. to cut production capacity in the years 1998 and 2000 were included in the framework of the 'Plan for the modernisation, rationalisation, restructuring and reduction of activity 1998 to 2000', notified by Spain to the Commission and to which the Commission had given its consent in its Decision No 98/637/ECSC in accordance with the principles and objectives of Decision No 3632/93/ECSC. The 1998 to 2002 Plan notified by Spain envisaged global coal production capacity reductions without specifying individual targets for the companies, since these had to submit proposals for the closure of production units, the reduction of production capacity or if necessary both, to be able to qualify under certain conditions for the aid mentioned in Article 5 of Decision No 3632/93/ECSC.

(17) The Commission decided to analyse the granting of aid to González y Díez S.A. to cover exceptional costs in light of the information published in the press as a result of the 100 % acquisition of that company by Mina la Camocha S.A. on 23 July 1998.

(18) The Commission analysed the annual management report for the year 1998 of the company Mina la Camocha S.A. and deduced that on 23 July 1998 the company had acquired 100 % of the shares of the company González y Díez S.A. at a purchase price of 784 439 000 pesetas. The balance sheet of the company Mina la Camocha S.A. on 31 December 1998 indicates financial assets amounting to 784 439 000 in total, entered as 'Holdings in the companies of the group'. On the liabilities side of the balance sheet there is a sum totalling 700 million pesetas entered as 'debts to companies of the group'. Note No 15 of the management report specifies that on 29 and 30 December 1998 the company González y Díez S.A. transferred funds to the company Mina la Camocha S.A. totalling 600 million pesetas and 100 million pesetas respectively.

(19) The annual management report of the company González y Díez S.A. relating to the financial year 1998 shows that the company received State aid totalling 651 908 560 pesetas to compensate its coal production cut by 48 000 tonnes per year. The operating account for 1998 shows a completely exceptional net operational profit of 700 015 591 pesetas. The management report of the company González y Díez S.A. also shows that on 29 and 30 December 1998 funds were transferred to the company Mina la Camocha S.A. in amounts of 600 million pesetas and 100 million pesetas respectively.

(20) The management report of the company González y Díez S.A. explains that on 11 November 1998 the company signed a rider to the contract of 13 March 1998 with Unión Eléctrica Fenosa SA reducing by 48 000 tonnes the quantity of coal it had to supply to Térmica de Soto de la Barca, which thus amounts to 238 000 tonnes per annum for the period 1999-2000. The report makes no reference to closure of installations as a consequence of this cut in production and mentions changes made to the exploitation systems

([9]) OJ L 83, 27.3.1999, p. 1.

which had resulted in a reduction in the activities of open-cast subcontractors, with González y Díez S.A. itself having carried out virtually all the coal extraction activities.

(21) Having analysed the accounts of the company González y Díez S.A. for the financial year 1998, the Commission checked that the aid totalling 651 908 560 pesetas granted to the company to cover the technical costs of closing down extraction installations corresponding to an annual production capacity reduction of 48 000 tonnes was entered in the company's accounts as an operational profit. The Commission was unable to identify the costs related to the annual production capacity reduction of 48 000 tonnes.

(22) The gross operating profit of the company González y Díez S.A. in the financial year 1998 amounted to 998 185 023 pesetas and the net profit in the financial year to 700 015 591 pesetas. The profits for 1998 are far larger than those in previous financial years, which amounted to 141 084 825 pesetas in 1997 and 65 722 182 pesetas in 1996. The result for the financial year 1999 was a loss of 408 740 pesetas. The 1998 profit on 30 June of that year, i.e. before 100 % of the shares of González y Díez S.A. were acquired by Mina la Camocha S.A., amounted to 50 420 961 pesetas.

(23) The transfers of 600 million pesetas and 100 million pesetas from González y Díez S.A. to Mina la Camocha S.A. on 29 and 30 December 1998, respectively, were apparently made possible by the profit González y Díez S.A. earned in the financial year 1998 from the aid to cover exceptional closure costs.

(24) The acquisition of the company González y Díez S.A. by Mina la Camocha S.A. on 23 July 1998 could be explained by the prospect of receiving an extraordinary payment resulting from the State aid expected for reducing the quantities of coal stipulated in the contract between González y Díez S.A. and the electricity company. In effect, according to the management reports the value of the company acquired (González y Díez S.A.) is twice that of the purchasing company (Mina la Camocha S.A.). Moreover, the company Mina la Camocha S.A. has a very weak financial structure: its total assets, worth 22 443 136 000 pesetas on 31 December 1998, represent forty-six times its own capital amounting to 481 403 000 pesetas on the same date. The company Mina la Camocha S.A. is also subject to a closure plan and receives each year aid for the reduction of activity pursuant to Article 4 of Decision No 3632/93/ECSC. For its part, the company González y Díez S.A. receives operational aid each year pursuant to Article 3 of that Decision.

(25) Taken together, the above information therefore indicated:

(a) that the capital of González y Díez S.A. was acquired in total on 23 July 1998 by the company Mina la Camocha S.A. for a price of 784 million pesetas;

(b) that during the course of the financial year 1998 González y Díez S.A. received 652 million pesetas of aid as compensation for a supposed production capacity cut of 48 000 tonnes;

(c) that during the course of the financial year 1998, González y Díez S.A. recorded net profits of approximately 700 million pesetas;

(d) that at the end of 1998 González y Díez S.A. transferred approximately 700 million pesetas to Mina la Camocha S.A.

(26) This information suggests that the aid received by González y Díez S.A. greatly exceeded the costs of the supposed capacity reduction, since they were entered entirely as operational income and these exceptional profits could be transferred to the parent company.

(27) In the report sent by Spain on 2 December 1999 the company González y Díez S.A. acknowledged that the operating profit for the financial year 1998 included aid totalling 651 908 560 pesetas, intended to cover the exceptional closure costs. However, the company González y Díez S.A. stressed that the payments in question were two loans from one company to the other, which were repaid with interest before 2 August 1999. As regards the exceptional closure costs, the company's report does not verify the exceptional costs resulting from the restructuring of González y Díez S.A. In contrast, the report refers to expenditure of 319 896 354 pesetas corresponding to the repayment of loans and subsidies unrelated to the restructuring for the period 1998 to 2000, expenditure of 232 589 000 pesetas on investment in equipment for open-cast operation, and expenditure of 158 973 459 pesetas on investment for the modernisation of the underground mines.

(28) In a letter dated 19 March 2001 Spain informed the Commission that it had granted further aid to González y Díez S.A. totalling 463 592 384 pesetas for the year 2000, to cover the exceptional costs of cutting annual production by 38 000 tonnes in that year.

(29) The Commission analysed the management report of the company González y Díez S.A. for the year 2000 and found that the aid totalling 463 592 384 pesetas had been accounted for as operational income, while it was not possible to identify in the company's accounts the expenditure occasioned by the closure of production capacities. The operational profit in 2000 was 217 383 757 pesetas, so that the accounts would have recorded a loss if the company had not received the aid of 463 592 384 pesetas to cover the costs of production capacity cuts.

3.2. **Aid to cover exceptional costs in the year 2001**

(30) Without the Commission's prior authorisation, Spain granted the company González y Díez S.A. aid totalling 383 322 896 pesetas (EUR 2 303 817) for the year 2001, which was intended to cover the costs of cutting annual production capacity by 34 000 tonnes. This reduction was to take place in 2001 at the underground mine of Sorriba (Prohida subsector). The company's production would change from 200 000 tonnes per year at the beginning of 2001, to 166 000 tonnes per year at the end of that year.

(31) In Decision 2002/241/ECSC the Commission did not rule on aid totalling 394 000 000 pesetas which Spain planned to grant to González y Díez S.A. for the year 2001 (the aid notified exceeded the aid granted) to cover exceptional restructuring costs. The Commission justified its decision not to rule on that aid on the grounds that it was awaiting an analysis of information to be communicated by Spain on the aid granted to the said company for the years 1998 and 2000.

(32) In a letter dated 13 December 2001 the Commission requested Spain to provide information on the aid totalling 383 322 896 pesetas (EUR 2 303 817) that Spain had granted to González y Díez S.A. in 2001.

(33) In letters dated 28 February 2002 and 24 April 2002, Spain sent the Commission the technical reports of González y Díez S.A. dated 13 February and 26 February 2002, on the costs of closing down installations in 2001.

(34) In the letter from González y Díez S.A. dated 26 February 2002, which Spain sent to the Commission on 28 February 2002, the company states that the value of the mining operations abandoned as a result of the reduction of activity in 1998, 2000 and 2001 amounts to 657 700 000 pesetas.

(35) On 13 May 2002 Spain notified the Commission that the aid for 2001 totalling 383 322 896 pesetas (EUR 2 303 817) had already been paid to the company.

4. **REPRESENTATIONS BY INTERESTED PARTIES**

(36) In the context of the present proceedings the company González y Díez S.A. sent its representations to the Commission by means of:

(a) a letter dated 28 April 2003 to the Institute for the restructuring of coal mining (Ministry of Finance), forwarded to the Commission with a letter from Spain dated 30 April 2003 and accompanied by a report endorsed by mining experts and other supplementary documents;

(b) a letter dated 26 May 2003 sent directly to the Commission's Directorate General for Energy and Transport by the law office Uría & Menéndez.

The report endorsed by mining experts responds to the 'request for information' (point 5) of the Commission's decision initiating the present proceedings ([10]).

(37) After some initial considerations on the mining operations at the La Prohida subsector of the Sorriba Group (underground operation) and the Buseiro Group (open-cast operation), the report justifies the costs of reducing activity in the years 1998, 2000 and 2001.

The information submitted is much more complete than that sent to the Commission in the proceedings that led to Decision No 2002/827/ECSC, and includes new elements.

In effect, in the information relating to the present proceedings González y Díez S.A. modifies its presentation of the facts compared with the proceedings leading to Decision 2002/827/ECSC. The company now justifies the expenditures incurred for all the closure operations in the La Prohida subsector of the Sorriba Group, instead of continuing to do this only for the abandonment of 170 000 tonnes above level 3 of the said subsector.

According to this new presentation of the facts, the report endorsed by independent experts says the following (in summarised form) about the expenditures associated with the closure of the La Prohida subsector of the Sorriba Group:

([10]) See footnote 1.

(a) the total length of the galleries dug at level 3 to work the 170 000 tonnes abandoned is 1 030 metres, representing a total cost of EUR 738 523.68 (122 880 000 pesetas);

This work was entered as an operational cost in the company's accounts; for that reason it cannot be identified in the fixed-asset capital of the situation balance on the date of their abandonment;

(b) the total length of the galleries abandoned at level 3 of the La Prohida subsector and which were used for working the reserves above level 3 is 1 640 metres, of which 1 496 metres feature in the register of fixed-assets with a residual value of EUR 610 716.04 (101 614 599 pesetas) on 31 December 2001;

(c) the total length of the galleries abandoned at levels 2 and 4 of the La Prohida subsector is 1 625 metres, of which 1 093 metres feature in the register of fixed assets with a residual value of EUR 395 808.55 (65 857 001 pesetas) on 31 December 2001;

(d) the length of the galleries abandoned at the 1st level assigned to the La Prohida subsector is 490 m; the residual value of these galleries and other assets abandoned in this subsector, as featured in the fixed-asset records, was EUR 1 046 970.83 (174 201 288 pesetas) on 31 December 2000;

(e) thus, the residual value of the entire La Prohida subsector, including the galleries entered in the fixed-asset register and the remaining fixed assets, amounts to 341 672 888 pesetas (EUR 2 053 495.41) according to the company's accounts;

(f) the experts add that of this total nothing was yet imputed to losses of assets in the balance of 22 404 600 pesetas (EUR 134 654.36), of which an amount of 19 417 316 pesetas (EUR 116 700.42) will constitute a loss in the financial year 2003, given that the difference of 2 987 284 pesetas (EUR 17 953.94) is recorded in the financial years 2001 and 2002 as an amortisation;

(g) the report endorsed by independent experts justifies the work to modify the ventilation circuit by the need for the Tres Hermanos subsector to communicate with level 1 of La Prohida; for that reason various inclined planes were created along with other work in the 'Tres Hermanos' sector located at a lower level than La Prohida; the total cost was EUR 602 146 29 (100 188 713 pesetas); the same work was evaluated in the document from Uría & Menéndez at EUR 698 489.70 (16 218 907.20 pesetas);

(h) the refurbishment of the outside at the La Prohida sector incurred expenditure of EUR 61 609.60 (10 250 975 pesetas);

(i) the company provided an allowance in the balance, of EUR 601 012.10 (100 000 000 pesetas) in anticipation of possible expenses incurred on the outside of the mine.

(38) As regards the open-cast mining sector of Buseiro, the report endorsed by independent experts confirms that until 1998 the deposit had been worked integrally, i.e. the overhead and wall veins of seam I. The movements of excavation residues and the mine waste tips produced until now correspond with the integral working of the said seam I.

At the time when the trough of the syncline was worked, it was decided to abandon the wall vein of seam I because of the poor quality of the coal. However, according to the experts in the northern zone of the trough an overburden excavation estimated at 1 005 080 m^3 had already taken place to gain access to the wall vein.

The total cost of earth movement corresponding to this overburden excavation is EUR 1 902 805.52 (316 600 200 pesetas). This expenditure is recorded in the company's accounts as 'operational costs'.

The report confirmed by independent experts includes other expenditure incurred by planning changes, such as:

(a) restoration costs (higher than allowed for) of 24.87 ha, valued at EUR 547 066.46 (91 024 200 pesetas); this cost corresponds to the value of the guarantees signed with the government of the Principality of Asturias; the costs are recorded under the heading 'production costs';

(b) purchase of additional land for mine waste tips, to the value EUR 372 176.75 (61 925 000 pesetas), recorded as fixed assets of the company;

(c) creation of a mine waste tip located on the east side and communication tracks with the west side and its later restoration to accommodate the overburden excavation in the northern zone of the trough, to the value of EUR 1 227 156.65 (204 181 686 pesetas);

The experts consider that those costs could have been attributable in whole or in part to the reduction of activity, and that no data are available to carry out any evaluation of them;

Of this total of EUR 1 227 156.65, an amount of EUR 772 763.27 (128 576 989 pesetas) was attributed to losses of fixed assets in the financial year 2002, and an amount of EUR 249 662.02 (41 540 265 pesetas) to amortisation in the years 1999, 2000 and 2001; the balance of EUR 204 731.36 (34 064 432 pesetas) is still to be written off from the fixed assets;

(d) the report by independent experts verifies that in the financial year 2002 an amount of EUR 1 693 504.15 (281 775 381 pesetas) was allowed as the total amount of the guarantees demanded by the Principality of Asturias, of which EUR 547 066.40 correspond to the restoration of land following the reduction of activity mentioned earlier.

(39) The Commission notes that the experts state in various parts of their report that they were not able physically to visit the workings referred to as being inactive or used for the creation of mine waste tips in the open-cast top excavation zones. The data and reports submitted by the company which the experts were able to check during visits to the mining operations and offices of González y Díez S.A., carry more weight than the others for the purposes of the Commission's analysis. In many cases the experts could do no more than confirm the information submitted by the company.

(40) From a legal point of view, in its communication dated 26 May 2003 the company González y Díez S.A. considers that the Commission does not have the competence to give a ruling. Neither the ECSC Treaty, nor the EC Treaty, nor the Nice Protocol on the financial consequences of the expiry of the ECSC Treaty and the Coal and Steel Research Fund confer such competence upon it. The Commission does not indicate what legal instrument allows it to initiate and determine proceedings on coal aid agreed upon before the expiry of the ECSC Treaty, which occurred on 23 July 2002. The EC Treaty does not empower the Commission to examine aid for coal mining granted by the Member States earlier than 24 July 2002. The general principles of non-retroactivity of legal rules and legitimate expectations go against the application of legal rules to situations that precede their entry into force. No text establishes the possibility of the retroactive application of the EC Treaty to situations earlier than 24 July 2002 and, in particular, to aid for coal mining agreed upon before that date. Consequently, the Commission was not authorised to initiate and decide the said proceedings.

(41) In the opinion of the company González y Díez S.A., the procedure chosen by the Commission is inappropriate for the purpose intended, namely the repeal of Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacement of the latter by a new final decision. The principle of legality would require the Commission to have immediately and officially repealed Articles 1, 2 and 5 of the said Decision. The principle of legitimate expectations would have no relevance, since it would not suit the interested party to maintain them because their repeal would benefit that party. Thus, this procedure would not be the appropriate course for the Commission since Regulation (EC) No 659/1999 does not allow the Commission to repeal the said Decision as part of the formal investigation procedure established in Article 4(4) of the said Regulation. It would only be possible to initiate the formal investigation procedure once Articles 1, 2 and 5 of Decision 2002/827/ECSC had been annuled by the Court of First Instance or, as required by the principle of legality, once they had been officially repealed by the Commission.

(42) The company González y Díez S.A. also communicated the costs deriving from the reduction of its activities, on the basis of the report endorsed by independent experts dated 25 April 2003 and of the reports by the auditors Salas & Maraver dated January 2001 and 28 May 2001, which had been transmitted in the framework of the proceedings that led to Decision No 2002/827/ECSC.

(43) In the opinion of the company González y Díez S.A. the reduction of supplies during the period 1998 to 2002 would have been 125 426.58 t, more than the expected 120 000 t, changing from 286 139.46 t in 1998 to 160 712.88 t in 2002.

(44) González y Díez S.A. considers it necessary to bear in mind that Decision 2002/827/ECSC 'is based on data supplied in the context of the previous proceedings of formal aid investigation' and, as already mentioned, those data have been superseded in light of the present state of complete abandonment of the La Prohida subsector. The letter also says that González y Díez S.A. has totally abandoned the western zone of the open-cast deposit of Buseiro.

(45) González y Díez S.A. adds comments and clarification on the report by the independent experts, among which the following can be emphasised:

(a) González y Díez S.A. criticises the fact that the Commission considers that the 1 005 080 m^3 of overburden excavation might have been overestimated. In the company's opinion this overburden excavation could in reality be 6 687 064 m^3. However, the independent experts had stated that they were unable to quantify the overburden excavation of 1 005 080 m^3 but that, on the basis of information from the company, it can be considered reasonable. In the opinion of González y Díez S.A., 'the company could not amortise the costs deriving from the excess volume of dead rock and soil moved' when the independent experts stated that the expenditure was attributable to 'operating costs' and not to investment.

(b) González y Díez S.A. refers to the cancellation of the contract with Transportes Peral, when in the letter of 8 November 1999 from Mina la Camocha (the owner of González y Díez S.A.), sent by Spain on 2 December 1999, it is stated that there were no installation closures and that González y Díez S.A. had to invest 232 589 000 pesetas to operate with its own resources instead of contracting.

(46) The document from González y Díez S.A. gives information about the acquisition of land for 61 925 000 pesetas, the creation of a mine waste tip on the east side whose residual value on 31 December 1998 was 34 064 432 pesetas, access tracks to the tip, whose residual value on the same data was 170 117 254 pesetas, and the restoration of open-cast workings, of which 91 024 200 pesetas correspond to the restoration of the western mine waste tip. González y Díez S.A. indicates that the said tip is used to store the surplus excavation residue from the western deposit of Buseiro and not only the overburden excavation from the northern zone, which justifies those expenses as a consequence of the operational planning change whose result was that the work carried out to store a larger volume of excavation residue is now no longer necessary. The latter justifies the purpose of the mine waste tip activity and its restoration as a consequence of the abandonment of operations on the west side of Buseiro.

(47) The document from González y Díez S.A. justifies the expenditure at the Buseiro workings on the basis of indent (e) residual costs deriving from legal obligations in the context of land restoration, this being a legal obligation, and indent (k) exceptional intrinsic depreciations, of the Annex to Decision No 3632/93/ECSC.

(48) As regards costs for the abandonment of the La Prohida subsector of the Sorriba Group, the information in the document from González y Díez S.A. coincides with that in the report by independent experts and is justified on the basis of the following indents of the Annex to Decision No 3632/93/ECSC: indent (f) for ventilation shafts, recovery of a crossing and future costs, also partly attributable to indents (l) and (g); indent (k) for the abandonment of the 1 030 m at level 3 and the residual value of the remaining galleries of the La Prohida subsector; indents (f) and (g) for the restoration work at La Prohida.

(49) The document from González y Díez S.A. also includes information on the repayable loan of 313 500 000 pesetas intended for investment projects and granted between 1990 and 1993 in the context of the Strategic Plan for Competitive Action (hereinafter 'SPCA'). The document also states that in the same context non-refundable aid was granted to the company for investment, to the value of 209 million pesetas. The document states that 233 492 186 pesetas were paid in the years 1999–2000 to repay the loan and interest accrued.

The document from González y Díez S.A. gives a detailed description of the Directive from the Ministry of Industry and Energy dated 30 May 1985, regulating the granting of subsidies and aid in connection with the programme of energy resource mining and the objectives of the scheme, which are mainly to promote the production of coal under viable economic conditions, to increase productivity, or to restrict the production costs, of coal treatment installations and of geological and mining prospecting. The document reports on the Agreement signed on 30 December 1999 and the Annexes signed subsequently with the Ministry of Industry and Energy. The objective of the agreement was:

(i) to establish a new system of operation by soutirage after prior improvement of the mining operation;

(ii) to increase annual production to 240 000 tonnes of marketable coal;

(iii) to improve output per worker, and safety; and

(iv) to reduce operating costs.

The total budget amounted to 1 160 million pesetas.

The Agreement signed between González y Díez S.A. and the Ministry of Industry and Energy provided for the granting of the following subsidies for the period 1990 to 1993:

(i) for research and technical development activities: 23 million pesetas, non-refundable (20 % of the investment costs);

(ii) for operating and ore treatment activities: 209 million pesetas, non-refundable (30 % of the investment costs) and 313.5 million pesetas (30 % of the investment costs), as a refundable subsidy.

González y Díez S.A. claims that these last two items of subsidy totalling 209 000 000 and 313 500 000 pesetas respectively were intended for carrying out investments in installations and activities designed to increase mining output: an output that had to be reduced from 1998 onwards at the Buseiro deposit and from 2000 onwards at the Sorriba deposit (La Prohida subsector). González y Díez S.A. claims, in short, that despite undertaking to cut production capacity in 1998 and 2000 at Buseiro and La Prohida, it was in parallel continuing to repay the Spanish Administration amounts of a subsidy initially intended to increase production capacity.

(50) The document from González y Díez S.A. is accompanied by 20 annexes relating to reports, agreements and evidence of payments, which all constitutes more complete information than that submitted before.

5. **REPRESENTATIONS BY SPAIN**

(51) With a letter dated 29 April 2003, Spain sent the Commission a copy of the agreements signed between the then Ministry of Industry and González y Díez S.A. within the framework of the SPCA between 1990 and 1993, and the refundable and non-refundable subsidies granted in that context.

With the same letter Spain sent a copy of the report prepared by the Government of the Principality of Asturias, which is the Spanish authority responsible for mining operations. In its report it says that the precise terms and conditions of the activity reduction presented by González y Díez S.A. are not known. The Government of the Principality of Asturias states that since 1998 all work in the Buseiro sector has taken place at more than 545 m above sea level (a.s.l.).

The company González y Díez S.A. also sent the Commission a letter dated 14 April 2003, which had been sent to it at its request by the Government of the Principality of Asturias, in which it is stated inter alia that since 2001 no coal has been extracted from the Prohida subsector and that since 1 January 2002 the said mine group has remained inactive and abandoned. The letter defines the Prohida subsector as that part of the mine located between level 1, 277 a.s.l., and the surface, taking level 2 at a height of 330 a.s.l., level 3 at 385 a.s.l., and level 4 at 454 a.s.l.

The said letter from the Government of the Principality of Asturias also indicates that it can be inferred from the Work Plans that production fell from 302 423 tonnes in 1997 to 160 686 tonnes in 2002.

In a letter dated 30 June 2003, the Commission invited Spain to comment on the representations made by the interested parties (González y Díez S.A.). Spain did not submit any comments.

6. **EVALUATION OF THE AID, AND CONCLUSIONS**

(52) Having regard to all the information available, including the new data, the Commission has analysed the aid in detail.

6.1. **Legal framework and competence of the Commission**

(53) The ECSC Treaty and the laws adopted for its implementation, in particular Decision No 3632/93/ECSC, expired on 23 July 2002. Until the ECSC Treaty's expiry State aid to the coal industry was examined in relation to the rules established by Decision 3632/93/ECSC. Decisions 98/637/ECSC and 2001/162/ECSC, authorising aid to coal sector companies in Spain for 1998 and 2000, were adopted in that context.

(54) The present Decision relates to events that took place before 24 July 2002, concerning aid subject to the ECSC Treaty system and in an area to which the system of the EC Treaty now applies. Thus, this Decision straddles two successive systems.

(55) The legal approach that the Commission considers applicable in this matter was explained in detail in its Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty ([11]) (2002/C 152/03). The Commission refers to that Communication and in particular to paragraphs 22 to 26 and 45 to 47 for the definition of the applicable legal framework.

(56) The basic principle is that from 24 July 2002 onwards, sectors covered until that date by the ECSC Treaty and by the rules of procedure and law deriving therefrom, become subject to the rules of the EC Treaty and the rules of procedure and law deriving from the latter. From that date the Commission has competence in relation to State aid to the coal industry pursuant to Article 88(2) of the EC Treaty. If the Commission observes that illegal aid has been granted by a Member State or from the resources of a state and that this is incompatible with the Common Market, it decides that the State in question must cease the said aid. The Commission also has the duty to monitor effectively the compliance with its decisions. For that reason the Commission must continue monitoring, both before and after the expiry of the ECSC Treaty, the implementation by Member States of Decisions 98/637/ECSC and 2001/162/ECSC adopted pursuant to Decision No 3632/93/ECSC, and has the power to adopt the necessary measures in the event of incorrect use of the aid.

(57) Communication 2002/C 152/03 is based on the principle that the EC Treaty and the ECSC Treaty are two elements of the same legal system. The EC Treaty is of general application while the ECSC Treaty had a sectoral scope and was therefore an exception from the former. In effect, the relationship between these Treaties is governed by the provisions of Article 305(1) of the EC Treaty, which states that the provisions of the EC Treaty do not affect those of the Treaty Establishing the European Coal and Steel Community, in particular as regards the rights and obligations of the Member States, the powers of the said Community's institutions and the rules laid down in the said Treaty for the functioning of the common market in coal and steel. Consequently, the general Treaty is applicable in all cases where the sectoral Treaty does not apply. Thus, contrary to what is claimed by the company González y Díez S.A., the expiry of the ECSC Treaty cannot result in a legal vacuum since that Treaty is enshrined in a legal system which automatically fills the vacuum produced by the disappearance of one of its elements. In addition it must be stressed that in this case the basic rules applicable by virtue of the ECSC and EC systems, in other words Decision No 3632/93/ECSC and Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid for coal mining ([12]), have virtually the same basic content.

(58) Contrary to what the company suggests in its representations, the 'Nice Protocol on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel' does not resolve the issue of the legal framework after the expiry of the ECSC Treaty in a general way, but rather, provides clarification of a very specific issue (the future use of certain ECSC funds), which bears no relationship to the issues with which the present Decision deals.

(59) The Commission also points out that the 'legal vacuum' theory advanced by the company González y Díez S.A. would lead to results not only erroneous from a legal standpoint but also contrary to the interests of the company itself. In effect, if it were correct that the Commission lacked the competence to repeal its Decision 2002/827/ECSC after the expiry of the ECSC Treaty, it would follow according to the same logic that neither was the Court competent to annul a ECSC Decision after the expiry of the said Treaty. The inevitable consequence would be that Decision 2002/827/ECSC continued to be fully valid and that its legal consequences could not be modified. The Commission considers that this view is simply unsustainable from a legal and logical standpoint.

(60) On the other hand, the company complains that Articles 1, 2 and 5 of Decision 2002/827/ECSC were not immediately repealed rather than initiating the procedure for their repeal. It must be stressed in this connection that a final decision on the appropriateness of revoking those provisions could only be adopted after examining the representations made by Spain, the applicant party and any other interested party. It is obvious that the company González y Díez S.A. would have preferred immediate revocation without prior resumption of the procedure, but such a decision could have prejudiced the rights of other interested parties, for example possible competitors. The withdrawal of a negative decision is a favourable act for the beneficiary of the aid, but it may be prejudicial to the interests of its competitors. For the Commission, this means that such a withdrawal cannot be decided without first offering possible interested parties the opportunity to make their representations.

([11]) OJ C 152, 26.6.2002, p. 5.

([12]) OJ L 205, 2.8.2002, p. 1.

6.2. **Rules of procedure applicable**

(61) The present Decision is being adopted after the expiry of the ESCS Treaty on 23 July 2002. As the Commission explained in detail in points 26 and 45 of its Communication 2002/C152/03, this implies that the procedural rules applicable from 23 July 2002 are those deriving from the EC Treaty: Article 88 of that Treaty, Regulation (EC) No 659/1999 and the procedural provisions of Regulation (EC) No 1407/2002. As explained in point 26 of Communication 2002/C152/03, the basic principle is that the rules applicable are those which were in force at the time of taking the procedural step in question. Consequently, the procedural rules do not have retroactive effect and the rules applicable are those which were in force at the time of the procedure. In other words, from 24 July 2002 the Commission will apply exclusively the procedural rules of Regulation (EC) No 659/1999 in any pending case.

(62) The present Decision is there made within the framework defined by Article 88(2) of the EC Treaty and by Regulation (EC) 659/1999. In particular, as regards the incorrect use of the aid corresponding to the years 1998 and 2000, the procedure applicable is that provided for in Article 16 of the Regulation. Article 10 et. seq. in particular are applicable in respect of the aid for 2001.

6.3. **Funding rules applicable**

(63) As regards the funding rules applicable:

(a) After the expiry of the ECSC Treaty, the Commission will continue monitoring the implementation by Member States of the decisions authorising State aid adopted pursuant to Decision No 3632/93/ECSC, as explained in point 45 of Communication 2002/C152/03. In the event of non-compliance, the case will be dealt with in accordance with the procedure laid down in Regulation (EC) No 659/1999. Consequently, as regards the possible incorrect use of the aid corresponding to the years 1998 and 2000, the Commission will check whether the conditions established in its Decisions 98/637/ECSC and 2001/162/ECSC have been respected. Those Decisions were adopted in 1998 and 2000 on the basis of the ECSC regulations applicable at the time, and they are decisions which continue to be firm and binding. Consequently, in connection with the use of the aid, compliance with the conditions established in the two ECSC Decisions in question must be checked in relation thereto.

In any event, the Commission points out that the conditions contained in the said Decisions refer to the requirements that follow from Decision No 3632/93/ECSC and that those requirements are also contained in Regulation (EC) No 1407/2002, in force since 23 July 2002.

The cost categories that can be covered by the aid to which Article 5 refers are defined in the Annex to Decision No 3632/93/ECSC. In particular, the cost categories to which the Annex refers, which can correspond to 'technical costs of closure', are as follows:

(i) residual liabilities deriving from fiscal, legal or administrative provisions (indent (e) of the Annex);

(ii) additional underground safety work resulting from restructuring (indent (f) of the Annex);

(iii) mining damage provided that it has been caused by pits previously in service (indent (g) of the Annex);

(iv) residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water (indent (h) of the Annex);

(v) other residual costs resulting from water supplies and the removal of waste water (indent (i) of the Annex);

(vi) exceptional intrinsic depreciation provided that it results from the restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation (indent k) of the Annex).

(b) As regards the aid for 2001, which was effectively paid before being authorised, the Commission examined its compatibility in principle in relation to Article 7 of Regulation (EC) No 1407/2002, as explained in point 47 of Communication 2002/C 152/03. When it rules after 23 July 2002 on State aid granted up to that date without its prior approval, the Commission will apply the specific provisions of Regulation (EC) No 659/1999. The Commission points out that as regards the facts to which the present Decision relates, the content of Article 7 of Regulation (EC) No 1407/2002 is virtually equivalent to that of Article 5 of Decision No 3632/93/ECSC. The result of the financial analysis should therefore be similar, although it is

the latter Decision which is being applied. In the event of a possible divergence, the Commission would likewise take into account the principle of legal security to determine the rule applicable.

6.4. **Evaluation**

(64) There is not the least doubt about the aid character of all these measures. For the aid granted in 1998 and 2000, its character as aid is not in dispute and it is merely necessary to check whether the use made of it does or does not comply with the authorising Decisions. In any case it is clear that all these measures satisfy the requirements stipulated in Article 87(1) of the Treaty (and more particularly those stipulated in indent c) of Article 4 of the ECSC Treaty). In effect, they are subsidies which selectively favour certain companies in a particular sector; consequently, they affect competition and trade between the Member States and the funds are clearly from the public purse. Accordingly, the Commission must examine, in their case, their compatibility with the authorising Decisions 98/637/ECSC and 2001/162/ECSC and with the Treaty.

(65) On 31 March 1998 and 5 October 1999 Spain notified to the Commission aid to cover 'technical costs of closure' for the years 1998 and 2000, pursuant to Article 5 of Decision No 3632/93/ECSC.

(66) In its notification of the aid to cover exceptional costs for the years 1998 and 2000, Spain presented a global figure for all privately owned coal companies. Spain's justifiication for this global notification was that it did not know at the time of the notification which specific companies would agree to plans for closure or activity reduction during the course of the year.

(67) In its Decisions 98/637/ECSC and 2001/162 ECSC the Commission authorised global aid to cover the technical costs of closure of the Spanish privately owned companies for the sum of 10 325 millions pesetas for 1998 and 9 959 millions pesetas (EUR 59 854 795,48) for 2000.

(68) The aid authorised by the Commission in its Decisions 98/637/ECSC and 2001/162/ECSC is intended to cover the specific cost categories set out in the Annex to Decision No 3632/93/ECSC, namely:

— the loss in value of fixed assets of companies that have to carry out total or partial closures (indent (k) of the Annex);

— other exceptional costs resulting from the progressive closures related to the restructuring of the coal industry (indents (e), (f), (h) and (i) of the Annex).

(69) In its Decisions 98/637/ECSC and 2001/162/ECSC the Commission requested that Spain grant individual aid to the companies in accordance with the criteria laid down in Decision No 3632/93/ECSC.

In Article 2 of its Decision 98/637/ECSC the Commission stipulated that:

'In accordance with Article 86 of the ECSC Treaty, Spain shall adopt all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under this Decision. It shall ensure that the aid authorised is used for the purposes intended and that any unspent, overestimated or incorrectly used aid for any item covered by this Decision is repaid to it.'

The wording of Article 2 of Decision 2001/162/ECSC is practically identical.

In the justification for its two Decisions the Commission says that:

'Spain must ensure that the aid granted to undertakings to cover exceptional costs is in line with the categories of costs specified in the Annex to Decision No 3632/93/ECSC.'

In addition, in its Decision 2001/162/ECSC relating to the year 2000 the Commission adds in its justification:

'Spain must ensure that, within the framework of the provisions of Article 86 of the Treaty, the aid is limited to that which is strictly necessary in the light of the social and regional considerations which characterise the decline of the Community's coal industry. The aid may not give any economic advantage, whether directly or indirectly, to productions for which no aid is authorised or to other activities distinct from coal production. In particular, Spain must ensure that aid granted to undertakings under Article 5 of Decision No 3632/93/ECSC to cover the technical cost of closure is not used by the undertakings as aid for current production (Articles 3 and 4 of the Decision) and that the closure of capacity for which the aid is intended is definitive and that it is carried out in optimum conditions of safety and environmental protection.'

(70) Aid to cover exceptional costs must in any case meet the criteria of Article 5(1) of Decision No 3632/93/ECSC, namely that it can be regarded as compatible with the common market if its amount does not exceed those costs.

(71) The Commission initially analysed the incorrect application of the aid for the years 1998 and 2000 and the compatibility of the aid for 2001 on the basis of the data submitted by the Member State and by the beneficiary company. The conclusions of that analysis were the logical outcome of the information sent to the Commission. The Commission referred to its Decision No 2002/827/ECSC for a detailed explanation of the said analysis.

(72) In response to the Commission's decision to reopen the formal procedure to examine the aid granted to González y Díez S.A., the company made new representations which included detailed and well documented reports endorsed by new independent experts. The Commission points out that since its first request on 25 October 1999, the company had been given numerous opportunities to provide information about the fate of the aid under examination and that the reports from the company are now much more complete.

(73) Nevertheless, the Commission notes that the new independent experts were unable to verify many of the data concerning activity reduction, since at the time of their report (2003) the works had been abandoned or completed. Those verifications could have been carried out when the Commission asked for the reports on previous occasions, since the works were accessible at that time. For that reason, the Commission must draw its conclusions on the basis of the information sent by Spain on 29 and 30 April 2003, and in previous reports when necessary to obtain a complete picture of the facts.

(74) The company González y Díez S.A. makes a new claim in its document with comments on the decision to reopen the proceedings, arguing that instead of having abandoned 170 000 tonnes in the La Prohida subsector and 585 000 t in the Buseiro sector, what it did was to abandon the La Prohida subsector completely and to abandon totally the western zone of the open-cast deposit of Buseiro.

The Commission considers that the La Prohida subsector, as defined in the letter of 14 April 2003 from the Government of the Principality of Asturias, can be regarded as 'a production unit' for the purposes of Regulation (EC) No 1407/2002 and Commission Decision 2002/871/EC of 17 October 2002, establishing a joint framework for the communication of information needed for the application of Council Regulation (EC) No 1407/2002 on State aid to the coal industry ([13]). However, the western zone of Buseiro does not satisfy that definition if account is taken of the operation project of 1994.

The Commission can, however, accept that the aid to cover exceptional restructuring costs in the La Prohida subsector relate to the total closure of that production unit. The aid analysis carried out by the Commission is in line with Article 7 and the Annex to Regulation (EC) No 1407/2002, which only makes provision for aid for the total closure of production units.

In the case of the partial closure of the Buseiro sector the Commission can continue carrying out the analysis in accordance with the criteria of Article 5 and the Annex to Decision No 3632/93/ECSC, given that an analysis based on the requirement for total closure would be unfavourable to the company and, in the particular circumstances of this case, would conflict with the principle of legality. In effect, given that the final decision on this case should have been adopted before the entry into force of Regulation (EC) No 1407/2002 and that the delay cannot be attributed solely to the company, it would not be compatible with the principle of legality to make the company suffer the negative consequences that would result from a tightening of the basic rules during the said period.

6.4.1. *Aid that can be authorised (partially)*

(75) Now that the plans of the workings abandoned at level 3 of the La Prohida subsector have been analysed, the Commission considers that the value at cost price of the 1 030 metres of galleries needed for the working of the abandoned 170 000 tonnes is excessive. A considerable proportion of those galleries had already been used. Moreover, the construction of those galleries was put down to operation costs and about 40 % of that cost was covered by State aid. The justification put forward by the company for 100 % coverage of the implementation cost is equivalent to an accumulation of incompatible aids. Adopting the most favourable position for the company, the Commission can regard as justified 60 % of the cost of creating the 1 030 metres of galleries, namely EUR 443 114.21 (73 728 000

([13]) OJ L 300, 5.11.2002, p. 42.

pesetas). Part of the aid received during 2000 can be justified on the basis of indents (g) and (h) of the Annex to Regulation (EC) No 1407/2002. The remaining amount of EUR 295 409.47 (49 152 000 pesetas) is not compatible.

(76) The Commission can regard as justified the EUR 610 716.04 (101 614 599 pesetas) corresponding to the residual value of 1 496 metres of galleries abandoned at level 3 of La Prohida, which feature in the record of fixed assets on 31 December 2000. The Commission analysed the company's management report for the year 2001 and verified that this amount features as a loss of fixed assets. The aid is justified on the basis of indent k) of the Annex to Regulation (EC) No 1407/2002. The EUR 610 716.04 (101 614 599 pesetas) can be authorised for the year 2001, the year in which they are written off in the company's accounts.

(77) The Commission can regard as justified the EUR 395 808.55 (65 857 001 pesetas) and the EUR 1 046 170.83 (174 201 288 pesetas) that correspond, respectively, to the residual value on 31 December 2000 of the 1 093 metres of galleries abandoned on levels 2 and 4 and the 490 m abandoned on level 1 of other assets abandoned in the La Prohida subsector. The Commission bases its view on the total closure of that production unit. The Commission analysed the company's management report for 2001 and verified that this quantity is recorded as a loss of fixed assets. The aid is justified on the basis of indent (k) of the Annex to Regulation (EC) No 1407/2002 and the Commission proposes to authorise it against the financial year 2001.

(78) The Commission can authorise the EUR 134 654.36 (22 404 600 pesetas) that the company considers to be outstanding as the value of the difference between the metres of galleries abandoned in the La Prohida subsector and those which had a residual value in the register of fixed assets on 31 December 2000. On the basis of information from the company, the Commission verified that the corresponding assets feature in the register of fixed assets of the company on 31 December 2000. The Commission proposes to authorise that aid against the year 2001.

(79) The Commission can authorise the aid of EUR 61 609.60 (10 250 975 pesetas) for the restoration of the outside of the La Prohida sector. That aid is compatible with indents (h) and (c) of the Annex of Regulation (EC) No 1407/2002, and can be authorised against the year 2001.

(80) After analysing the 'Project for the open-cast working of the Buseiro zone' dated July 1994, submitted as an Annex in the document from Uría & Menéndez, the Commission noted that the Buseiro deposit shows numerous geological irregularities and therefore uncertainties in its future operation. The descriptions given by the independent mining experts of Layer I are partial, given that they correspond only to the southern part of the deposit. The Project mentions the complexity of the western side. As regards the real presence of Layer I, it indicates that this level cannot be worked in some places because of the high ash content, justifies the choice of variant 5 for the determination of reserve volumes and suggests an alternative to arrive at the figure of 450 000 tonnes. The Commission does not agree with the comments by González y Díez S.A. concerning the effect on the additional costs incurred in the Buseiro Group by the technical modifications of that project, and on the contrary accepts the view of the independent experts that the additional costs resulting from the reduction of production are those due to the overburden excavation of 1 005 080 m^3 in the northern zone. The Commission also considers that the said movement of 1 005 080 m^3 of excavation residues was overestimated, since although the independent experts were unable to evaluate that figure, the experts who proposed the report of January 2001 cite 'the experience obtained by the partial working of the bottom of the syncline in the northern zone (the only one in which the bottom was reached) where the coal ash in that vein (the wall vein) ranges between 40 % and 60 %'. After analysing the technical studies, the Commission concludes that the only expenditure attributable to activity reduction in the Buseiro sector is that corresponding to the overburden excavation in the northern zone, with its corresponding associated restoration costs in the external mine waste tip. The Commission also considers that the change of plan was due to geological factors already taken into account in the original project and that the extra costs due to those geological factors should in no case be covered by additional aid, since the company has received operational aid every year.

(81) The movement of earth involved in the overburden excavation of 1 005 080 m^3 was counted as an operational cost by the company, as is normal practice. Given that the company received aid to cover open-cast operational losses, which was of the order of 27 % of the production cost, the Commission, adopting the hypothesis most favourable to the company, can only authorise 73 % of the EUR 1 902 805.52 (316 600 200 pesetas). The Commission considers that it can authorise this aid against the year 1998. The aid is compatible with indent (i) of the Annex of Regulation (EC) No 1407/2002. Consequently, the Commission considers that the sum of EUR 513 757.49 (85 482 054 pesetas) is not compatible.

(82) The Commission considers that the attribution of the total residual value of the formation of the western mine waste tip and the access tracks as a loss due to the reduction of activity is excessive, since the possibility of abandoning the western side had been foreseen in the July 1994 plan and, to quote form the 1994 plan, 'raising the bottom of the cutoff automatically makes available more than sufficient capacity for internal dumping, since the total volume of dead rock is decreased and it can be disposed of in a large cavity at the north end present in the base at a height of approximately 530 a.s.l.'. However, given that the western mine waste tip was abandoned, and in view of the difficulty of evaluating the real cost that should be attributed to the reduction of activity at Buseiro, the Commission adopts the position most favourable for the company and therefore proposes to authorise the aid of EUR 204 731.36 (34 064 432 pesetas) and the aid of EUR 1 022 423.30 (170 117 254 pesetas) corresponding respectively, to the residual value of the creation of the mine waste tip and the access tracks on 31 December 1998. The Commission can authorise that aid against the years 1998 and 2000 on the basis of indent (i) of the Annex to Regulation (EC) No 1407/2002.

6.4.2. *Aid that cannot be authorised*

(83) The aid amounting to EUR 602 146.29 (100 188 13 pesetas) was intended for the creation of shafts and other work to provide ventilation for the 'Tres Hermanas' sector of the Sorriba group. That expenditure corresponds to investments in mining infrastructure necessary for the working of the 'Tres Hermanas' group. Expenditure on new investments cannot be regarded as liabilities inherited from the past within the meaning of Regulation (EC) No 1407/2002, nor in accordance with Decision No 3632/93/ECSC. On the other hand, as can be deduced from its notification of 19 December 2002 concerning the 2003 to 2007 plan for the restructuring of the coal industry, Spain does not intend to grant aid for investments of the type envisaged in Article 5(2) of Regulation (EC) 1407/2002. Such investment aid would moreover be incompatible with the aid to cover operating losses of the Sorriba group which Spain is granting to González y Díez S.A. Neither does the aid correspond to indent (l) of Section I of the Annex to Decision No 3632/93/ECSC. That category of aid is not included in the Annex to Regulation (EC) No 1407/2002 in accordance with which the Commission is currently analysing aids, but neither would it be compatible with indent (l) of Section I of the Annex to Decision No 3632/93/ECSC given that the investment referred to relates to working the reserves in the 'Tres Hermanas' subsector.

(84) The Commission cannot authorise the aid of EUR 601 012.10 (100 000 000 pesetas) to make provision for the coverage of future costs incurred by surface damage due to the closure of the La Prohida subsector. The Commission observes that this provision and the corresponding sum were not included at all in the notification of the aid planned by Spain for 2001. Moreover, this sum exceeds the amount notified (and paid in advance) by Spain for that year. Consequently, the Commission cannot declare it compatible in this Decision.

(85) The costs amounting to EUR 547 066.46 (91 024 200 pesetas) corresponding to the agreements signed with the Government of the Principality of Asturias to guarantee the restoration of land after open-cast operation, are part of the production costs of coal extracted in the western zone of the Buseiro group. In effect, land restoration is the final part of the production cycle of an open-cast mine and the cost of that restoration is a component of the total cost of the coal extracted. In the case of the Buseiro gangue heap, the company does not provide justification that abandonment of the mine waste tip involves additional restoration costs and, on the contrary, it justifies those expenses on the basis of the legal obligation established by Royal Decree 1116/1984 of 9 May and the Order of the Ministry of Industry and Energy dated 13 June 1984 developing it, which establishes that after operations, the areas affected must be restored. The company has received State aid to cover all operating losses, including the restoration of the open-cast mine of Buseiro. The new aid would be on top of that received to cover operating losses and the Commission cannot authorise the aid amounting to EUR 547 066.46 (91 024 200 pesetas).

(86) The land acquired by the company for open-cast mining is registered among the company's fixed assets, but is not an asset that depreciates. The Commission cannot authorise the aid amounting to EUR 372 176.75 (61 925 000 pesetas) corresponding to the purchase price of the land, since this is not considered to be a lost asset and the aid is not covered by any of the points of the Annex of Regulation (EC) No 1407/2002.

(87) The refundable and non-refundable subsidies received by González y Díez S.A. in the context of the SPCA Agreement signed on 30 December 1989 with the Ministry of Industry and Energy, were intended to finance projects whose purpose is to promote coal production under economically viable conditions and to increase productivity. The loans were received during the period 1990 to 1993 when the projects were implemented. According to what can be deduced from Annex III of the agreement signed, the refundable loan of 313 500 000 pesetas was mainly intended for the establishment of the new system of operation by 'soutirage', which was and continues to be used by the company according to the report by independent experts, Annex III of the SPCA Agreement also refers to

'clear indications of exceptional open-cast operations, which would enhance the estimated profitability of the whole' and of an annual production target of 260 000 marketable tonnes, which was exceeded. The payment of 233 492 186 pesetas (EUR 1 403 316) in the years 1999 and 2000, however, corresponds to the repayment of loans received between 1990 and 1993, and is unrelated to the company's activity reduction plan notified to the Commission for the period 1998 to 2001. The Commission also points out that the payments made by the company in 1999 and 2000 are much higher than envisaged in the initial plan owing to the payment delays, as emerges from the letter of the Ministry of Industry and Energy (MINER) sent by registered post on 22 December 1997 and other documentation sent to the Commission. The Commission also points out that the refundable loan of 313 500 000 pesetas was accompanied by a non-refundable subsidy of 209 million pesetas and by another non-refundable subsidy of 23 million pesetas for research and technological development activities. In addition to these capital subsidies, the company received each year aid to cover approximately 40 % of the underground operation production costs and 27 % of the open-cast operation production costs. As explained earlier, the Commission proposes to authorise the entire residual value on 31 December 2000 of the fixed assets in the La Prohida subsector and in a substantial part of the Buseiro sector. The aid amounting to 233 492 186 pesetas (181 292 186 pesetas in 1998 and 52 200 000 pesetas in 2000) corresponding to the repayment of SPCA subsidies, which could include investments in mine works in the La Prohida subsector, would result in an accumulation of aid incompatible with the common market. Accordingly, the Commission cannot authorise that aid.

(88) Even if it considers that the reduction of coal deliveries is not the criterion for the granting of aid intended to cover exceptional restructuring costs, the Commission finds that it cannot agree with the view expressed by González y Díez S.A. on the reductions made, since the deliveries in 1997 and 1998 are higher by approximately 15 000 tonnes than those the company was providing in previous years.

(89) The Annex shows the aid authorised and the aid not authorised.

6.4.3. *Conclusions on the incorrect use of the aid granted by Spain 1998 and 2000*

(90) After analysing all the information available, the Commission notes that the aid received by González y Díez S.A. to cover exceptional costs of restructuring pursuant to Article 5 of Decision No 3632/93/ECSC, totalling 651 908 560 pesetas in 1998 and 463 592 384 pesetas in 2000, is recorded in the company's accounts as operating costs, thus generating exceptional gross operating profits, in 1998 and 2000, of 998 185 023 pesetas and 217 383 752 pesetas respectively. The net operating profits after taxes, without aid to cover exceptional costs, were 277 177 852 pesetas in 1998 and probably negative in 2000.

(91) The Commission notes that as a consequence of the use of the aid to cover exceptional restructuring costs (Article 5 of Decision No 3632/93/ECSC) as operating aid (Article 3 of Decision No 3632/93/ECSC), the company's own funds increased from 787 009 112 pesetas on the date of acquisition by Mina la Camocha S.A. to 1 624 447 451 pesetas on 31 December 2000, and that this increase occurred as a result of the exceptional profits in 1998 and 2000.

(92) The Commission considers that the aid granted to González y Díez S.A. for the years 1998 and 2000 pursuant to Article 5 of Decision 3632/93/ECSC exceeds the costs incurred by the restructuring carried out in 1998 and 2000 in accordance with Article 3 of that Decision, and was consequently not used for the purposes for which it had been authorised by the Commission.

(93) Neither during the proceedings that gave rise to Decision 2002/827/ECSC nor in the present formal infringement proceedings has the company González y Díez S.A. justified the origin of the exceptional profits between 1998 and 2001, which brought about the equivalent increase of its own funds. The company acknowledges, in its letter to its owner Mina la Camocha dated 11 November 1999, sent by Spain on 2 December 1999, that 'in no case was the aid intended to compensate costs of any nature and that the profits of the financial year 1998 include the aid of 651 908 560 pesetas granted by the MINER'.

(94) The Commission considers that the company González y Díez S.A. made incorrect use of the aid granted by Spain in 1998 pursuant to 98/637/ECSC, and in 2000 pursuant to Decision 2001/241/ECSC, totalling 521 075 440 pesetas (EUR 3 131 726.47), broken down as follows:

(a) Galleries created and not used:	49 152 000 pesetas	(EUR 295 409.47)
(b) Restoration of open-cast areas:	91 024 200 pesetas	(EUR 547 066.46)
(c) Value of open-cast land:	61 925 000 pesetas	(EUR 372 176.75)
(d) Overburden excavation in the northern zone:	85 482 054 pesetas	(EUR 513 757.49)
(e) Repayment of SPCA subsidies:	233 492 186 pesetas	(EUR 1 403 316.30)

6.4.4. *Conclusions on the aid to cover exceptional costs in 2001*

(95) In a letter dated 19 March 2001 Spain notified the Commission about aid to cover 'technical costs' in respect of closure, which it intended to grant to various companies during the financial year 2001, among which González y Díez S.A. was included with an amount of 393 971 600 pesetas (EUR 2 367 817).

(96) In its Decision 2002/241/ECSC the Commission did not rule on the above aid and announced that it would not do so until it had analysed the information provided by Spain in response to the Commission's questions on aid for the years 1998 and 2000.

(97) In its letter of 13 May 2002, Spain informed the Commission that it had granted the company González y Díez S.A. aid totalling 383 322 896 pesetas (EUR 2 303 817) to cover the technical costs of reducing annual capacity by 34 000 tonnes.

(98) The granting of that aid by Spain was not in line with Article 9(4) of Decision No 3632/93/ECSC, which establishes that:

'Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the specific criteria established by Articles 3 to 7.'

(99) Consequently, the aid of 383 322 896 pesetas (EUR 2 303 817) granted by Spain to González y Díez S.A. for the year 2001 is illegal.

(100) The Commission carried out a first evaluation of the compatibility of the aid of 383 322 896 pesetas (EUR 2 303 817), based on elements derived from the reports by González y Díez S.A. and in particular those of 13 February 2002 and 26 February 2002, sent by Spain respectively on 28 February and 24 April 2002.

(101) On 22 August 2002 the Commission received the management report of the company González y Díez S.A. for 2001, in response to its request for the annual reports of all the companies in order to check compliance with the provisions of Article 2(3) of Decision No 3632/93/ECSC.

(102) The management report of González y Díez S.A. for 2001 records 383 322 896 pesetas as 'extraordinary income' and justifies 'extraordinary expenditure' amounting to 389 268 288 pesetas in the following way: 319 268 288 pesetas as the residual value of the La Prohida subsector (Sorriba sector) and 70 000 000 pesetas as provision for expenses related to the abandonment of mining works to be effected in 2002. That aid is therefore correctly entered in the accounts of the company González y Díez S.A. Nevertheless, its compatibility with Article 7 and the Annex of Regulation (EC) No 1407/2002 must be examined.

(103) In response to the initiation of the present formal infringement proceedings, the Commission received new information from Spain about the aid.

(104) As a result of the analysis carried out by the Commission, aid totalling 374 328 463 pesetas (EUR 2 249 759.37) can be considered compatible with Article 7 of Council Regulation (EC) No 1407/2002, broken down as follows:

(a) Residual value of galleries used at level 3:	101 614 599 pesetas	(EUR 610 716.04)
(b) Residual value of the rest of the abandoned galleries on levels 2 and 4:	65 857 001 pesetas	(EUR 395 808.55)
(c) Residual value of level 1 galleries and other assets abandoned in the La Prohida subsector:	174 201 288 pesetas	(EUR 1 046 970.83)
(d) Lost value of abandoned assets not counted in 2001:	22 404 600 pesetas	(EUR 134 654.36)
(e) Exterior restorations:	10 250 975 pesetas	(EUR 61 609.60)

(105) The aid totalling EUR 602 146.29 (100 188 713 pesetas) to González y Díez S.A. for mine investments and infrastructures needed for the operations at the 'Tres Hermanas' group of the Sorriba group is incompatible with Article 7 of Regulation (EC) No 1407/2002, since the new investments cannot be regarded as liabilities inherited from the past. Moreover, investment aid of that nature would be incompatible with the aid provided to cover operating losses at the Sorriba group, which Spain on the other hand granted to González y Díez S.A.

(106) As regards the inclusion in the company's balance for 2001 of a provision amounting to EUR 601 012.10 (100 000 000 pesetas) to cover exceptional restructuring costs to be incurred in the future by the closure of the La Prohida subsector, the partial closure of the Buseiro sector, or both, the Commission points out that this provision and the corresponding amount had not been included at all in the notification of aid envisaged by Spain for 2001. Moreover, this sum exceeds the sum notified (and paid in advance) by Spain for the said year. Consequently, the Commission cannot declare it compatible in the present Decision.

(107) The Commission considers that the aid of 8 994 433 pesetas (EUR 54 057.63) granted by Spain to González y Díez S.A. for 2001 exceeds the closure costs, and is consequently incompatible with the common market.

6.4.5 *Recovery*

(108) Pursuant to Article 16 and Article 14(2) of Regulation (EC) No 695/1999, the aid corresponding to 1998 and 2000 that has been deemed incorrectly used in relation to Decisions 98/637/ECSC and 2001/162/ECSC must be repaid by the beneficiary company. It should be pointed out that these authorising Decisions (98/637/ECSC and 2001/162/ECSC) indicated very clearly that the aid authorisation was explicitly conditional upon its actual correspondence with certain categories of closure costs. In effect, these Decisions specified that the aid to cover exceptional costs had to satisfy the requirements of Article 5(1) of Decision No 3632/93/ECSC, which implied that its amount cannot exceed those costs. Given that the authorisation was subject to conditions and that the conditions imposed were not satisfied in the case of the aid examined in the present proceedings, any possible invocation of the principle of legitimate expectations is automatically excluded.

(109) Similarly, pursuant to Article 14(2) of Regulation (EC) No 659/1999, the aid for 2001 already paid and that has been declared incompatible in this Decision must also be repaid by the beneficiary company. Given that this aid was provided illegally before having been authorised by the Commission, any possible invocation of the principle of legitimate expectations is automatically excluded.

6.4.6. *Amendment of Decision 2002/827/ECSC*

(110) Decision 2002/827/ECSC can consequently be amended, by repealing some of its Articles,

HAS ADOPTED THIS DECISION:

Article 1

The State aid totalling EUR 3 131 726.47 granted by Spain to the company González y Díez S.A. to cover exceptional restructuring costs for the years 1998 and 2000 pursuant to Article 5 of Decision 3632/93/ECSC constitutes an incorrect application of Decisions 98/637/ECSC and 2001/162/ECSC and is incompatible with the common market.

Article 2

The State aid totalling EUR 2 249 759.37 (374 328 463 pesetas) granted by Spain to the company González y Díez S.A.to cover, for the year 2001, exceptional costs of closure incurred during the period 1998 to 2001 is compatible with Article 7 of Regulation (EC) 1407/2002.

Article 3

The following State aid that Spain intends to grant the company González y Díez S.A. is incompatible with Article 7 of Regulation (EC) 1407/2002:

(a) an amount of EUR 602 146.29 (100 188 713 pesetas) for the year 2001, intended for investments in mining infrastructure for the working of the 'Tres Hermanas' group of the Sorriba group;

(b) an amount of EUR 601 012.10 (100 000 000 pesetas), for the year 2001, intended to constitute a provision for covering future costs incurred by the closure of the 'La Prohida' subsector and the partial closure of the Buseiro sector, which took place during the period 1998 to 2001.

The aid mentioned in indents (a) and (b) of the first paragraph cannot therefore be granted.

Article 4

1. Spain shall adopt all the necessary measures to recover from the company González y Díez S.A.:

   (a) the aid mentioned in Article 1;

   (b) an amount of EUR 54 057.63 (8 994 433 pesetas), paid illegally before authorisation by the Commission for the financial year 2001, and constituting an unauthorised excess over the aid authorised pursuant to Article 2 and, where appropriate, any other amount paid illegally under the same circumstances.

2. The recoveries mentioned in indents (a) and (b) of paragraph 1 shall be effected without delay and in accordance with the procedures laid down by national law, provided that they allow immediate, effective implementation of this Decision. The aid to be recovered shall be liable to interest charges payable from the date on which it was placed at the disposal of the recipient to the date of recovery thereof. The interest shall be calculated on the basis of the reference rate used to calculate the grant equivalent in the context of regional aid.

Article 5

Spain shall inform the Commission, within two months from the notification of this Decision, of the measures it has adopted to comply with this Decision.

Article 6

Articles 1, 2 and 5 of Decision 2002/827/ECSC are repealed.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 5 November 2003.

For the Commission

Loyola de PALACIO

Vice-President

ANNEX

	Account register	euros	Ptas	Approval	Year	Justified euros	Justified Ptas	Unjustified euros	Unjustified Ptas
La Prohida (underground)									
Galleries made and not used (1 030 m)	Costs	738 523,68	122 880 000,00	60 %	2000	443 114,21	73 728 000,00	295 409,47	49 152 000,00
Galleries at level 3 (other) (1 496 m)	Fixed ass.	610 716,04	101 614 599,00	100 %	2001	610 716,04	101 614 599,00	0,00	0,00
Galleries at levels 2 and 4	Fixed ass.	395 808,55	65 857 001,00	100 %	2001	395 808,55	65 857 001,00	0,00	0,00
Galleries at level 1 and other activities	Fixed ass.	1 046 970,83	174 201 288,00	100 %	2001	1 046 970,83	174 201 288,00	0,00	0,00
Galleries still not written off from fixed ass.	Fixed ass.	134 654,36	22 404 600,00	100 %	2001	134 654,36	22 404 600,00	0,00	0,00
Ventilation shafts and galleries	Investm.	602 146,29	100 188 713,00	0 %	2001	0,00	0,00	602 146,29	100 188 713,00
Exterior restoration	Costs	61 609,60	10 250 975,00	100 %	2001	61 609,60	10 250 975,00	0,00	0,00
Provision for damage	Provision	601 012,10	100 000 000,00	0 %	2001	0,00	0,00	601 012,10	100 000 000,00
Buseiro (open-cast)									
Overburden excavation, north	Costs	1 902 805,52	316 600 200,00	73 %	1998	1 389 048,03	231 118 146,00	513 757,49	85 482 054,00
Mine waste tip, west	Fixed ass.	204 731,36	34 064 432,00	100 %	1998	204 731,36	34 064 432,00	0,00	0,00
Access tracks	Fixed ass.	1 022 425,30	170 117 254,00	100 %	1998	1 022 425,30	170 117 254,00	0,00	0,00
Restoration of open-cast area	Costs	547 066,46	91 024 200,00	0 %	1998	0,00	0,00	547 066,46	91 024 200,00
Land		372 176,75	61 925 000,00	0 %	1998	0,00	0,00	372 176,75	61 925 000,00
Repayment of SPCA loans		1 403 316,30	233 492 186,00	0 %	1998/2000	0,00	0,00	1 403 316,30	233 492 186,00
Total						5 309 078,70	883 356 295,00	4 334 884,90	721 264 155,00

COMMISSION DECISION

of 10 December 2003

on the State aid which the Campania region of Italy has granted to the agricultural sector

(notified under document number C(2003) 4469)

(Only the Italian text is authentic)

(2004/341/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having called on interested parties to submit their comments pursuant to that Article ([1]), and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 31 October 1994, registered as received on 4 November 1994, Italy notified the Commission in accordance with Article 88(3) of the EC Treaty of the aid provided for in Regional Law (Campania) No 24 of 12 August 1993 governing, promoting and developing organic agriculture in Campania.

(2) The law, initially registered under number N 645/94, was later entered in the register of non-notified aids under number NN 140/94, the Commission having noted that the law had already been adopted and had entered into force without a suspension clause.

(3) By letter dated 27 July 1995 (SG(95) D/10012), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid measure concerned.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission called on interested parties to submit their comments.

(5) The Commission received comments from Italy in a letter dated 29 September 1995, registered on 3 October 1995.

(6) Comments were received from the Permanent Representative of Denmark to the European Union by letter of 6 December 1995, registered on the same day. These comments were forwarded to Italy by letter No VI/001809 of 8 January 1996 and Italy was given the opportunity to react. No reaction to these comments was received from Italy.

(7) By telex No VI/29692 of 22 July 1996, the Commission invited the Italian authorities to clarify the comments they had submitted at the start of the procedure in their letter of 29 September 1995, registered as received on 3 October 1995. The Commission received no reply to that telex.

(8) With a view to concluding examination of the file, by telex AGR 021605 of 7 August 2003 the Commission sent the Italian authorities a reminder, asking them to provide a reply to the previous telex No VI/29692 of 22 July 1996. The Commission has received no reply.

II. DETAILED DESCRIPTION OF THE AID

(9) The regional law under examination lays down rules governing the promotion and introduction of organic farming techniques at regional level. The only aid measure provided for therein involves a grant for switching to organic production (Article 19 of Regional Law No 24/93) which is intended to offset losses of income suffered by farmers when switching from traditional farming to organic farming methods as referred to in Regulation (EEC) No 2092/91, over a maximum of four years. The assistance covers up to 75 % of such losses.

([1]) OJ C 292, 7.11.1995, p. 14.
([2]) Cf. footnote 1.

(10) The Commission decided to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the abovementioned aid measure on the following grounds.

(11) The Commission was generally favourable towards aid for converting to organic farming in accordance with Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs ([3]), provided that such aid did not exceed the actual income loss suffered by the farmer as a result of the conversion.

(12) Regulation (EEC) No 2092/91 lays down the binding conditions that must be met in order for agricultural products to be defined as organic and any national or regional provisions in this area must also comply with those conditions.

(13) The regional law in question does not satisfy these conditions, particularly as regards:

(a) the length of the conversion period (the regional law provides for a conversion period of two years for annual and perennial crops, whereas Annex I to Regulation (EEC) No 2092/91 stipulates for perennials a minimum period of three years);

(b) the possibility of incorporating ingredients not obtained by organic production methods (without laying down the maximum percentages to be observed if the indications referring to organic production methods in the sales description of the product or in the list of ingredients are to be used, as specified in Article 5 of Regulation (EEC) No 2092/91);

(c) the inspection authorities (which do not appear on the list of inspection authorities authorised in Italy);

(d) the products listed in the Annexes on production standards (not corresponding to the products listed in the Annexes to Regulation (EEC) No 2092/91).

(14) In addition, Article 12 of the regional law provides that products from outside the region must be accompanied by a certificate issued by the authorities competent for the territory from which they come.

([3]) OJ L 198, 22.7.1991, p. 1.

(15) Organic farming products may move freely in the Community subject to compliance with the rules on production and the provisions on packaging and marketing laid down in Annex III to Regulation (EEC) No 2092/91. The regional law in question was therefore also in breach of Article 12 of Regulation (EEC) No 2092/91, which prohibits any restriction on the marketing of organic farming products.

(16) In view of the fact that regional law (Campania) No 24/93 was at variance on several points with the binding provisions of Regulation (EEC) No 2092/91, the aid provided for in Article 19 of the regional law could not, in the opinion of the Commission, qualify under any of the exceptions laid down in Article 87(2) and (3) of the Treaty.

III. **COMMENTS FROM INTERESTED PARTIES**

(17) Comments were received from the Permanent Representative of Denmark to the European Union by letter of 6 December 1995, registered on the same day.

(18) In its comments the Danish Ministry of Agriculture and Fishery said that it shared the objections expressed by the Commission in its decision to open the procedure on the aid concerned. It also said that aids in favour of organic farming should only be granted to agricultural undertakings which complied with Regulation (EEC) No 2092/91.

(19) The Ministry of Agriculture's letter also expressed concern that the Italian provisions provided for a restriction on the import of organic products to the region concerned. As regards the method for calculating the aid in the Italian law, the Ministry noted that the commitments made by the beneficiaries ought to have been maintained for at least five years (and not a maximum of four), as required by Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside ([4]).

IV. **COMMENTS FROM ITALY**

(20) The Commission received comments from Italy on behalf of the Campania Region, by letter dated 29 September 1995, registered on 3 October 1995.

([4]) OJ L 215, 30.7.1992, p. 85. Regulation repealed by Regulation (EC) No 1257/1999 (OJ L 160, 26.6.1999, p. 80).

(21) In their comments the Italian authorities indicated that the law had not been implemented since its application was suspended by Decision of the Regional Government No 1073 of 28 March 1995, partly due to the lack of timely notification to the Commission pursuant to Article 88(3) of the Treaty and partly due to the need to adapt the law to bring it into line with the Community rules on organic production.

(22) In order to meet the second need a draft law had been prepared. However due to the end of the mandate of the regional parliament this draft law was not pursued.

(23) In their comments the Italian authorities indicated that they shared the objections of the Commission, which was for them a further incentive to proceed with the revision of Regional Law No 24/93. The Italian authorities also confirmed that its application would remain suspended.

V. **ASSESSMENT OF THE AID**

(24) Pursuant to Article 87(1) of the Treaty, 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 is, in so far as it affects trade between Member States, incompatible with the common market.

(25) The measure under examination provides for the grant of aid, through public resources, to specific agricultural undertakings which are undeniably granted an undue economic and financial advantage to the detriment of other undertakings not receiving the same contribution. The Court of Justice has held that an improvement in the competitive position of an undertaking as a result of State financial aid can lead to a distortion of competition compared with other competing undertakings not receiving such assistance ([5]).

(26) The measure affects trade between Member States in that there is substantial intra-Community trade in agricultural products as indicated by the table below ([6]), which lists the overall value of agricultural imports and exports between Italy and the EU in the period 1993 to 2001 ([7]). Within Italy, Campania is a significant producer of agricultural products.

(ECU/EUR million)

Total agricultural sector		
	Exports	Imports
1993	6 714	12 741
1994	7 360	13 390
1995	8 364	13 629
1996	9 191	14 525
1997	9 459	15 370
1998	9 997	15 645
1999	10 666	15 938
2000	10 939	16 804
2001	11 467	16 681

(27) It should also be recalled that the Court of Justice has held that aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States even if it does not itself export its products. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Such aid is therefore likely to affect trade between Member States and distort competition ([8]).

([5]) See the judgment of the European Court of Justice in Case C-730/79, *Philip Morris* v *Commission* [1980] ECR 2671, grounds 11 and 12.

([6]) Source: Eurostat.

([7]) Consistent case-law holds that the condition of the effect on the trade is met since the benefiting company carries out an economic activity which is the subject of trade between the Member States. The simple fact that aid strengthens the position of this company in relation to other competing companies in intra-Community trade makes it possible to consider that this trade was affected. As regards State aid to the agricultural sector, settled case-law holds that, regardless of the relatively small amount of total aid involved and its distribution among many farmers, there is an impact on intra-Community trade and competition (see the judgments of the Court of Justice in Case C-113/2000, *Kingdom of Spain* v *Commission*, [2002] ECR 7601, grounds 30 to 36 and 54 to 56, and in Case C 114/2000, [2002] ECR 7657, grounds 46 to 52, 68 and 69.

([8]) Judgment of the Court of Justice in Case 102/87, *French Republic* v *Commission* ECR [1988] 4067.

(28) The Commission therefore concludes that the measure is caught by the prohibition in Article 87(1) of the EC Treaty.

(29) The prohibition in Article 87(1) is followed by exemptions in Article 87(2) and (3).

(30) The exemptions listed in Article 87(2)(a), (b) and (c) are manifestly inapplicable given the nature of the aid measures in question and their objectives. Indeed, Italy has not submitted that either Article 87(2)(a), (b) or (c) is applicable.

(31) Article 87(3)(a) is also inapplicable since the aids are not intended to promote the development of areas where the standard of living is abnormally low or where there is serious underemployment.

(32) Article 87(3)(b) is equally inapplicable as the aids in question are not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in Italy's economy.

(33) The aid under examination is not intended to achieve or suitable for achieving the objectives referred to in Article 87(3)(d).

(34) Considering the nature of the aid under examination and its objectives the only exemption which may be applicable is the one provided for by Article 87(3)(c) of the Treaty.

Applicable provisions

(35) The applicability of the abovementioned exception needs to be assessed in the light of the provisions applicable to the grant of State aids in the agriculture sector, namely the Community guidelines for State aid in the agriculture sector ([9]) (hereinafter 'the Guidelines'), which entered into force on 1 January 2000.

(36) According to point 23.3 of the guidelines, the Community will apply them with effect from 1 January 2000 to new notifications of State aid and to notifications which are pending on that date. Unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 (new Article 88) of the EC Treaty ([10]) will be assessed in accordance with the rules and the guidelines in force at the time the aid is granted.

(37) It should be noted that 'to implement' means not only the actual grant of the aid but the conferral of powers that allow the aid to be provided without any further formalities ([11]).

(38) In the light of the above considerations the examination of the aid measure concerned falls within the scope of the State aid rules which were applicable to this type of measure before the entry into force of the Community guidelines for State aid to the agriculture sector ([12]).

(39) The measure under examination, which is provided for in Article 19 of Regional Law No 24/93, is an aid for conversion to organic production and is intended to offset losses of income suffered by farmers when switching from traditional farming to organic farming methods as referred to in Regulation (EEC) No 2092/91, over a maximum period of four years. The aid covers up to 75 % of such losses.

(40) Before the adoption of the guidelines which are currently applicable, the Commission assessed the compatibility of this type of aid measure by analogy with the provisions of Regulation (EEC) No 2078/92 ([13]).

(41) Article 2 of Regulation (EEC) No 2078/92 laid down that, subject to positive effects on the environment and the countryside, aid could be granted for farmers who undertook to reduce substantially their use of fertilisers and/or plant protection products, or to keep to the reductions already made, or to introduce or continue with organic farming methods.

(42) Article 10 of that regulation laid down that Member States were not precluded from implementing, except in the field of application of Article 5(2), additional aid measures for which the conditions of granting of aid differed from those laid down therein or the amounts of

([9]) OJ C 232, 12.8.2000, p. 19.

([10]) OJ L 83, 27.3.1999, p. 1.

([11]) See Commission letter SG(89) D/5521 of 27 April 1989.

([12]) See footnote 9.

([13]) See footnote 4.

which exceeded the limits stipulated therein ([14]), provided that those measures complied with the objectives of that regulation and with Articles 92, 93 and 94 (now Articles 87, 88 and 89) of the Treaty.

(43) As indicated in the decision initiating the procedure in this case, the Commission was generally favourable towards aid for converting to organic farming methods in accordance with Regulation (EEC) No 2092/91, provided that it did not exceed the actual income loss suffered by the farmer as a result of the conversion.

(44) In the light of the applicable rules it appears that the measure under examination, which is designed to encourage a switch to the organic farming methods laid down in Regulation (EEC) No 2092/91, may be considered to pursue the objectives of Article 2(a) of Regulation (EEC) No 2078/92 (favouring the introduction or continuation of organic farming methods).

(45) However, the measure under examination simply provides for an aid to offset up to 75 % of the losses of income suffered by farmers when switching from traditional farming to organic farming techniques, over a maximum period of four years. No indication was provided on how such losses, which constitute the basis for the quantification of the aid, are assessed and calculated, so as to allow the Commission to verify that the aid does not exceed the actual income loss suffered by the farmer as a result of the conversion.

(46) Moreover, taking into account the comments submitted by the Danish authorities, it must be considered that the Italian authorities failed to provide a clear indication of the length of the commitment to convert to organic farming (which would appear to be a maximum of four years) or on the terms on which the aid could be granted where the farmer was personally unable to give an undertaking for the minimum period required (which, pursuant to Regulation (EEC) No 2078/92, was five years) ([15]).

(47) Furthermore, as it was indicated by the Commission in its decision to open the procedure on the aid measure concerned, Regulation (EEC) No 2092/91 lays down mandatory conditions to be met if agricultural products are to be deemed organic and any national (or regional) provisions in this area must comply with those conditions.

(48) As the Italian authorities acknowledged in their letter of 29 September 1995, the regional law in question does not meet these conditions, particularly as regards:

(a) the length of the conversion period (the regional law provides for a conversion period of two years for both annual and perennial crops, while Annex I to Regulation (EEC) No 2092/91 indicates for perennials a minimum period of three years);

(b) the possibility of incorporating ingredients not obtained by organic production methods (without laying down the maximum percentages to be observed if the indications referring to organic production methods in the sales description of the product or in the list of ingredients are to be used, as specified in Article 5 of Regulation (EEC) No 2092/91);

(c) the inspection authorities (which do not appear on the list of inspection authorities approved by Italy);

(d) the products listed in the Annexes on production standards (not corresponding to the products listed in the Annexes to Regulation (EEC) No 2092/91).

(49) Although repeatedly requested, the Italian authorities have not provided any information on the actual amendments made to the regional law under examination with a view to making it compliant with Regulation (EEC) No 2092/91.

(50) In the light of the above assessment the Commission must therefore conclude that the doubts expressed in its decision to open the procedure on the measure concerned are confirmed, as the aid measure under

([14]) Article 4 of Regulation (EEC) No 2078/92 provided for the grant of an annual aid per hectare or livestock unit removed from a herd to farmers who gave one or more of the undertakings listed in Article 2 for at least five years, in accordance with the programme applicable in the zone concerned. The aid had to be granted in accordance with conditions laid down in the regulation. In particular Article 5 laid down that, in order to achieve the regulation's objectives, the Member States had to determine (a) the conditions for the grant of aid; (b) the amount of aid, on the basis of the undertaking given by the beneficiary and of the loss of income and of the need to provide an incentive; (c) the terms on which the aid for the upkeep of abandoned land as referred to in Article 2(1)(e) may be granted to persons other than farmers, where no farmers are available; (d) the conditions to be met by the beneficiary to ensure that compliance with the undertakings may be verified and monitored; (e) the terms for the grant of aid in cases where the farmer is personally unable to give an undertaking for the minimum period required. No aid could be granted under the regulation for areas subject to the set-aside scheme which were being used for the production of non-food products. While ensuring that the incentive content of the scheme was retained, the Member States could limit the aid to a maximum amount per holding and differentiate according to holding size.

([15]) Article 5 of Regulation (EEC) No 2078/92, see footnote 4.

examination does not satisfy the State aid rules appying before 1 January 2000 to aid for switching to organic farming methods as referred to in Regulation (EEC) No 2092/91.

(51) The Commission's assessment of the aid measure does not change even under the new guidelines applicable to State aids.

(52) Firstly, although recently reminded by telex AGR 021605 of 7 August 2003, the Italian authorities have still not provided any information on the actual amendments made to the regional law under examination with a view to making it compliant with Regulation (EEC) No 2092/91.

(53) Secondly, consideration should also be given to the fact that point 5.3 (agri-environmental aid) of the Community guidelines for State aid in the agricultural sector ([16]), applicable to this kind of aid, cross-refer to Articles 22, 23 and 24 of Regulation (EC) No 1257/1999 ([17]), which repeals and replaces Regulation (EEC) No 2078/92, as well as the relevant implementing rules now laid down in Commission Regulation (EC) No 445/2002 of 26 February 2002 laying down detailed rules for the application of Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) ([18]).

(54) The new provisions currently applicable to this type of aid, in addition to new requirements which do not appear to be met by the measure under examination ([19]), provide for the same basic requirements as those in Regulation (EEC) No 2078/92.

(55) These basic requirements, as demonstrated above, are not satisfied by the aid measure provided for in Article 19 of Regional Law No 24/93, particularly as regards the need to demonstrate to the Commission the losses of income suffered by the farmer, the way such losses are calculated and the length of the commitments made by the farmers.

([16]) OJ C 232, 12.8.2000.

([17]) OJ L 160, 26.6.1999. Regulation as last amended by Regulation (EC) No 1783/2003 (OJ L 270, 21.10.2003, p. 70). This latter Regulation completely replaces Chapter VI of Regulation (EC) No 1257/1999 as regards agri-environmental measures.

([18]) OJ L 74, 15.3.2002, p. 1. Regulation as last amended by Regulation (EC) No 963/2003 (OJ L 138, 5.6.2003, p. 32). See in particular Articles 13 to 21 of Regulation (EC) No 445/2002.

([19]) See footnote 18 and in particular Articles 13 to 21 of Regulation (EC) No 445/2002. For example, pursuant to Article 20 of Regulation (EC) No 445/2002, a farmer who gives an agri-environmental commitment for part of his holding must adhere to at least the standard of usual good farming practice throughout the farm.

(56) In the light of the above assessment the aid provided for in Article 19 of Regional Law No 24/93 does not satisfy the State aid rules applicable to aid for conversion to organic farming methods as referred to in Regulation (EEC) No 2092/91 and cannot therefore benefit from a derogation pursant to Article 87(3)(c) of the Treaty. As demonstrated in recitals 30 to 33, the aid cannot benefit from any other derogation provided for by the Treaty and must therefore be considered incompatible with the common market.

(57) However, since the application of the law was suspended by the Italian authorities (see recital 21 of this decision) there is no need for the Commission to order recovery of the aid.

(58) Regarding Article 12 of the regional law (which provides that products from outside the region must be accompanied by a certificate issued by the authorities competent for the territory from which they come), the following should be noted. Organic farming products may move freely in the Community subject to compliance with the rules on production and the provisions on packaging and marketing in Annex III to Regulation (EEC) No 2092/91. It follows therefore that the regional law in question was also in breach of Article 12 of Regulation (EEC) No 2092/91, which prohibits any restriction on the marketing of organic farming products. However, this is not an issue which appears to affect the compatibility of the aid with the common market, but rather a separate violation of Community law, which could be subject to infringement proceedings (Article 226 of the EC Treaty). The Commission reserves its right to intervene on this point, but since the application of the law was suspended by the Italian authorities, there appears to be no need to institute such proceedings.

VI. **CONCLUSIONS**

(59) In the light of the above, the aid measure provided for by Article 19 of Law No 24/93 of the Campania Region to offset losses of income suffered by farmers when switching from traditional farming to organic farming as referred to in Regulation (EEC) No 2092/91 cannot benefit from any of the derogations to Article 87(1) provided for by the Treaty and is therefore incompatible with the common market.

(60) According to the information provided by the Italian authorities, regional law No 24/93 was not implemented.

(61) Ordering recovery is therefore unnecessary,

HAS ADOPTED THIS DECISION:

Article 1

The State aid provided for by Article 19 of Regional Law No 24/93 of the Campania Region which Italy intended to implement to offset losses of income suffered by farmers when switching from traditional farming to organic farming as referred to in Regulation (EEC) No 2092/91 is incompatible with the common market.

This aid cannot be implemented.

Article 2

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

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 10 December 2003.

For the Commission

Franz FISCHLER

Member of the Commission

COMMISSION DECISION

of 16 December 2003

on the State aid which Italy (Sicily) is planning to implement for the agricultural sector

(notified under document number C(2003) 4474)

(Only the Italian text is authentic)

(2004/342/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having called on interested parties to submit their comments pursuant to the Article cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 2 May 1996, registered on 8 May 1996, Italy notified the Commission of the aids provided for by Regional Law No 33/1996 of the Region of Sicily of 18 May 1996.

(2) Scrutiny of the notification was divided into four parts: aid No N 340/A/96, involving all sectors other than agriculture and fisheries, aid No N 340/B/96, involving agricultural products listed in Annex I to the EC Treaty, aid No N 340/C/96, involving fishery products and aid No 340/D/96, involving transport. This Decision relates only to the aid for Annex I agricultural products.

(3) By letter dated 3 June 1996, registered on 12 June 1996, Italy submitted information sheets on the aid measures provided for by Articles 10, 17 and 18 of Regional Law No 33/1996.

(4) By letter dated 3 July 1996, registered on 11 July 1996, Italy submitted the text of Regional Law No 33/1996 as published in the Regional Official Journal of Sicily (No 26 of 21 May 1996).

(5) In telexes No VI/027617 of 9 July 1996 and No VI/46886 of 5 December 1996, the Commission sought further information from the Italian authorities. By letter dated 19 December 1996, registered on 31 December 1996, Italy submitted additional information on Articles 9, 13, 14, 15, 16, 17 and 18 of Regional Law No 33/1996.

(6) By letter dated 21 March 1997 (SG(97) D/2243), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid measures provided for by Articles 1, 9, 10, 13(2) and (3), 17, 18 and 19 of Regional Law No 33/96.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission called on interested parties to submit their comments.

(8) The Commission received comments from Italy by letters dated 2 September 1997, registered on 4 September 1997, and 7 November 1997, registered on 17 November 1997.

(9) By letter dated 28 January 1998 Italy informed the Commission that the aid measure provided for by Article 18 of Law No 33/1996 could no longer be implemented due to the lack of financial resources allocated to it and undertook to renotify the aid measure under Article 88(3) of the Treaty should it be re-proposed in the future.

(10) To finalise its examination of the file, in telex AGR 029182 of 20 November 2000 the Commission asked the Italian autorities for clarifications about the aid in question. In that same telex the Commission also said that if the Italian authorities had taken steps to stop the grant of aid to the agricultural products listed in Annex I to the Treaty in accordance with the provisions in the Commmision Decision to initiate the formal scrutiny

[1] OJ C 201, 1.7.1997, p. 10.

[2] See footnote 1.

procedure, and if they had committed themselves to repealing those provisions in so far as they applied to the agricultural sector, then the competent authorities could consider withdrawing the notice.

(11) By letter dated 12 June 2001 Italy informed the Commission of the withdrawal of the notification of the aid measure provided for by Article 9 of Regional Law No 33/1996, as the measure concerned had not been applied and had been replaced by new aid measures which were notified and/or in the course of notification to the Commission under Article 88(3) of the Treaty ([3]).

(12) By letter dated 28 June 2001, registered on 2 July 2001, Italy sent further information regarding Article 10.

(13) In the light of the above, this decision concerns only the State aid provided for by Articles 1, 10, 13(2) and (3), 17 and 19 of Regional Law No 33/1996. As the notification of Articles 9 and 18 of Law No 33/96 was withdrawn by Italy by the letters of 28 January 1998 and 12 June 2001 there is no reason to assess the aid measures provided for by those two Articles.

(14) According to Article 63 of Regional Law No 33/96, implementation of the State aid measures provided for in the Law itself is conditional upon their approval by the Commission.

II. DETAILED DESCRIPTION OF THE AIDS

Article 1 of Regional Law No 33/96

(15) Article 1 provides for aid for the extra costs incurred by the undertakings operating in Sicily for the transport outside the Region of the goods produced and/or processed there. The reason for the aid is the distance of the undertakings from the main national and European markets. The aid applies to undertakings in all productive sectors (except for the mining and hydroelectric industries which are obliged to operate in the Region) that use rail, road, maritime and air transport, or combined transport. The aid applies to the period 1997 and 1998. It is calculated on the basis of the kilometres travelled and the transported weight in relation to the transport of the goods within Italy. The calculation of the extra costs is fixed annually by decree of the President of the Regional Government, on the basis of the most economical means of transport and the most direct connection between the place of production or processing and the commercial outlets. The aid for extra costs cannot exceed the real costs incurred.

(16) In its decision to initiate the procedure against this aid, the Commission noted that, in the case of the agricultural sector, the measure was in essence an amendment of the aid provided for by Article 90 of Regional Law No 25/93 of 1 September 1993 ([4]). This aid had been the subject of a negative decision under case C 30/95, with a view to cancelling the measure and recovering any amounts paid out ([5]). The reasons which had led the Commission to take that decision remain, in substance, valid ([6]).

(17) In particular, the Commission decided that this aid was operating aid, incompatible with the common market. This type of aid, which relieves the recipients of a part of their operating costs, has no durable and structural effect on the sectors concerned and it gives an advantage only to products which are produced in the region and marketed outside it, over products which do not benefit from a comparable measure, in Italy or in other Member States.

(18) Consequently, none of the exemptions referred to in paragraphs 2 and 3 of Article 87 of the Treaty were applicable. The Commission accordingly decided to initiate the procedure provided for in Article 88(2) of the Treaty against the aid provided for in Article 1 of Regional Law No 33/96 in respect of the production, processing and/or marketing of agricultural products.

([3]) See Article 6 of Regional Law No 22/99 (aid N 795/99) and Article 131 of Regional Law No 32/2000.

([4]) Article 1(8) of Regional Law No 33/1996 repeals Article 90 of Regional Law No 25/1993.

([5]) See Commission Decision C(96) 2249 of 17 July 1996, notified to the Italian government by letter SG(96) D/6819 of 26 July 1996.

([6]) The Commission considered that the aid provided for in Article 90 of Regional Law No 25/93, was, in addition, incompatible with Articles 30 and 52 of the Treaty owing to certain specific forms of application that were not reproduced in Article 1 of Regional Law No 33/96.

Article 10 of Regional Law No 33/96

(19) This Article extends the provisions of Articles 51, 52, 53 and 54 of Regional Law No 3/86 to consortia made up of agricultural, craft and commercial undertakings which are active in the production, processing and marketing of plants and flowers. According to the information provided by the competent authorities by letter of 3 June 1996, the aid measures concerned have unlimited duration.

(20) The aid on which the Commission had decided to open the procedure is the one provided for in Article 10, in so far as it refers back to Article 53(c) of Regional Law No 3/86). This aid, which concerns the creation of common structures, can be granted at a rate of 80 % to subsidise the following eligible expenditure: land purchase, construction of the necessary buildings, purchase and renovation of existing buildings and the acquisition of any other essential fixed structure that the cooperatives need in order to operate.

(21) In its assessment the Commission concluded that the above investments, which benefited from the regional subsidy, remained the property of the consortium and were to be used for the carrying out of its activities in the processing and marketing of agricultural products.

(22) In this sector, the provisions which were applicable at the time ([7]), required national aid to conform with the sectoral limits referred to in the second and third indents of point 1.2 of the Annex to Commission Decision 94/173/EEC and the intensity of aid could not exceed, in Objective 1 regions such as Sicily, 75 % of the cost of investment.

(23) The rate planned for the regional measure under examination was 80 % and no information was provided enabling compliance with the applicable sectoral limits to be checked. In view of these considerations, the grant of the aid provided for in Article 53(c) of Regional Law No 3/86 to the consortia referred to in Article 10 of Regional Law No 33/96 could not benefit from any of the exemptions referred to in Article 87(2) or (3) of the EC Treaty.

Article 13(2) and (3) of Regional Law No 33/96

(24) Article 13(2) of Regional Law No 33/96 provides that, following the damages to agricultural production caused by the adverse weather events that occurred between December 1995 and March 1996, the Regional Government may decide to suspend payment of the contributions due by their members to the Consorzi di bonifica which were located in areas that had been included in the territories affected by the natural disasters in accordance with National Law No 185/92 (a law providing for national compensation for damages to agricultural production once the areas affected by the natural disaster have been demarcated by Ministerial Decree). Under Article 13(3) the Region may reimburse the Consorzi di bonifica up to ITL 5 000 million for the unpaid contributions.

Article 17 of Regional Law No 33/96

(25) Article 17 of Regional Law No 33/96 allows the Region to advance the amounts due from the State as assistance from the national solidarity Fund to compensate for the damage caused by a natural disaster (National Law No 185/92). The aid measure provided for by Article 17 is limited to 1996, for which expenditure of ITL 20 000 million was planned (see letter of 3 June 1996). The aid consists of subsidies to enable farmers to restore their working capital (capitale di conduzione) and subsidies for the restoration of farming structures which were damaged by the natural events concerned. The beneficiaries are independent farmers who have suffered damage to more than 35 % of their gross saleable production due to temperature fluctuations and subsequent flooding in 1996.

(26) The aid provided for in Article 13(2) and (3) and that provided for in Article 17 can be cumulated within the limits allowed by National Law No 185/92.

(27) In its decision to open the procedure against Article 13(2) and (3) and Article 17, the Commission noted that the measures had to be examined in the light of the criteria that it applied at that time to national aidto

([7]) Guidelines for State aid in connection with investments in the processing and marketing of agricultural products (OJ C 29, 2.2.1996, p. 4) and the Annex to Commission Decision 94/173/EEC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agriculture and forestry products and repealing Decision 90/342/EEC (OJ L 79, 23.3.1994, p. 29).

compensate for the damage caused by natural disasters ([8]). Under those criteria, the two following conditions had to be met:

(a) the losses suffered by the recipient of aid had to reach 30 % of normal production (20 % in the less-favoured areas within the meaning of Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in less favoured areas ([9])) calculated on the basis of production in the three previous years.

(b) any possibility of over-compensating the losses incurred had to be excluded.

(28) The Commission noted in its Decision that, in the case under examination, the information available did not make it possible to conclude that both conditions in question were met. Indeed, with regard to Article 17, which transposes and incorporates national legislation on natural disasters and adverse weather conditions, the regional texts as submitted restricted themselves to referring National Law No 185/92 and its implementing provisions, including a letter from the Ministry of Agriculture (A1659 of 2 July 1996) which indicated that the aid could not be more than 100 % of the damage. When the procedure on the aids under examination was opened, the national law in question was also the subject of a decision to open the procedure under Article 88(2) of the Treaty, by virtue of the fact that it was impossible to check compliance with the conditions mentioned in 27(a) and (b) ([10]).

(29) Consequently, in the absence of specific assurances regarding regional compliance with the above conditions, the Commission noted that the same conclusions held in the case under examination.

(30) In particular, the Commission had pointed out, firstly, that neither the regional law under examination nor the information transmitted indicated how 'normal' production was calculated as the reference for fixing the threshold that triggered compensation. Secondly, doubts remained as regards the condition of no over-compensation.

([8]) Working document VI/5934/86, 10.11.1986, Rev 2. Rules governing the grant of national aids in the event of damage to agricultural production or the means of agricultural production and national aids involving the defraying of a proportion of the insurance premiums covering such risks

([9]) OJ L 128, 19.5.1975, p. 1.

([10]) Aid C12/95, (OJ C 295, 10.11.1995, p. 5).

(31) In their letter dated 19 December 1996, the Italian authorities stated that, in the case of Article 17 of Regional Law No 33/96, the Ministry of Agriculture's letter of 2 July 1996 required aid not to exceed 100 % of the losses incurred. However, the Commission said that the aid referred to in Article 17 of Regional Law No 33/96 seemed to be cumulable with other aids, in particular those under Article 13(2) of that law. No assurances that over-compensation did not occur in the event of cumulation had been provided.

(32) In view of the preceding considerations, the Commission was not in a position to check for compliance with the conditions set out in point 27(a) and (b). Consequently, none of the exemptions referred to in Article 87(2) and (3) of the Treaty were applicable.

Article 19 of Regional Law No 33/96

(33) This Article provides for subsidies up to 80 % for the construction on farms of facilities for the production of electric, thermal or mechanical energy from renewable resources. In particular it provides for an increase in the aid intensity laid down in Article 12(1) of National Law No 308/82 of 29 May 1982 and in Article 13(1) of National Law No 10/91 of 9 January 1991, which set the maximum intensity at 55 % (65 % for cooperatives). The subsidy can be cumulated with a subsidised loan covering the investment costs not covered by the subsidy. The budget for the measure amounted to ITL 2 500 million.

(34) The Commission noted in its decision to open the procedure that at that time it had already had the opportunity of examining a similar regional legislative text and had communicated to the Italian government its position concerning the problems of cumulation in the agricultural sector by its letter No SG(94) D/11946 of 16 August 1994 (aid No E 1/94). In that communication the Commission had specified, inter alia, that the maximum aid rates provided for in the national law (i.e. 55 %, or 65 % for farming cooperatives) had to be coordinated with the rates in force for national investment aid for the production, processing and marketing of agricultural products. At the time that the procedure was initiated, the rules applying to these kinds of aid required compliance with the following conditions:

(a) the applicable maximum rates in the agricultural sector (any aid, subsidy and/or cumulated interest rebate) had to be complied with. These were respectively:

(i) in the primary production sector (investments falling within Article 12(5) of Council Regulation (EEC) No 2328/91 on improving the efficiency of agricultural structures ([11])): 35 %, or 45 % in the less-favoured areas within the meaning of Directive 75/268/EEC;

(ii) processing industry and marketing: 55 % (75 % in the Objective 1 regions).

(b) in both cases, the sectoral limits laid down in Regulation (EEC) No 2328/91 or in the Community Guidelines on national aid for investments in the processing and marketing of agricultural products had to be complied with ([12]).

(35) No assurances as regards compliance with the above conditions were provided by the Italian authorities.

(36) Consequently, the aid referred to in Article 19 of Regional Law No 33/96 could not benefit from any of the exemptions provided for by Article 87(2) and (3) of the EC Treaty.

III. **COMMENTS FROM INTERESTED PARTIES**

(37) No comments from interested parties were received.

IV. **COMMENTS FROM ITALY**

(38) The Commission received comments from Italy, on behalf of the Region of Sicily, by letters dated 2 September 1997, registered on 4 September 1997, and 7 November 1997, registered on 17 November 1997. Additional information was subsequently sent by letter dated 28 June 2001, in reply to Commission telex AGR 029182 of 20 November 2000.

(39) In its letter of 2 September 1997 Italy submitted comments regarding Articles 1, 13 and 17 of Law No 33/96.

(40) With regard to Article 1 Italy submitted a copy of the comments which it had already submitted in the context of the procedure regarding the aid provided for in Article 90 of Regional Law No 25/93. The aid provided for by this Article had been the object, within the framework of procedure C 30/95, of a final negative decision requiring the repeal of the measure and the recovery of any aid paid out. In their comments the Italian authorities stated that the aid was intended to promote alternative ways of transporting agricultural goods with the coordinated use of vehicles in compliance with Article 77 of the Treaty. The competent authorities indicated that transport in Sicily was based mainly on road transport (67 %). The transport of agricultural products was often unorganised, involving the irrational and imbalanced use of different transport systems: road, rail and maritime transport. The situation was made more difficult by the fact that transport was often carried out by small, non-specialised, often family-run, road haulage companies ('padroncini'). Their organisation mirrored the fragmentation of the regional agricultural trade, with the result that the transport system was not very open to innovation, organisation or the use of combined forms of transport. This situation had repercussions not only on the economy (the cost of transport per unit was higher and there was a risk that the vehicle would return from its destination entirely or partially empty), but also on the environment and on road safety. The regional aid was therefore intended to develop intermodal transport and to encourage the grouping of transport operators by favouring the demand for transport. The aid would be temporary and aimed at the development of an intermodal organised system of transport, so favouring a transfer from road transport to combined road-rail and road-maritime transport and a reduction in the number of vehicles used for the transport of agricultural products. In accordance with paragraph 4 of that Article, the aid could be a flat-rate payment based on the type of transport, without a direct link to the quantity or value of the products transported. The competent authorities ended their comments by saying that, for the reasons set out above, they considered the aid to be compatible with Article 77 (now 73) and with Article 92(3)(b) and (c) (now 87(3)(b) and (c)) of the Treaty.

(41) With regard to the aid provided for by Article 13(2) and (3) and by Article 17, the Italian authorities indicated that for the calculation of the 'normal' production used to determine the 35 % loss required by National Law No 185/92, they had analysed the data sent by the provincial inspection offices to the National Statistics Institute (ISTAT) over the previous 10 years. In order to establish correct reference averages for each Province, the only production data considered were those for years when no adverse weather events had occurred. To ensure there was no overcompensation, the competent authorities stressed that under the Ministry's note A/1659 of 2 July 1996 the aid could not exceed 100 % of the damage suffered by the beneficiary. The Italian authorities confirmed that the aid provided for by Article 13(2) of the Law could be cumulated with the aids provided for by Articles 17 and 18 of that same Law. However, in compliance with the above mentioned Ministerial instructions, the aid could never exceed the

([11]) OJ L 218, 6.8.1991, p. 1.
([12]) See footnote 7.

amount of the losses suffered by the beneficiary. Moreover the Italian authorities stressed that the aid provided for by Article 13(2), i.e. the suspension of the collection of the contributions to the Consorzi di bonifica, was granted to all owners of immovable property located within the area covered by the Consorzio di bonifica who had benefited from the land reclamation works (and so not just to farmers).

(42) In its letter of 7 November 1997 Italy submitted comments regarding Articles 1 and 10 of Law No 33/1996.

(43) As regards Article 1 the Italian authorities said that the rules on transport were consistent with Council Directive 92/106 of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States ([13]). They also referred to some comments from the Regional Assembly of Sicily. Some of the Regional Assembly's comments had been made direct to the Commission during a meeting held on 25 September 1997. According to these comments, Article 1 of Law No 33/96 was a regional aid within the meaning of Article 87(3)(a) of the Treaty and should be examined in the light of point 2.6 of the Commission Communication 94/C 364/06 of 20 December 1994 ([14]).

(44) As regards Article 10 the competent authorities indicated that the aids concerned could not be cumulated with other national or regional aids and could be granted at the rate of 80 % of the documented expenditure up to a maximum of ITL 1 000 million (ITL 1 200 million for the structures of second-degree consortia). Moreover, according to the competent authorities the method for calculating the 80 % rate differed from that used by the Commission as the region measure referred to a maximum volume of documented expenditure, whereas the 75 % rate applied by the Commission related to the cost of the investment. By letter dated 28 June 2001, the competent authorities indicated that the aid rate laid down in Article 33(1)(c) of Regional Law No 3/86 had been reduced by Article 51 of Regional Law No 32/2000 to 50 % on a maximum volume of expenditure of ITL 1 000 million (1 200 million for the structures of second-degree consortia). They also said that the aid was granted for the production, processing and marketing of plants and flowers, and that admissible expenditure covered the purchase of land and the cost of building immovable property, the cost of buying of existing buildings, their conversion and adaptation.

V. **ASSESSMENT OF THE AID**

(45) Article 87(1) of the Treaty provides that 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 is, in so far as it affects trade between Member States, incompatible with the common market.

A measure that is not State aid

(46) In the light of the above and the information provided by the competent authorities, one of the notified measures under examination is not to be considered a State aid within the meaning of Article 87(1) of the Treaty. This applies to Article 13(2) and (3), since, based on the information provided by the competent authorities, the suspension of the payment of the contributions due by their members to the Consorzi di bonifica applies equally to all owners of immovable property in the area covered by the Consorzi di Bonifica which were affected by adverse weather conditions between December 1995 and March 1996 and not just to the farmers located therein.

(47) The Consorzi di bonifica are public bodies tasked with carrying out public infrastructure works ([15]). They are regulated by national and regional law. These works may include: the planning, execution, maintenance and management of 'bonifica works' (land reclamation and also making land suitable for human occupation, since most of the land needing to be reclaimed was originally swampy and malaria-ridden), the implementation of protective measures to contain and prevent floods, the management of water resources with a view to rational economic and social development, etc. The land reclamation works belong to the State and Regions.

([13]) OJ L 368, 17.12.1992, p. 38. As corrected in OJ L 72, 25.3.1993, p. 36.

([14]) Changes to the method for the application of Article 92(3)(c) of the Treaty to regional aid. Communication from the Commission to the Member States and interested third parties on changes to the method for the application of Article 92(3)(c) of the EC Treaty to regional aid (OJ C 364, 20.12.1994, p. 8).

([15]) See aid Nos N 718/97, N 130/2000, N 412/2001 and N 53/2003, Venice Lagoon.

(48) The law gives the Consorzi di bonifica the power to impose contributions on their members which are compulsory and collected through the direct taxation system ([16]).

(49) The members of the Consortium are all the owners of immovable property (land and buildings) which is located within the area covered by the Consortium. The contribution under examination is therefore akin to a tax and it is imposed on all the members of the Consortium (usually including the State, the regions, the provinces and the municipalities for the assests belonging to them) who benefit from the land reclamation works, on the basis of their ownership of immovable property located within the area covered by the Consortium, and independently of the activity carried out by the owner of the property. The contribution is normally calculated on the basis of the 'cadastral rent' of the real estate ('rendita catastale' for buildings and 'reddito dominicale' for land) as resulting from public land registers, and on the basis of 'hydraulic indexes of benefit' ('indici idraulici di beneficio') relating to the specific areas where the property is located.

(50) In the case under examination the Region pays the Consortia for the loss of income resulting from the suspension of the collection of the contributions from all their members, not only from those members who may exercise an economic activity. Although many of the property owners in the area concerned might be farmers (which may explain the reference to the demarcation of the affected areas under National Law No 185/92), the measure under examination cannot be considered to favour certain undertakings or the production of certain goods within the meaning of Article 87(1) of the Treaty, since, according to the information provided, it is not aimed specifically at subjects exercising an economic activity and is applicable, without discrimination, to all property owners whose real estate is located within the area covered by the Consorzio di bonifica and who benefit from the land reclamation works. The measure does not therefore constitute a State aid within the meaning of Article 87(1) of the Treaty.

State aid measures

(51) Articles 1, 10, 17 and 19 of Regional Law No 33/96 provide for the grant of aid from public funds to specific agricultural undertakings which will undeniably be granted an undue economic and financial advantage to the detriment of other undertakings not receiving the same contribution. The Court of Justice has held that an improvement in the competitive position of an undertaking as a result of State financial aid leads to possible distortion of competition compared with other competing undertakings not receiving such assistance ([17]).

(52) The measures affect trade between Member States in that there is substantial intra-Community trade in agricultural products as indicated by the table ([18]) below, which lists the overall value of agricultural imports and exports between Italy and the European Union over the 1997 to 2001 period ([19]). Within Italy, Sicily is a significant producer of agricultural products.

Total agricultural sector

	ECU-EUR million	ECU-EUR million
	Exports	Imports
1997	9 459	15 370
1998	9 997	15 645
1999	10 666	15 938
2000	10 939	16 804
2001	11 467	16 681

(53) It should however be recalled that the Court of Justice has held that aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States even if it does not itself export its products. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member

([16]) Article 21 of Royal Decree No 215/1933, Article 864 of the Civil Code and Article 103 of DPR (Decree of the President of the Republic) No 603/73.

([17]) Court Judgment in Case C-730/79, *Philip Morris Holland BV* v *Commission*, ECR [1980] 2671, grounds 11 and 12.

([18]) *Source:* Eurostat.

([19]) Consistent case law holds that the condition of the effect on trade is met when the benefiting company carries out an economic activity which is the subject of trade between the Member States. The simple fact that the aid strengthens the position of this company in relation to other competing companies in intra-Community trade makes it possible to consider that trade was affected. As regards State aid to the agricultural sector, settled case law holds that, regardless of the relatively small amount of total aid involved and its distribution among many farmers, there is an impact on intra-Community trade and competition (see Case C 113/2000, [2002] ECR 7301, grounds 30 to 36 and 54 to 56 and Case C 114/2000, *Kingdom of Spain* v *Commission*, [2002] ECR I-7657, grounds 46 to 52, 68 and 69.

States have less chance of exporting their products to the market in that Member State. Such aid is therefore likely to affect trade between Member States and distort competition ([20]).

(54) The Commission therefore concludes that the measures are caught by the prohibition in Article 87(1) of the Treaty.

(55) The prohibition in Article 87(1) is followed by exemptions in Article 87(2) and (3).

(56) The exemptions listed in Article 87(2)(a),(b) and (c) are manifestly inapplicable given the nature of the aid measures in question and their objectives. Indeed, Italy has not submitted that Article 87(2)(a), (b) or (c) is applicable.

(57) Article 87(3)(a) is also inapplicable since the aids are not intended to promote the development of areas where the standard of living is abnormally low or where there is serious underemployment.

(58) The Commission must however consider that in their written comments submitted in a meeting the Sicilian authorities said that Article 1 of Law No 33/96 was a regional aid within the meaning of Article 87(3)(a) of the Treaty and should be examined in the light of point 2.6 of the Commission Communication 94/C 364/08.

(59) In this respect reference is made to point 3.7 of the guidelines applicable to State aid to agriculture ([21]) which states that, because the very specific conditions of agricultural production must be taken into account during the assessment of aid which is intended to favour the less-favoured regions, the Commission's guidelines on national regional aid ([22]) do not apply to the agricultural sector. Where they are relevant to the agricultural sector, regional policy considerations have been incorporated into the Community guidelines for State aid to the agriculture sector.

(60) In the light of the above, in so far as Article 1 of Regional Law No 33/96 provides for aid to undertakings operating in the production, processing and marketing of Annex I agricultural products, by reducing their normal transport costs, as in this case, the measure must be evaluated on the basis of State aid rules applicable to agriculture.

(61) Moreover the measure which, in the case under examination, provides for aid to reduce transport costs of Annex I agricultural products outside Sicily does not manifestly appear intended to promote the development of areas where the standard of living is abnormally low or where there is serious underemployment, nor have the Sicilian authorities provided any demonstration in this respect or shown the link between the aids that they intend to grant and the development of areas where the standard of living is abnormally low or where there is serious underemployment.

(62) Furthermore the last indent of point 2.6 of Commission Communication 94/C 364/08 states that it does not apply to Annex I agricultural products but instead concerns particular European regions. This Communication is therefore manifestly inapplicable to the aid for the transport of agricultural products outside Sicily, as are the guidelines on national regional aids in which the rules on aids to compensate for extra transport costs in specific regions ([23]) have been later incorporated.

(63) It follows that the derogation provided for by Article 87(3)(a) of the Treaty is therefore inapplicable to the measures under examination.

(64) Article 87(3)(b) is equally inapplicable as the aids in question are not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in Italy's economy.

([20]) Case 102/87 *French Republic* v *Commission* ECR [1988] I-4067.

([21]) OJ C 28, 1.2.2000, p. 2. As corrected in OJ C 232, 12.8.2000, p. 17.

([22]) OJ C 74, 10.3.1998, p. 9.

([23]) See Amendments to the guidelines on national regional aid (OJ C 258, 9.9.2000, p. 5). Point 4.16.1 states 'In the outermost regions qualifying for exemption under Article 87(3)(a) and (c) of the Treaty, and in the regions of low population density qualifying for exemption either under Article 87(3)(a) or under 87(3)(c) on the basis of the population density test referred to at point 3.10.4, aid which is not both progressively reduced and limited in time and is intended to offset in part additional transport costs may be authorised under special conditions. It is the task of the Member State to prove that such additional costs exist and to determine their amount'.

(65) The Commission must however consider that the Italian authorities have also invoked Article 87(3)(b) to claim that Article 1 of Regional Law No 33/96 is compatible with the Treaty. In this respect the Commission notes that the Italian authorities have failed to indicate which important project of common European interest the aid would promote or which serious disturbance in Italy's economy the aid would remedy.

(66) The competent authorities have vaguely indicated that the aid is aimed at promoting intermodal transport in compliance with Community Directive 92/106/EEC; this cannot be considered an important project of common European interest within the meaning of Article 87(3)(b) of the Treaty, however. Moreover the aid provided for in Article 1 is granted to the beneficiaries for any type of transport they intend to use and the Italian authorities have not demonstrated the link between the aid that they intend to grant and the execution of any important project of common European interest.

(67) This aid is not intended to achieve or suitable for achieving the objectives referred to in Article 87(3)(d).

(68) Considering the nature of the aid under examination and its objectives, the only exemption which may be applicable is the one provided for by Article 87(3)(c) of the Treaty.

Applicable provisions

(69) The applicability of the derogation referred to in Article 87(3)(c) of the Treaty must be assessed in the light of the provisions applicable to the grant of State aid in the agriculture sector, namely the Community guidelines for State aid in the agriculture sector ([24]) (hereinafter 'the guidelines').

(70) Under point 23.3 of the guidelines, the Commission will apply them with effect from 1 January 2000 to new notifications of State aid and to notifications which are pending on that date. Unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the Treaty ([25]) will be assessed in accordance with the rules and guidelines in force at the time the aid is granted.

(71) On the basis of the information available, Regional Law No 33/96 was notified to the Commission and its Article 63 provides for a suspensory clause which makes the implementation of the State aid measures contained in the Law conditional upon their approval by the Commission ([26]).

(72) By means of telex AGR 029182 of 20 November 2000, the Commission asked the competent authorities to state whether aid had already been granted to Annex I agricultural products based on provisions in respect of which the Commission had decided to open a formal investigation. The Commission also indicated that, if the Italian authorities could state that they had not granted the aid to the agricultural sector on the basis of the abovementioned provisions and had committed themselves to repealing the relevant legal provisions in so far as they applied to the agricultural sector, they were invited to consider the option of withdrawing the notification under examination.

(73) The Italian authorities have not replied to this question. Without any information to the contrary the Commission is therefore entitled to assume that the aid concerned has not yet been put into effect. Their examination therefore falls within the scope of the new Guidelines ([27]).

Article 1 of Regional Law No 33/96

(74) Article 1 provides for aid for the extra costs incurred by undertakings operating in Sicily for the transport outside the Region of the goods produced and/or

([24]) See footnote 21.

([25]) OJ L 83, 27.3.1999, p. 1.

([26]) Article 63 (EC control procedure) reads: '1. The assistance provided for in this law shall be subject to the applicable Community rules on State aid, and to the conclusion of the procedures laid down in Article 93(2) and (3) of the Treaty. 2. Any suspension of a provision as a result of the procedure laid down in Article 93 of the Treaty shall not prejudice the implementation of the other provisions of this law that are not subject to comment or that have been favourably assessed by the Commission of the European Communities.'

([27]) See footnote 21.

processed in Sicily. The reason for the aid is the distance of the undertakings from the main national and European markets. The aid applies to undertakings in all productive sectors (except for the mining and hydroelectric industries which are obliged to operate in the Region) which use rail, road, maritime and air transport, or combined transport, and so to the transport of agricultural goods. The aid relates to the period 1997 and 1998. The aid is calculated on the basis of the kilometres travelled and transported weight, based on the transport of the goods within Italy. The calculation of the extra costs is fixed annually by Decree of the President of the Regional Government, on the basis of the most economical means of transport and the most direct connection between the place of production or processing and the commercial outlets. The aid for extra costs cannot exceed the real costs incurred.

(75) In its decision to open the procedure with regard to this aid, the Commission noted that with regard to the agricultural sector, the aid was in essence an amended form of the aid provided for in Article 90 of Regional Law No 25/1993 which was the object, under procedure C 30/95, of a final negative decision requiring the repeal of the measure and the recovery of any aid paid out ([28]). The reasons which had led the Commission to take that decision remain, in substance, valid ([29]).

(76) In particular the Commission noted that it regarded this type of aid as being operating aid which is not compatible with the common market. This type of aid, which relieves the recipients of a part of their operating costs, has no durable or structural effect on the sectors concerned and it only gives an advantage to Sicilian products which are marketed outside the region over products which do not benefit from a comparable measure, in Italy or in other Member States.

(77) The Commisson's assessment of this measure does not change under the guidelines. In particular, point 3.5 of the guidelines establishes that in order to be considered compatible with the common market, any aid measure must contain some incentive element or require some counterpart on the part of the beneficiary. Unless exceptions are expressly provided for in Community legislation or in these guidelines, unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector, and in particular aids which are granted solely on the basis of price, quantity, unit of production or unit of the means of production are deemed to be operating aids which are incompatible with the common market. Furthermore, by their very nature, such aids are also likely to interfere with the mechanisms of the common organisations of the market.

(78) The aid under examination does not contain any incentive element and does not require any counterpart on the part of the beneficiary. Neither the guidelines applicable to State aid to agriculture nor any other Community rules provide for State aid of this type and the aid in question is intended merely to improve the financial situation of producers without contributing in any way to the sector's development.

(79) In their comments, the Italian authorities said that the aid was intended to encourage inter-modal transport and to improve the transport sector. However, the aid in question is quite obviously paid to undertakings that use any haulier whatsoever to carry their products to markets located outside Sicily. In the case under examination, these undertakings are involved in the production, processing and marketing of agricultural products listed in Annex I to the EC Treaty. The aid relieves the undertakings of the transport costs for their goods, which they should normally bear. No evidence has been provided that the aid is aimed at encouraging a particular type of transport or that the aid is passed on to the transport sector. All the comments made by the competent authorities in respect of the transport sector and their references to Article 77 (now 73) of the Treaty are therefore inapplicable to this case and devoid of any foundation.

(80) Consequently the aid measure provided for in Article 1 of Regional Law No 33/96 in favour of undertakings involved in the production, processing and/or marketing of agricultural products under Annex I, both under previous Commission practice and under the guidelines which are currently applicable to State aid for agriculture, provides operating aid to relieve the beneficiaries of their transport costs.

(81) Since the aid under examination has no incentive element and does not require any counterpart on the part of the beneficiary, and since Sicily is not an outermost region where operating aid could be allowed

([28]) See footnotes 4 and 5.
([29]) See footnote 6.

under point 16 of the current Community guidelines, no justification can be given under State aid rules applicable to agriculture to the aid under examination, which is simply operating aid intended to relieve the beneficiaries of their transport costs.

(82) As such this aid cannot benefit from a derogation under Article 87(3)(c) of the Treaty. As demonstrated above, the aid cannot even benefit from a derogation under Article 87(3)(a) or (b) or from any other derogation provided for by the Treaty. This aid is therefore to be considered incompatible with the common market and cannot be implemented.

Article 10 of Regional Law No 33/96

(83) This Article extends the provisions of Articles 51, 52, 53 and 54 of Regional Law No 3/86 to consortia made up of agricultural, craft and commercial undertakings which are active in the production, processing and marketing of plants and flowers. According to the information provided by the competent authorities by letter of 3 June 1996, the aid measures concerned are of unlimited duration.

(84) The aid on which the Commission had decided to open the procedure is the one provided for by Article 10, in so far as it refers back to Article 53(c) of Regional Law No 3/86. This aid, which concerns the creation of common structures, can be granted at a rate of 80 % to subsidise the following eligible expenditure: purchase of land, construction of the necessary buildings, purchase and conversion of existing buildings and the acquisition of any other essential fixed structure that the cooperatives need in order to operate.

(85) In the sector concerned, according to the provisions which were applicable at the time ([30]), national aid had to conform to the sectoral limits referred to in the second and third indents of point 1.2 of the Annex to Commission Decision 94/173/EEC and the aid intensity could not exceed 75 % of the investment costs in Objective 1 regions such as Sicily.

(86) The rate planned for the regional measure under examination was 80 % and no information was provided enabling compliance with the applicable sectoral limits to be checked.

(87) In their comments on this measure the Italian authorities indicated firstly that the aids concerned could not be cumulated with other national or regional aids and could be granted at the rate of 80 % of the documented expenditure up to a maximum of ITL 1 000 million (or ITL 1 200 million for the structures of second-degree consortia). Moreover, according to the competent authorities, the way in which the 80 % rate was calculated differed from that used by the Commission in that the regional measure related to documented expenditure on a maximum volume of expenditure, whereas the 75 % maximum applied by the Commission related to the cost of the investment.

(88) By letter dated 28 June 2001, the competent authorities indicated that the aid rate laid down in Article 33(1)(c) of Law No 3/86 had been reduced by Article 51 of Law No 32/2000 to 50 % on a maximum volume of expenditure of ITL 1 000 million (1 200 million for the structures of second-degree consortia). They also said that the aid was granted for the production, processing and marketing of plants and flowers, and that admissible expenditure covered the purchase of land and the cost of building immovable property and the cost of buying of existing buildings, their conversion and adaptation. Since Article 10 of Regional Law 33/96 refers back to Article 53 of Law 3/86 (and not to Article 33 of this law), it is not at all clear that the measures to which the reduction refers are indeed Article 53 of Law 3/86 and Article 10 of Law 33/96.

(89) This information however does not change the assessment made by the Commission in its decision to open the procedure on the aid measure concerned.

(90) For the reasons which are set out below, this measure of unlimited duration cannot be deemed compatible with the State aid rules on investment aid for the production, processing and marketing of Annex I agricultural products which are applicable from 1 January 2000 and which are set out in points 4.1 and 4.2 of the Community guidelines on State aid in the agriculture sector ([31]).

(91) With regard to the aids for processing and marketing, those guidelines stipulate that, as a general rule, aid granted to support investments in connection with the processing and marketing of agricultural products may be granted only to enterprises which can be demonstrated to be economically viable, based on an

([30]) See footnote 7.

([31]) See footnote 21.

assessment of their prospects ([32]), and which comply with minimum standards regarding the environment, hygiene and animal welfare. However, where investments are made in order to comply with newly introduced minimum standards regarding the environment, hygiene or animal welfare, aid may be granted in order to achieve these new standards. The aid rate may not exceed 50 % of eligible investments in Objective 1 regions and 40 % in the other regions. Eligible expenditure may include the construction, acquisition or improvement of immovable property, new machinery and equipment, including computer software, general costs, such as architects, engineers and consultation fees, feasibility studies and the acquisition of patents and licences, up to 12 % of the expenditure referred to above.

(92) No aid may be granted unless sufficient evidence can be produced that normal market outlets for the products concerned can be found. To this end the products concerned, the types of investment and existing and expected capacities must all be assessed to an appropriate degree. To this end, any restrictions on production or limitations of Community support under the common market organisations must be taken into account. In particular no aid may be granted in contravention of any prohibitions or restrictions laid down in the common organisations of the market.

(93) Although, as is the case for 2000, the aid rate may have been reduced to 50 %, the aid provided for in Article 10 of Regional Law No 33/96 does not comply with any of the other conditions set out in the preceding paragraphs. In particular, there is no evidence that normal market outlets for the products concerned have been found. Moreover the conditions of viability and minimum standards regarding the environment, hygiene and animal welfare are not met. As regards the eligible expenditure, the purchase of land cannot be authorised.

(94) With regard to the aid for primary production governed by point 4.1 of the Guidelines, subject to the exceptions provided for in point 4.1.2, which in the case under examination do not apply, the maximum rate of public support, expressed as a percentage of the volume of eligible investment is limited to a maximum of 40 %, or 50 % in the less-favoured areas, as defined in Article 17 of Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations ([33]). In the case of investments made by young farmers within five years of setting-up, the maximum rate of aid is increased to 45 %, or 55 % in the less-favoured areas.

(95) Aid for investments may only be granted to agricultural holdings whose economic viability can be demonstrated by an assessment of their prospects ([34]), and where the farmer possesses adequate occupational skill and competence. The holding must comply with minimum Community standards regarding the environment, hygiene and animal welfare. However, where investments are made in order to comply with newly introduced minimum standards regarding the environment, hygiene or animal welfare, aid may be granted in order to achieve these new standards.

(96) No aid may be granted for investment having as its objective increased production for which normal market outlets cannot be found. The existence of normal market outlets should be assessed appropriately in terms of the products concerned, the types of investment and existing and expected capacities. Any restrictions on production or limitations of Community support under the common market organisations must be taken into account. Where, under a common market organisation, restrictions on production or limitations of Community support exist at the level of individual farmers, holdings or processing plants, no aid may be granted for investment which would increase production beyond these restrictions or limitations.

(97) Eligible expenditure may include the construction, acquisition or improvement of immovable property, new machinery and equipment ([35]), including computer

([32]) Aid cannot be granted to undertakings in financial difficulties except where such aid satisfies the conditions laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

([33]) OJ L 160, 26.6.1999, p. 80.

([34]) See footnote 32.

([35]) The purchase of second-hand equipment can be deemed admissible in duly justified cases if all the following four conditions are also met:
(a) a declaration from the seller stating the precise origin of the equipment and confirming that it has not previously benefited from a national or Community contribution;
(b) the purchase of such equipment must be of particular benefit to the programme or project or be imposed by exceptional circumstances (new equipment not available or only after a long waiting period, so threatening the proper implementation of the project);
(c) it must produce a reduction in the associated costs (and so the amount of aid) relative to the cost of that equipment if bought new, so maintaining a good cost/benefit ratio for the operation;
(d) the technical and/or technological features of the equipment must meet the demands of the project.

software, general costs, such as architects, engineers and consultation fees, feasibility studies, the acquisition of patents and licences, up to 12 % of the expenditure referred to above, and land purchase, including legal fees, taxes and land registration costs. The maximum eligible expenses may not exceed the limits for total investment set by the Member State in accordance with Article 7 of Regulation (EC) No 1257/1999.

(98) The Commission also applies the rules set out in this section by analogy to investments in primary agricultural production which are not made by farmers, for example where equipment is purchased for shared use by producer associations.

(99) The aid provided for by Article 10 does not satisfy the rules currently applicable to investment aid for primary production. Although, as it would appear, the aid rate may have been reduced in 2000 to 50 %, this does not mean that aid is not granted for investment having as its objective increased production for which normal market outlets cannot be found. Moreover, the conditions of viability, adequate occupational skills and competence and compliance with minimum Community standards regarding the environment, hygiene and animal welfare are not met.

(100) In the light of the above assessment, the grant of aid provided for by Article 10 of Regional Law No 33/96 in so far as it refers back to Article 53(c) of Regional Law No 3/86 does not comply with the State aid rules for investments in the production, processing and marketing of Annex I agricultural products. As such this aid cannot benefit from the derogation provided by Article 87(3)(c) of the Treaty. This aid is therefore to be considered incompatible with the common market and cannot be implemented.

Article 19 of Regional Law No 33/96

(101) This Article provides for subsidies up to 80 % for the construction on farms of facilities for the production of electric, thermal or mechanical energy from renewable resources. In particular it provides for an increase in the aid rate laid down in Article 12(1) of National Law No 308/82 and in Article 13(1) of National Law No 10/91, for which the maximum limit is 55 % (65 % for cooperatives). The capital subsidy can be cumulated with a subsidised loan covering the investment costs not covered by the subsidy. The budget for the measure amounted to ITL 2 500 million. As stated in paragraph (2) above, this Decision covers only the aid measures in favour of Annex I agricultural products.

(102) The Commission noted in its decision to open the procedure that the maximum aid rates provided for in the national law (55 %, 65 % for farming cooperatives) had to be coordinated with the aid rates and the rules in force for investment aid for the production or processing and marketing of agricultural products.

(103) At the time of the opening of the procedure, as set out in the letter to Italy, the rules applicable to this type of aid required:

(a) compliance with the applicable maximum rates in the agricultural sector (cumulating any aid, subsidy and/or interest rebate). These were respectively:

(i) in the primary production sector (investments falling within Article 12(5) of Regulation (EEC) No 2328/91): 35 %, or 45 % in the less-favoured areas within the meaning of Directive 75/268/EEC;

(ii) in the processing and marketing sector: 55 % (75 % in the Objective 1 regions).

(b) in both cases, compliance with the sectoral limits laid down in Regulation (EEC) No 2328/91 for primary production and in the Community guidelines on State aid for investments in the processing and marketing of agricultural products as referred in to the Annex to Commission Decision 94/173/EEC.

(104) The Italian authorities offered no assurances as regards compliance with the above conditions. The measure under examination does not therefore satisfy any of the rules which were applicable to investment aid for the production, processing and/or marketing of Annex I agricultural products.

(105) The measure does not even satisfy the rules which currently apply to investment aid for the production, processing and/or marketing of Annex I agricultural products, as set out at points 4.1 and 4.2 of the guidelines.

(106) Although the measure introduces aid to construct on-farm facilities for the production of electric, thermal or mechanical energy from renewable resources, and is therefore an aid within the meaning of point 4.1 of the guidelines (and to which point 4.3 refers), it will also be assessed, as was done at the time of the opening of the procedure, on the basis of the rules which are currently applicable to the processing and marketing of Annex I agricultural products.

(107) The rules applicable to investment aid for processing and marketing were outlined above in the context of the assessment of the aid provided for by Article 10 of Regional Law No 33/96. Like the aid provided for by Article 10, the aid provided for by Article 19 does not satisfy these rules either. In particular, there is no evidence of normal market outlets for the products concerned. The aid rate of up to 80 % well exceeds the 50 % aid rate allowed by the guidelines. Since the aid is not granted within the framework of a regional aid scheme which has previously been approved by the Commission in accordance with the Community guidelines on national regional aid, the aid cannot even be granted up to a possibly higher rate which was approved under that scheme. Moreover the conditions of viability and minimum standards regarding the environment, hygiene and animal welfare are not met.

(108) According to the rules set out at point 4.1 of the guidelines which apply to investment aid for primary production and for diversification at farm level, subject to the exceptions provided for in point 4.1.2, the maximum rate of public support, expressed as a volume of eligible investment, is limited to a maximum of 40 %, or 50 % in the less-favoured areas as defined in Article 17 of Regulation (EC) No 1257/1999. However, in the case of investments made by young farmers within five years of setting-up, the maximum aid rate is increased to 45 %, or 55 % in the less-favoured areas. Under point 4.1.2, where investments result in extra costs relating to the protection and improvement of the environment, the improvement of hygiene conditions of livestock enterprises or the welfare of farm animals, the maximum aid rates of 40 %, or 50 % under point 4.1.1.2 may be increased by 20 or 25 percentage points respectively. This increase may be granted only for investments which go beyond the minimum Community requirements in force. The increase must be strictly confined to the extra eligible costs necessary to meet the objective in question and does not apply to investments which increase production capacity.

(109) Aid for investment may be granted only to agricultural holdings whose economic viability can be demonstrated by an assessment of their prospects ([36]), and where the farmer possesses adequate occupational skill and competence. The holding must comply with minimum Community standards regarding the environment, hygiene and animal welfare. However, where investments are made in order to comply with newly introduced minimum standards regarding the environment, hygiene or animal welfare, aid may be granted in order to achieve these new standards.

(110) No aid may be granted for investments having as their objective increased production for which normal market outlets cannot be found. The existence of normal market outlets should be assessed appropriately in terms of the products concerned, the types of investment and existing and expected capacities. Any restrictions on production or limitations of Community support under the common market organisations must be taken into account. Where, under a common market organisation, restrictions on production or limitations of Community support exist at the level of individual farmers, holdings or processing plants, no aid may be granted for investment which would increase production beyond these restrictions or limitations.

(111) Eligible expenditure may include the construction, acquisition or improvement of immovable property, new machinery and equipment ([37]), including computer software, general costs, such as architects', engineers' and consultants' fees, feasibility studies, the acquisition of patents and licences, up to 12 % of the expenditure referred to above, and land purchase, including legal fees, taxes and land registration costs. The maximum eligible expenses may not exceed the limits for total investment set by the Member State in accordance with Article 7 of Regulation (EC) No 1257/1999.

(112) The Commission also applies the rules set out in this section by analogy to investments in primary agricultural production which are not made by farmers, for example where equipment is purchased for shared use by producer groups.

([36]) See footnote 32.
([37]) See footnote 35.

(113) The aids provided for by Article 19 do not satisfy the rules currently applicable to investment aid for primary production and for diversification at farm level. In particular, there are no guarantees that aid is not granted for investments having as their objective increased production for which normal market outlets cannot be found. The aid rate, which can unconditionally reach 80 %, exceeds the maximum rates allowed by the Guidelines, i.e. 40 % (or 50 % in the less-favoured areas as defined by Article 17 of Regulation (EC) No 1257/1999); or 45 % (55 % in the less favoured areas) if the investments are carried out by young farmers within five years of setting-up; or 60 % (75 % in less-favoured areas) if the investments include extra costs attributed to the protection or improvement of the environment, the improvement of hygiene conditions of livestock enterprises or the welfare of farm animals, in accordance with the conditions laid down in point 4.1.2.4 of the guidelines. Moreover, the conditions of viability, adequate vocational skills and competence and compliance with the minimum standards regarding the environment, hygiene and animal welfare are not met.

(114) In the light of the above assessment, the grant of aid provided for by Article 19 of Regional Law No 33/96 does not comply with the State aid rules for the production, processing and marketing of Annex I agricultural products. As such this aid cannot benefit from the derogation provided by Article 87(3)(c) of the Treaty. This aid is therefore to be considered incompatible with the common market and cannot be implemented.

Article 17 of Regional Law No 33/96

(115) Article 17 of Regional Law No 33/96 allows the Region to advance the amounts due from the State as assistance from the national solidarity Fund to compensate for the damage caused by a natural disaster (National Law No 185/92). The aid measure provided for by Article 17 is limited to 1996, for which an appropriation of ITL 20 000 million is earmarked (see letter of 3 June 1996). The aid consists of subsidies to enable farmers to restore their working capital (capitale di conduzione) and subsidies for the restoration of structures on the holdings which were damaged by the natural events concerned. The beneficiaries are independent farmers who suffered damage to more than 35 % of their gross saleable production due to the temperature fluctuations and flooding that occurred in 1996.

(116) The aid provided for in Article 17 can be cumulated within the limits allowed by National Law No 185/92.

(117) In its decision to open the formal procedure against the aid provided for by Article 17, the Commission noted that the above assistance had to be examined in the light of the criteria applied by the Commission at the time to national aid to compensate for the damage caused by natural disasters ([38]). According to these criteria, the following two conditions had to be met:

(a) the losses suffered by the aid recipients had to reach 30 % of their normal production (or 20 % in the less-favoured areas within the meaning of Directive 75/268/EEC) calculated on the basis of production in the preceding three years;

(b) any possibility of over-compensating the losses incurred had to be excluded.

(118) The Commission noted in its Decision that, in the case under examination, the information abialable made it impossible to conclude that both these conditions were met. With regard to Article 17, which transposes and incorporates national legislation on natural disasters, the regional texts submitted restricted themselves to referring to the provisions of National Law No 185/92 and its implementing arrangements, including a letter from the Ministry of Agriculture (A1659 of 2 July 1996) which indicated that the aid could not exceed 100 % of the damage. At the time the procedure on the aid under examination was opened, National Law No 185/92 was also the subject of a decision to initiate the procedure provided for in Article 88(2) of the Treaty, by virtue of the fact that it was impossible to check compliance with the conditions referred to in point 117(a) and (b) above ([39]). Consequently, in the absence of specific assurances regarding compliance at the regional level with those conditions, the Commission noted that the same conclusions were also inevitable in the case under examination.

(119) In particular, the Commission had pointed out, firstly, that neither the regional law nor the information submitted in respect of this case file indicated how 'normal' production used as the reference for fixing the minimum compensation threshold was calculated. Secondly, doubts remained as regards the condition regarding excess compensation.

([38]) See footnote 8.
([39]) Aid C 12/95 (OJ C 295, 10.11.1995, p. 5).

(120) In their comments on Article 17, which they submitted after the opening of the procedure, the Italian authorities indicated that, to calculate the 'normal' production which they used to determine the 35 % loss required by National Law No 185/92, they had analysed the data sent by the provincial inspection offices to the National Statistics Institute (ISTAT) over the last 10 years. In order to establish correct reference averages for each province, the production data considered were only those for years when no adverse weather events had occurred. As regards non-overcompensation, the competent authorities stressed that, under the Ministry's note A/1659 of 2 July 1996, the aid could not exceed 100 % of the damage suffered by the beneficiary. Although the aid provided for by Article 17 could be cumulated with that provided for by Article 13(2) of Law 33/96, in compliance with the above mentioned Ministerial instructions, the total aid could therefore never exceed the amount of the losses suffered by the beneficiary.

(121) At the time of the notification of the aid and of the decision to open the procedure, these types of aid were assessed on the basis of the Rules governing the grant of national aids in the event of damage to agricultural production or the means of agricultural production and national aids involving the defraying of a proportion of the insurance premiums covering such risks ([40]). In accordance with these rules and constant Commission practice, weather events such as ice, hail, frost, rain or drought could be deemed natural disasters within the meaning of the Treaty if the damage suffered by an individual aid beneficiary reached a particular threshold, set at 30 % of normal production (20 % in the less-favoured areas) based on the total gross quantity of production affected by the event in question on an individual holding applying for an allowance to compensate for losses suffered and on the corresponding normal gross annual production. That rate had to be determined by comparing average normal production recorded objectively for each holding concerned during a reference period of three years preceding that of the event in question, disregarding, where appropriate, a previous year which also gave rise to compensation on the same grounds, against the reduced or destroyed production under consideration.

(122) The rules which are currently applicable to make good the damages caused by these weather events are contained in point 11.3 of the guidelines. According to these rules the Commission has consistently held that adverse weather conditions such as frost, hail, ice, rain or drought cannot of themselves be regarded as natural disasters within the meaning of Article 87(2)(b) of the Treaty. However, because of the damage that such events may cause to agricultural production or the means of agricultural production, the Commission has accepted that such events may be likened to natural disasters once the level of damage reaches a certain threshold, which has been fixed at 20 % of normal production in the less-favoured areas and 30 % in other areas. Because of the inherent variability of agricultural production, the maintenance of such a threshold also appears necessary to ensure that weather conditions may not be used as a pretext for the payment of operating aid. In order to enable the Commission to assess such aid schemes, notifications of aid measures to compensate for damage caused by adverse weather conditions should include appropriate supporting meteorological information.

(123) Where damage occurs to annual crops the relevant loss threshold of 20 % or 30 % should be determined on the basis of the gross production of the relevant crop in the year in question compared with the gross annual production in a normal year. In principle the gross production in a normal year should be calculated by reference to the average gross production in the previous three years, excluding any year in which compensation was payable as a result of other adverse weather conditions. The Commission will however accept alternative methods of calculation of normal production, including regional reference values, provided it is satisfied that these are representative and not based on abnormally high yields. Once the volume of lost production has been determined, the amount of aid payable should be calculated. In order to avoid over-compensation, the amount of aid payable should not exceed the average level of production during the normal period multiplied by the average price in the same period, minus actual production in the year the event took place, multiplied by the average price for that year. The amount of aid should also be reduced by the amount of any direct aid payments.

(124) As a general rule, the calculation of loss should be made for each individual holding. This is particularly the case where aid is paid to compensate for damage caused by localised events. However, where the adverse weather conditions have affected a wide area in the same way, the Commission will accept that aid payments are based on average losses, provided that these are representative and will not result in significant overcompensation of any beneficiary.

(125) In the case of damage to the means of production the effects of which are felt over several years (for example

([40]) See footnote 8.

the partial destruction of orchard crops by frost), for the first harvest following the adverse event the percentage real loss in comparison with a normal year, determined in accordance with the principles set out in the previous paragraphs, must exceed 10 % and the percentage real loss multiplied by the number of years in which production is lost must exceed 20 % in the less-favoured areas and 30 % in other areas.

(126) The Commission applies the principles set out above by analogy in the case of aids to compensate for losses to livestock caused by adverse weather conditions.

(127) In order to avoid over-compensation, the amount of aid paid should be reduced by any amount received under insurance schemes. Furthermore, normal costs not incurred by the farmer, for example because of the non-harvesting of the crop, should also be taken into account. However, where such costs are increased as a result of the adverse weather conditions, additional aid may be granted to cover these costs.

(128) Aid to compensate farmers for damage to buildings and equipment caused by adverse weather events (for example damage to glasshouses caused by hail) will be accepted up to 100 % of actual costs, without any minimum threshold being applied. As a general rule, only farmers, or the producers' association of which they are members, are entitled to the aid described in this section. The aid must not exceed in this case the farmer's actual loss.

(129) In their notification and in the comments subsequently submitted, the competent authorities indicated that the beneficiaries are independent farmers who have incurred damage to more than 35 % of their gross saleable production due to the temperature fluctuations and flooding that occurred in 1996. According to the notification, Article 17 of Regional Law No 33/96 allows the Region to advance the amounts due from the State as assistance from the national solidarity Fund to compensate for the damage caused by a natural disaster (National Law No 185/92). The aid consists of subsidies to enable farmers to restore their working capital (capitale di conduzione) and subsidies for the restoration of structures in the holdings which were damaged by the natural events concerned. The aid measure provided for by Article 17 was limited to 1996, for which an appropriation of ITL 20 000 million was planned.

(130) The Commission has recently concluded its examination of the compensatory aids granted by Italy on the basis of National Law No 185/92 until 31 December 1999 to make good the damage caused by natural disasters and adverse weather conditions (Aid C 12/A/95). In this decision, following a detailed assessment, the Commission found these aids to be compatible with the common market. In particular the Commission concluded that the method for calculating the losses proposed by the competent authorities was acceptable, that the weather events for which the Law provided compensation following a loss of 35 % of the gross saleable production were compatible with Community rules and that no overcompensation could arise from the cumulation of the different types of aids to make good the damage caused by natural disasters and comparable weather events.

(131) Although that Decision regarding National Law No 185/92 covers only the aid granted up to 31 December 1999, and was adopted on the basis of the State aid rules for aid to make good the damage caused by natural disasters and comparable weather events which were applicable until that date ([41]), the Commission expressed a favourable opinion both on the criteria used to establish that certain exceptional weather events were comparable to natural disasters and on the method for calculating the losses suffered by the beneficiaries which were applied by the Italian authorities when the adverse weather events governed by Article 17 took place (1996). Since Article 17 merely anticipates financially the aid provided for by National Law No 185/92 and the competent authorities expressly referred to the provisions of that law and its implementing rules for the grant of the aids under examination, there is no reason to reach a different conclusion in this case. Moreover, regarding the risk of overcompensation, the competent authorities in their comments have provided sufficient assurances that, even when cumulated with other public aid, the aid could never exceed the amount of the losses suffered by the beneficiary.

(132) Furthermore, it must be considered that, regarding the application of National Law No 185/92 from 1 January 2000, i.e. from the entry into force of the new State aid rules applicable to compensation to farmers for damages caused by natural disasters and adverse weather events, the Italian authorities, in the context of another dossier (aid C 12/B/95), by letters of 20 November 2000 and

([41]) See footnote 8.

21 November 2003, registered on 24 November 2003 (and as supplemented by the fax of 25 November 2003), supplied detailed information that demonstrates that the aid granted by them under National Law No 185/92 continues to satisfy State aid rules as they are now reproduced in point 11 of the Community guidelines on State aid to the Agriculture sector and as they were reported above.

(133) In particular, in their letters of 20 November 2000 and 21 November 2003 the Italian authorities gave assurances that:

(a) the aid is granted only after a Decree declaring the exceptionality of the weather event concerned is issued by the Ministry of Agriculture following the verification of the data contained in the technical reports made by the provincial public inspection services competent for agriculture which are submitted to it by the regions. These reports, which are drafted on a case-by-case basis after the event concerned, contain the technical information for evaluating the exceptionality of the weather event (including the relevant meteorological information) and for quantifying the resulting damages ([42]);

(b) the minimum damage threshold for obtaining aid is 35 % (and not 30 % or 20 % as required by the guidelines) of the affected crop and of the holding's gross marketable production. The affected holding's average normal production is calculated on a three-year basis, taking 'normal crop years' as the reference, i.e. years in which there were no disasters or excessively good harvests;

(c) the aid is paid only in relation to the loss suffered by the crop which reported a loss not lower than 35 %; the losses concerning insured crops are excluded from the calculation of the aid and the normal costs not incurred by the farmer, for example because of the non-harvesting of the crop, are also taken into account;

(d) overcompensation from the cumulation of the different types of aids is excluded.

(134) In the light of the above considerations it may therefore be concluded that the aid provided for by Article 17 of Regional Law No 33/96 to make good the damage caused by adverse weather events, which refers back to the conditions contained in National Law No 185/92, is compatible with the common market and may therefore benefit from the derogation set for these types of aids by Article 87(3)(c) of the Treaty.

VI. **CONCLUSIONS**

(135) In view of the above considerations, the aid measures provided for by Article 1 of Regional Law No 33/96 to reduce the transport costs of undertakings involved in the production, processing or marketing of Annex I agricultural products cannot benefit from any of the derogations to Article 87(1) provided for by the Treaty and are therefore incompatible with the common market.

(136) The aid measures provided for by Article 10 (in so far as it refers back to Article 53(c) of Regional Law No 3/86) and by Article 19 of Regional Law No 33/96 to support investments in favour of undertakings involved in the production, processing or marketing of Annex I agricultural products cannot benefit from any of the derogations to Article 87(1) provided for by the Treaty and are therefore incompatible with the common market.

([42]) Article 2 of Law No 185/92 provides that, once the regions have established, on the basis of technical reports made by the provincial public inspection services competent for agriculture, the areas which were hit by the natural disaster or by the comparable exceptional adverse weather event and have assessed the damages, the Ministry of Agriculture, following verification of the effects of the event concerned, issues a Decree which declares the exceptional nature of the event and allows the grant of aid in favour of the affected undertakings which suffered damages equal at least to 35 % of their gross marketable production. According to the information provided by the competent authorities in their letter of November 2003 regarding the aid paid for natural disasters and comparable events since 1 January 2000, the technical information for evaluating the exceptional nature of each weather event concerned (including the relevant meteorological information) and for quantifying the resulting damages are contained in specific technical reports which are drafted by the provincial public inspection services competent for agriculture, on a case-by-case basis, after the event concerned. For each weather event, or group of weather events, which have resulted in damage equal at least to 35 % of the gross marketable production of the affected undertakings, after verification of the above regional inspection reports, the Ministry of Agriculture issues a Decree declaring the exceptional nature of the event concerned. As an example of the procedure described and of the data on the basis of which the exceptionality of a weather event is declared, the national authorities sent a dossier regarding drought in Sicily (Agrigento) in the years 2001/2002. Each Decree issued by the Ministry of Agriculture contains: a description of the exceptional weather event concerned, the period during which the event took place, the affected area and the type of aids provided for by Law No 185/92 which could be granted.

(137) The aid measure provided for by Article 17 of Regional Law No 33/96 concerning the grant of aid for damages caused by adverse weather events similar to natural disasters can be considered compatible with the common market in accordance with Article 87(3)(c) of the Treaty as aid designed to make good the damage caused by events similar to natural disasters.

(138) The aid measure provided for by Article 13(2) and (3) does not constitute State aid within the meaning of Article 87(1) of the Treaty.

(139) Under Article 63 of Regional Law No 33/96, implementation of the State aid measures provided for in the Law itself is conditional upon their approval by the Commission. Without evidence to the contrary, the Commission is therefore entitled to conclude that the aids have not yet been granted and that therefore, where incompatible, they must not be implemented.

HAS ADOPTED THIS DECISION:

Article 1

The State aids which Italy is planning to implement in favour of undertakings involved in the production, processing or marketing of Annex I agricultural products under Article 1 of Regional Law No 33/96 to reduce transport costs are incompatible with the common market.

The State aids which Italy is planning to implement in favour of undertakings involved in the production, processing or marketing of Annex I agricultural products under Article 10 (in so far as it refers back to Article 53(c) of Regional Law No 3/86) and under Article 19 of Regional Law No 33/96 to support investments are incompatible with the common market.

The above aids may accordingly not be implemented.

Article 2

The State aid which Italy is planning to implement in favour of agricultural undertakings under Article 17 of Regional Law No 33/96 to make good the damages caused by adverse weather events similar to natural disasters is compatible with the common market.

Article 3

The aid which Italy is planning to implement under Article 13(2) and (3) of Regional Law No 33/96 does not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 4

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

Article 5

This Decision is addressed to Italy.

Done at Brussels, 16 December 2003.

For the Commission

Franz FISCHLER

Member of the Commission