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Contents

([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 6 September 2005

on the aid scheme implemented by Italy for certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets

(notified under document number C(2005) 3302)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/638/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],

Whereas:

I. PROCEDURE

(1) On 2 October 2003 Decree Law No 269 of 30 September 2003 providing for urgent measures to promote development and to correct the trend of public finances ('Decree-Law No 269/2003'), as subsequently converted into Law No 326 of 24 November 2003, published in the Official Gazette of the Italian Republic No 274 of 25 November 2003, entered into force on its publication in the Official Gazette of the Italian Republic No 229 of 2 October 2003. Article 12 of Decree-Law No 269/2003 provides that the net operating result of certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies ('small- and mid-caps') listed on a regulated market in the European Union are subject to 5 % tax, instead of the standard 12,5 % tax withheld by non-specialised investment vehicles.

(2) By letter dated 22 October 2003 (D/56756), the Commission called on the Italian authorities to provide information about the incentives in question and their entry into force with a view to ascertaining whether they constituted aid within the meaning of Article 87 of the Treaty. By the same letter, it reminded Italy of its obligation to notify to the Commission before they are implemented any measures constituting aid pursuant to Article 88(3) of the Treaty.

(3) By letters of 11 November 2003 (A/37737) and 26 November 2003 (A/38138), the Italian authorities provided the information requested. On 19 December 2003 (D/58192) the Commission again reminded Italy of its obligations under Article 88(3) of the Treaty and invited the Italian authorities to inform those that might benefit from the incentives of the consequences provided for by the Treaty and by Article 14 of Council Regulation (EC) No 659/1999 [2] if the incentives in question were found to constitute aid unlawfully implemented without the prior authorisation of the Commission.

(4) By letter of 11 May 2004 (SG 2004 D/202046), the Commission informed Italy of its decision of 7 May 2004 to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the tax incentives granted by Italy by way of the scheme in question.

[1] OJ C 225, 9.9.2004, p. 8.

[2] OJ L 83, 27.3.1999, p. 1.

(5) By letter of 14 July 2004 (A/35463), the Italian authorities submitted their comments.

(6) On 9 September 2004 the Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union*, inviting interested parties to submit their comments ([3]).

(7) On 16 and 27 September 2004 two meetings took place between the Commission's representatives and the Italian tax authorities to examine certain aspects of the scheme.

(8) By letter of 7 October 2004 (A/37679), the Italian Association of Asset Management Companies ('Assogestioni') submitted its comments. By letter of 28 October 2004 (D/57696), the Commission forwarded the comments to the Italian authorities. By letter of 6 December 2004 (A/39479), the Italian authorities responded to the comments from Assogestioni.

(9) By letter of 18 February 2005 (A/31490), Assogestioni submitted further comments supplementing those sent on 7 October 2004. By letter of 24 February 2005 (D/51366), the Commission forwarded them to the Italian authorities. By letter of 4 April 2005 (A/32813), the Italian authorities submitted their comments on those further comments by Assogestioni.

(10) By letter of 28 February 2005 (A/31724), the *European Federation of Investment Funds and Companies* (FEFSI) submitted its comments. Since its comments were presented after the deadline set (see paragraph 6) and since they were similar to those submitted by Assogestioni, they were not forwarded to the Italian authorities or taken into account in the present decision.

II. DESCRIPTION OF THE MEASURE

General framework

(11) Article 12 of Decree-Law No 269/2003 introduces tax incentives for certain undertakings for collective investment in transferable securities (investment vehicles) that are subject to Italian law. In particular it stipulates that, as of the tax year in which certain conditions are met, the net operating result of those undertakings for collective investment in transferable securities that are specialised in shares of small- and mid-caps listed on a regulated market in the European Union (specialised investment vehicles) are subject to a 5 % tax, instead of the standard 12,5 % rate of tax. In general, under the Italian system of taxation of collective investments, the tax in question is withheld each year by collective investment undertakings on a taxable base corresponding to the annual increase in the registered daily value of their assets (net operating result), with a view to taxing the potential capital gains realised by the investors investing in such investment vehicles. In this way, no further tax is paid by the investors upon distribution of income deriving from such investments.

(12) The scheme amends the tax treatment in Italy of capital income accruing to various investment vehicles including the open-ended investment funds governed by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([4]), the 'historic Luxembourg' funds, open-ended investment companies (SICAVs) and closed-end investment funds, as governed by the laws regulating such investment vehicles. The relevant legal provisions concerned most notably include:

a) Articles 9 and 10b of Law No 77 of 23 March 1983 concerning the tax treatment of the net operating result of open-ended investment funds;

b) Article 11a of Decree-Law No 512 of 30 September 1983 concerning the tax treatment of the net operating result of certain investment funds, including the 'historic Luxembourg funds';

c) Article 11 of Law No 344 of 14 August 1993 concerning the tax treatment of the net operating result of closed-end investment funds;

d) Article 14 of Decree Law No 84 of 25 January 1992 concerning the tax treatment of the net operating result of SICAVs;

e) Articles 7 and 9 of Legislative Decree No 461 of 21 November 1997 concerning the tax treatment of capital income and other income accruing to investors resident in Italy;

f) Article 14 of Legislative Decree No 124 of 21 April 1993 concerning the tax treatment of capital income accruing to pension funds.

(13) The investment vehicles in question undertake collective investment in transferable securities including bonds, shares

([3]) See footnote 1.

([4]) OJ L 375, 31.12.1985, p. 3.

and other securities of listed and non-listed companies in the collective interest of third-party investors (participants). They may take the form of a contractual investment fund without legal personality (e.g. a unit trust) managed by a distinct management company or of a corporate investment fund (e.g. a SICAV) ([5]) or a pension fund ([6]). The investment vehicles taking the form of a unit trust can either be 'open-ended' or 'closed-end' funds. ([7])

(14) Article 12 of Decree-Law No 269/2003 provides that, as of the tax year in which the scheme entered into force, the specialised investment vehicles governed by the legislation in question are to apply a 5 % tax, instead of the standard 12,5 %, on the net operating result accruing to them and consisting in the annual increase in the registered daily value of their assets.

(15) Specialised investment vehicles within the meaning of Article 12 of Decree-Law No 269/2003 are:

a) investment vehicles whose bylaws expressly specify that at least two thirds of the value of the assets held are to be invested in shares of small- and mid-caps listed on a regulated market in the European Union;

b) investment vehicles that, one year after the starting date of the fund or from the date on which new bylaws were established, hold shares in small- and mid-caps listed on a regulated market in the European Union the value of which is equal to at least two thirds of its assets, during the calendar year for more than one sixth of the number of days of operation of the investment vehicle ([8]) following the end of the aforementioned period, on the basis of information taken from the Fund's relevant regular accounting reports.

([5]) The main difference between SICAVs (corporate funds) and contractual investment funds is that, in the case of SICAVs, there is no distinction between company capital and capital invested. The participating shares in a SICAV are its capital.

([6]) The tax rate applicable to the net operating result of pension funds is not directly reduced by Article 12 of Decree-Law No 269/2003 because special tax rules apply to them. However, pension funds investing in specialised investment vehicles benefit from a specific tax credit which allows them to apply the specific 5 % rate to the portion of their revenues deriving from specialised investment vehicles.

([7]) The difference between open-ended and closed-end funds is that, for the latter, the number of shares issued by the fund is fixed at the outset for a certain number of years, the participants do not have the right to request redemption of their shares at any time, and new issues of shares are also restricted. Open-ended funds are not subject to any of these restrictions (cf. Provvedimento del Governatore 27 agosto 2003 of the Bank of Italy amending the provisions on UCITS in the previous Provvedimento of 20 September 1999 and taking into account the changes to the provisions governing closed-end funds introduced by Decree No 47 of 31 January 2003).

([8]) This limit is set at two months in the case of closed-end funds.

(16) Small- and mid-caps within the meaning of Article 12 of Decree-Law No 269/2003 are companies whose market capitalisation does not exceed €800 million, as determined on the basis of the market price of the company's shares on the last trading day of each quarter of the calendar year ([9]).

(17) The scheme is applicable as of the tax year in which the investment vehicle's bylaws are amended (or adopted in case of a new investment vehicle), introducing the express requirement that the investment vehicle invest not less than two thirds of its assets in shares of small- and mid-caps listed on a regulated market in the European Union.

(18) The scheme amends the tax rules concerning all the various Italian investment vehicles in Italy, whether they are administered/incorporated in Italy and subject there to the special substitute tax levied on their net operating result (investment vehicles subject to substitute tax in Italy) or foreign vehicles subject to tax in Italy on revenues distributed to Italian subscribers. It amends with the same effect the tax rules applicable to foreign investment vehicles regulated by above-mentioned Council Directive 85/611/EEC (harmonised foreign UCITS) ([10]) and the net operating result of which is distributed to Italian investors or the shares of which are held by Italian investment vehicles ([11]).

(19) In order to clarify the effects of the scheme and the way in which it indirectly extends the tax reduction to non-specialised vehicles and to other participants, it is necessary to examine separately the different tax rules applicable to capital revenues accruing to investment vehicles and to their participants, as amended by Article 12 of Decree-Law No 269/2003. To this end, a distinction should be drawn between '*investment vehicles acting as financial intermediaries the income of which is subject to substitute tax in Italy*' and '*investment vehicles subject to substitute tax and acting as participants in other investment vehicles*', since the same investment vehicle may act both as a financial intermediary (i.e. it invests in transferable securities) and as a participant

([9]) A company can therefore be classified as a small- or mid-cap for one or more quarters, depending on stock market fluctuations.

([10]) The scheme does not directly affect taxation of foreign investment vehicles falling outside the scope of Directive 85/611/EEC.

([11]) To be more precise, while the foreign UCITS that distribute their net operating result to individual Italian investors apply Italian withholding tax upon distribution, the portion of the net operating result accruing to Italian investment vehicles from their participation in foreign UCITS is eligible for relief from double taxation by means of the exclusion of part of the net operating result deriving from such foreign UCITS.

investor (i.e. it invests in other investment vehicles). A separate section is devoted to the revenue accruing to other investors exempt from the substitute tax applicable to other investment vehicles.

Taxation of revenue accruing to investment vehicles acting as financial intermediaries subject to substitute tax in Italy

(20) Under the general system, investment vehicles are not subject to income tax. However, any operating revenue accruing to investment vehicles is ordinarily subject to the 12,5 % substitute tax calculated on their net operating result. As a general rule, this tax is in full discharge of tax liability, replacing any further tax on revenues distributed by investment vehicles.

(21) The net operating result is determined by deducting from the fund's net assets at the end of the year, plus the substitute tax payable and any amounts distributed during the year, the fund's net assets at the beginning of the year and the revenue from participation in collective investment undertakings subject to the substitute tax, as well as exempt revenue and revenue subject to withholding tax ([12]).

(22) Article 12 of Decree-Law No 269/2003 amends the general tax system in that it provides for the levying of a 5 % substitute tax on the operating revenue of specialised investment vehicles.

Taxation of revenue accruing to investment vehicles subject to Italian substitute tax and acting as participants in other investment vehicles

(23) Any revenue distributed by an investment vehicle subject to substitute tax in Italy to its participants (including other investment vehicles) is not subject to further taxation under the general system. The scheme in question maintains the exemption with regard to revenue deriving from specialised investment vehicles (subject to the 5 % substitute tax). It also reduces the effective tax on the revenue of non-specialized investment vehicles participating in foreign specialised investment vehicles not subject to substitute tax in Italy at a rate of 5 % ([13]).

Taxation of operating income accrued or distributed to other participants in investment vehicles not subject to the substitute tax

(24) Revenue distributed by Italian and foreign investment vehicles to Italian investors is not subject to further taxation in Italy because it has already been taxed at the level of the investment vehicle (withholding tax). However, if the participating investor is a business undertaking acting as such, the revenue received is included in its taxable income subject to the 33 % rate of tax. Such beneficiary undertakings qualify for a 15 % tax credit which offsets in full the double taxation of the capital revenue received. The scheme essentially confirms the tax credit, even when the revenue is distributed by specialised investment vehicles ([14]).

(25) Revenue distributed by foreign investment vehicles to Italian investors is subject to a 12,5 % withholding tax pursuant to Article 18 of the Italian Income Tax Code

([12]) Pursuant to Article 10b of Law No 77/1983, revenue from foreign investment vehicles not governed by Council Directive 85/611/EEC is included in the net operating result as it is not subject to withholding tax.

([13]) As a general rule, only 40 % of the net operating result accruing to an Italian investment vehicle from a foreign investment vehicle is taxable in Italy. This means that the foreign income accruing to an Italian investment vehicle is effectively taxed at 5 % (12,5 % of 40 % corresponds to a tax rate of 5 %). By excluding from the net operating result of an investment vehicle the entire amount of capital revenue deriving from a specialised investment vehicle subject to the reduced rate of 5 %, the scheme achieves the objective of ensuring equal treatment between investments made in Italian specialised investment vehicles and those made in foreign specialised investment vehicles.

([14]) Article 12 of Decree-Law No 269/2003 maintains the existing 15 % tax credit with a view to ensuring that the 5 % reduced tax levied on specialised investment vehicles is borne by the participating investor, which would be the case if the credit had been limited to 5 % (corresponding to the 5 % substitute tax paid by the investment vehicle) instead of 15 %. In short, the 15 % tax credit makes it possible to avoid higher taxation at the level of the investor, resulting in an aggregate rate of tax of 5 %. However, to prevent the participating investors from unduly benefiting from the full 15 % credit, while tax has been effectively paid at only 5 %, the scheme states that the tax credit constitutes a limited tax credit as regards the part not covered by the substitute tax on the accrued net operating result, i.e. 9 %, which cannot be reimbursed or used to offset income taxes due in tax years in which the revenue was taxed. To grant relief against withholding tax, Italian tax law provides for a tax refund to foreign (non-resident) investors participating in investment vehicles subject to tax in Italy, which qualify for a tax refund equal to 15 % of the amount distributed by the investment vehicles offsetting the tax previously charged. The scheme limits the refund to 6 % for distributions by specialised investment vehicles subject to the reduced substitute tax of 5 % under Article 12 of Decree-Law No 269/2003.

(TUIR). The scheme reduces the withholding tax to 5 % for revenue distributed by specialised investment vehicles. This provision ensures equal treatment of investors in foreign and Italian investment vehicles.

(26) Revenue deriving from investment vehicles is included in the net operating result of a pension fund participating in such investment vehicles. It is subject to a substitute tax of 11 %. To eliminate double taxation of the income accruing to pension funds, a tax credit equal to 15 % of such revenue is imputed against the substitute tax payable by such pension funds. The scheme adapts the new reduced-taxation arrangements for specialised investment vehicles to the specific tax system for pension funds.

(27) In parallel with the lowering of the substitute tax on specialised investment vehicles, the scheme reduces to 6 % the tax credit for revenue deriving from Italian specialised investment vehicles. Furthermore, Article 12 of Decree-Law No 269/2003 provides that the portion of the assets of pension funds generated by foreign specialised investment vehicles is subject to a 5 % substitute tax, instead of the standard 11 % ([15]).

III. GROUNDS FOR INITIATING THE PROCEDURE

(28) In its decision to initiate the formal procedure, the Commission considered that the measure met all the criteria for classification as state aid for specialised investment vehicles and for small- and mid-caps whose shares are held by such specialised vehicles within the meaning of Article 87(1) of the Treaty, while it did not raise any doubts regarding the direct tax reduction granted to investors in specialised investment vehicles because it constitutes a general measure for all investors.

(29) In raising doubts about the possible existence of aid for specialised investment vehicles, the Commission held them to be undertakings within the meaning of Article 87(1) of the Treaty because they either have a corporate form and constitute business entities *per se* or constitute separate assets managed by undertakings that compete on investment markets. Secondly, the Commission observed that specialised investment vehicles benefit either directly from a tax rate reduction or indirectly from additional capital investments by way of the tax reduction granted by the scheme to their investors where such vehicles invest primarily in small- and mid-caps listed on a regulated European market. The Commission further observed that the advantages in question are not proportionate to the number of shares in small- and mid-caps owned by such vehicles but are solely dependent on their status as specialised vehicles.

(30) As regards small-caps the Commission stressed that the measure provides an indirect advantage for those companies whose shares are held by specialised investment vehicles, because it has the effect of increasing their liquidity by providing them with easier access to capital. The advantage is dependent on their status as small- and mid-caps listed on a regulated European market and not on the performance; nor it is dependent on other conditions or investments made by such companies.

IV. COMMENTS FROM ITALY AND INTERESTED PARTIES

(31) In their comments, both Italy and Assogestioni claimed that the investment vehicles in question cannot be viewed as undertakings but simply as pools of assets managed by separate undertakings. The latter are subject to ordinary taxation on their profits and do not benefit from the tax reduction provided for in Article 12 of Decree-Law No 269/2003.

(32) Both Italy and Assogestioni further observed that the scheme should be viewed as a general tax policy measure directly benefiting the investors and only indirectly affecting small- and mid-caps and investment vehicles. For the interested parties, the scheme is aimed at fostering the market capitalisation of small- and mid-caps as opposed to other companies listed in Europe and, as such, it would fall outside the scope of state aid monitoring. Both Italy and the interested parties argued that the measure does not constitute aid for specialized investment vehicles or for certain management companies. In this respect, the Italian authorities stressed that the scheme is effectively open to all undertakings that create separate funds aimed at investing predominantly in small- and mid-caps listed on regulated European markets and would therefore constitute a general measure.

(33) Furthermore, according to those comments, the scheme would not affect competition because any European small- or mid-caps could benefit from the easier access to capital.

([15]) The effective 5 % substitute tax on the income accruing to pension funds from foreign specialised investment vehicles is realised because, under the specific tax provisions for pension funds, they may deduct from their net operating result, taxed at 11 %, the 54,55 % of the revenue distributed by a foreign specialised investment vehicle, with the result that applying the reduced rate of 11 % to 45,45 % corresponds to the imposition of a 5 % on total revenue. On the other hand, the revenue accruing to pension funds from Italian specialised investment vehicles is subject to an 11 % substitute tax although it qualifies for a 6 % tax credit to offset the tax already paid by such specialised investment vehicles.

Moreover, it would not constitute aid to such companies because investment vehicles or their management companies would take their investment decisions with a view to maximizing profits.

(34) Assogestioni provided detailed information on the functioning of the scheme during its first period of operation (2004). By the end of 2004 three specialised investment vehicles were operational: two that had existed previously and had amended their bylaws so that they invested primarily in shares of small- and mid-caps listed on regulated European markets, and one newly established fund. Assogestioni indicated that the tax cost of the scheme in 2004 was minimal. On the basis of the data presented by Assogestioni, the Commission calculated that the shortfall in tax revenues in 2004 amounted to some €1,1 million, account being taken of the necessary adjustments to offset the carry-forward of the virtual tax credits relating to tax incurred in previous years. Italy and the interested parties consider that these figures show that the scheme had an insignificant effect on intra-Community competition and trade, also bearing in mind that small- and mid-caps and investment vehicles established abroad may benefit from the indirect effects of the tax reduction in question.

V. ASSESSMENT OF THE MEASURE

State aid within the meaning of Article 87(1) of the Treaty

(35) Having considered the comments submitted by the Italian authorities and the interested parties, the Commission maintains its position that the tax reduction for investors constitutes state aid not only for specialised vehicles investing in shares of small- and mid-caps listed on regulated European markets but also for small- and mid-caps whose shares are held by such vehicles because it cumulatively meets all the criteria laid down in Article 87 (1) of the Treaty.

Selective advantage for specialised investment vehicles

(36) The Commission firstly confirms the view expressed in its letter opening the formal investigation procedure that, in some cases, investment vehicles are undertakings within the meaning of Article 87 of the Treaty and may accordingly benefit from the tax reduction provided for in Article 12 of Decree-Law No 269/2003. In particular, it considers that, even if specialised investment vehicles do not benefit directly from the tax reduction granted to their investors, they nonetheless receive an indirect economic benefit in so far as the tax reduction on investments in specialised vehicles prompts investors to buy shares in such vehicles, thereby providing additional liquidity and extra income in terms of entry and management fees.

(37) Pursuant to the Commission Communication on state aid and risk capital ([16]), in some cases where a state measure provides for the creation of a fund or other investment vehicle it is necessary to consider whether the fund or vehicle can be considered to be an enterprise benefiting from state aid. In the case at hand, the Commission takes note of the comment by the Italian authorities to the effect that the specialised investment vehicles benefiting from the reduced tax pursuant to Article 12 of Decree-Law No 269/2003 are simply pools of assets and so cannot be regarded as undertakings within the meaning of Article 87 of the Treaty. It notes, however, that in some cases such investment vehicles take corporate form and may therefore benefit individually from advantages although taxation of them is separate from taxation of the assets they manage. It further points out that other investment vehicles without legal personality are managed by undertakings which compete with other operators managing savings and that those undertakings may accordingly benefit from advantages.

(38) The Commission considers that specialised investment vehicles perform an economic activity and constitute undertakings within the meaning of Article 87(1). This is confirmed by the case law of the Court in the VAT field. In particular, the Court recently held ([17]) that transactions carried out by SICAVs and consisting in the collective investment in transferable securities constitute an economic activity carried out by taxable persons within the meaning of Article 4(2) of the Sixth VAT Directive ([18]). According to the case law ([19]), it is evident from the preamble to the First Directive ([20]) that VAT harmonisation aims to eliminate factors which may distort conditions of competition and therefore to secure neutrality in competition. Given that the state aid rules and the VAT harmonisation directives share the same purpose, the Commission considers it appropriate to refer to the case law concerning the latter, which confirms that the investment vehicles in question, whether or not they have corporate form, perform an economic activity and therefore constitute undertakings within the meaning of Article 87(1).

(39) The Commission accordingly considers that a tax advantage provided to investors investing in specialized investment vehicles favours the vehicles themselves as undertakings when they have corporate form or the undertakings

([16]) OJ C 235, 21.8.2001, p. 3, paragraph IV.1.

([17]) Case C-8/03 *BBL*, paragraphs 42 and 43.

([18]) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

([19]) Case 89/81 *Hong-Kong Trade Development Council* [1982] ECR 1277, paragraph 6.V. See also Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 20.

([20]) First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ 71, 14.4.1967, p. 1301; English Special Edition, Series I, Chapter 1967, p. 14).

managing such vehicles when they have contractual form. In particular, the increased demand for shares of specialized investment vehicles leads to an increase in the management and entry fees charged by the vehicles or by the undertakings managing them.

(40) The argument whereby the scheme is not selective in so far as it does not favour specific investment vehicles and managing undertakings with respect to their size, nationality, place of registration or composition is irrelevant in so far as what matters is the fact that the scheme provides for a tax reduction that is extraordinary and limited to the investment vehicles specialised in shares of listed small- and mid-caps and their managing undertakings. According to settled case law ([21]), the fact that aid is not aimed at one or more specific recipients defined in advance but is subject to a series of objective criteria cannot suffice to call into question the selective nature of a state measure. The Commission also considers that the fact that the advantage conferred by the scheme on investment undertakings managing specialised investment vehicles is only indirect cannot rule out the existence of state aid in so far as, according to the settled case law of the Court ([22]), direct tax advantages granted to investors who are not undertakings constitute indirect aid for the undertakings invested in.

(41) The Commission accordingly concludes that the measure confers the specific indirect advantage mentioned above on specialised investment vehicles and their management companies, to the detriment of other undertakings offering alternative forms of investment.

Selective advantage for small- and mid-caps whose shares are held by specialised investment vehicles

(42) The Commission also confirms the view expressed in its letter opening the formal investigation procedure that the effect of the scheme in question is to favour small- and mid-caps whose shares are held by specialised investment vehicles benefiting from the tax reduction provided for in Article 12 of Decree-Law No 269/2003. In particular, it considers that the scheme confers an indirect selective advantage on small- and mid-caps whose shares are held by specialised investment vehicles consisting in the increased demand for their shares and in increased liquidity. The argument that there would be no advantage for small- and mid-caps because funds and investors seek to maximize profits cannot be accepted since more favourable tax treatment enhances the attractiveness of such an investment, with increased liquidity for small- and mid-caps even in absence of any active behaviour by them aimed at benefiting from such an advantage.

(43) The argument according to which the scheme would constitute a general tax policy measure aimed at favouring the capitalisation of small- and mid-caps in Europe and would fall outside the scope of the state aid rules cannot be accepted either. The Commission takes the view that the tax advantage conferred does not offset any substantial disparity in tax treatment between collective investments in listed small- and mid-caps, on the one hand, and collective investments in other companies and individual investments in non-listed companies, on the other. Nor can the scheme be justified by its own specific objective because it provides solely for tax reductions in the case of specialised collective investments in shares of small- and mid-caps listed on regulated markets and, as such, it is not targeted at or proportionate to the aim of promoting the capitalisation of such companies but instead is conditional on the investments being made through specialised investment vehicles.

State resources

(44) The Commission would point out that the advantages in question are granted by the State or through state resources. Noting that Italy did not present any objections in this respect, it confirms the appraisal made in the decision to initiate the formal procedure according to which the advantage is attributable to the State as it consists in the forgoing of tax revenues by the Italian Treasury.

Effect on competition

(45) In view of the effects of the measure, the Commission confirms the appraisal made in the decision initiating the formal procedure that the measure may distort competition between undertakings and affect trade between Member States because the beneficiary companies can operate in international markets and pursue commercial and other economic activities in markets where competition is intense. In accordance with the settled case law of the Court ([23]), for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. In particular, the vehicles undertaking collective investment in transferable securities and specialised in shares of small- and mid-caps compete with other financial undertakings and operate in an open market characterised by substantial intra-Community trade. As to the small- and mid-caps whose shares are held by the specialised investment vehicles described in Article 12 of Decree-Law No 269/2003, at least some of them are active in sectors where trade between Member States takes place.

(46) The Commission considers that neither the limited tax expenditure on this scheme in 2004 (€1,1 million) nor the small number of specialised vehicles operating during that same year (three), as compared with the large number of listed small- and mid-caps whose shares have been held, can

([21]) Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 40, and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava and Others v Commission* [2002] ECR II-1385, paragraph 58.

([22]) Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 24 to 28, and Case T-93/02 *Confédération nationale du Crédit mutuel v Commission*, judgment of 18 January 2005, not yet reported, paragraph 95.

([23]) Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

affect the conclusion that the measure constitutes aid firstly because, according to the settled case law of the Court ([24]), even a small amount of aid affects competition and secondly because it is not ruled out by Italy that the scheme in question may have a far more important economic impact in the future. It must further be noted that the limited impact of the measure may also be explained by the fact that the Commission promptly initiated an investigation and opened the formal investigation procedure into the measure, and this may have influenced the behaviour of the operators. Lastly, although the number of eligible small- and mid-caps listed on regulated European markets is relatively large compared with the size of the tax reduction in 2004, the information presented by Italy does not indicate that the benefits accruing to any individual beneficiary fall within the limit for *de minimis* aid.

(47) The Commission has therefore come to the conclusion that the scheme alters (by way of the tax treatment accorded to investors) the competitive position of certain undertakings pursuing economic activities and, in so far as the latter operate on markets open to international competition, affects competition.

Lawfulness of the scheme

(48) Since the Italian authorities implemented the scheme without first notifying the Commission, they did not fulfil the obligation incumbent on them under Article 88(3) of the Treaty. In so far as it constitutes state aid within the meaning of Article 87(1) of the Treaty and was put into effect without prior approval from the Commission, the measure ranks as unlawful aid.

Compatibility

(49) As the measure constitutes state aid within the meaning of Article 87(1) of the Treaty, its compatibility with the common market must be assessed in the light of the derogations provided for in Article 87(2) and (3) of the Treaty.

(50) The Italian authorities have not explicitly challenged the Commission's assessment set out in its letter of 11 May 2004 instituting the formal investigation, namely that none of the derogations provided for in Article 87(2) and (3) of the Treaty and pursuant to which state aid may be considered compatible with the common market is applicable in the present case, and the Commission has not become aware of any other elements that invalidate this conclusion.

(51) The advantages in question are either unrelated to any expenses or linked to expenses ineligible for aid under existing Community guidelines or block exemptions.

([24]) Case C-142/87 Belgium v Commission [1990] ECR I-959.

(52) The derogations in Article 87(2) of the Treaty, which concern aid having a social character that is granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, do not apply in this case.

(53) Nor does the derogation in Article 87(3)(a) of the Treaty, which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, because the measure in question applies to Italian territory as a whole and not only to assisted regions in Italy within the meaning of Article 87(3)(a). Lastly, the scheme does not seem to contribute in any way to the development of the said regions.

(54) In the same way, the regime cannot be considered to be aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Italy, as provided for in Article 87(3)(b) of the Treaty. Nor does it have as its object the promotion of culture and heritage conservation, as provided for in Article 87(3)(d) of the Treaty.

(55) Lastly, the measures in question must be examined in the light of Article 87(3)(c) of the Treaty, which stipulates that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest is admissible. The tax advantages granted by the measure are not related or proportionate to specific investments, to job creation or to specific projects which would facilitate the development of certain economic activities or certain areas within the meaning of Article 87 (3)(c) of the Treaty. They cannot be declared compatible with the common market in accordance with the criteria laid down in the Commission Communication on state aid and risk capital ([25]) because the investments benefiting from them are targeted at companies listed on a regulated European market and the Italian authorities have not shown that those companies do not enjoy proper access to equity finance and face higher costs than other companies when it comes to raising capital. The Commission would finally point out that, as stated by the Court with respect to another aid measure favouring specific investments, '*there was nothing to prevent the scheme from being applied to undertakings in difficulties or operating in sensitive industries for which specific State aid rules have been laid down*' ([26]). It

([25]) OJ C 235, 21.8.2001, p. 3.

([26]) Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 69.

concludes that the advantages granted under the scheme reduce charges that should normally be borne by the beneficiaries in the course of their economic activities and must therefore be considered as operating aid, which, in accordance with practice and case law, is incompatible with the common market.

VI. CONCLUSIONS

(56) The Commission concludes that the tax reliefs granted under this measure constitute a scheme of operating aid not covered by any of the derogations from the general prohibition of such aid and that the measure is therefore incompatible with the common market. It also finds that Italy has unlawfully implemented the measure.

(57) Where state aid is found to have been granted unlawfully and to be incompatible with the common market, the natural consequence is that the aid should be recovered in order to restore as far as possible the competitive position that existed before the aid was granted.

(58) This decision concerns the scheme in question as such and must be immediately implemented, including recovery of the aid granted under the scheme pursuant to Article 14 of Procedural Regulation No 659/1999 ([27]).

(59) To this end, the Commission finds it necessary to ask Italy first to remove immediately the aid, which consists in the different tax treatment of their net operating result, in respect of the revenue accruing to investment vehicles specialised in shares of small- and mid-caps listed on regulated European markets by informing all those required by the relevant national rules of Article 12 of Decree-Law No 269/2003 to apply the tax incentives in question about the direct applicability of this Commission decision.

(60) Secondly, Italy must recover the aid from the investment vehicles or from the undertakings managing contractual investment vehicles that are at the same time the first beneficiaries of the aid and the persons required by tax legislation to pay to the State the substitute tax on their net operating result. The aid to be recovered corresponds to the difference between the standard substitute tax and the reduced tax resulting from the tax incentives in question. This decision is without prejudice to the possibility for the investment vehicles or for the undertakings that manage them to claim a corresponding amount from their investors, if such a possibility exists under national law. The obligation to recover the aid does not, however, rule out the possibility that all or part of the aid granted to individual beneficiaries may be compatible under Article 2 of Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([28]).

(61) The Commission calls on Italy to provide the information requested by replying to the questionnaire attached in Annex 1 to this decision, compiling a list of the financial intermediaries and the other parties concerned by the recovery of the tax incentive in question and indicating clearly the measures planned and already taken to obtain immediate and effective recovery of the unlawful state aid. It also calls on Italy to submit within two months of the adoption of this decision all documents showing that the proceedings for recovering the unlawful aid have been initiated (such as circulars, recovery orders, etc.).

(62) Interest has to be paid on the amounts to be recovered. It will be calculated on the basis of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([29]),

HAS ADOPTED THIS DECISION:

Article 1

The state aid in the form of tax incentives for undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on a regulated European market provided for by Article 12 of Decree-Law No 269/2003, unlawfully put into effect by Italy in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Article 2

The Italian Republic shall withdraw the aid scheme referred to in Article 1 with effect from two months following the date of notification of the present decision.

Article 3

1. Within two months of the date of notification of the present decision, the Italian Republic shall inform all the financial intermediaries, including the undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies and all the other parties concerned by the application of the state aid scheme referred to in Article 1, of the Commission decision deeming the scheme to be incompatible with the common market.

2. The Italian Republic shall take the necessary measures to recover the aid referred to in Article 1 and unlawfully made available to its beneficiaries from the corporate investment

([27]) See footnote 2.

([28]) OJ L 10, 13.1.2001, p. 30.

([29]) OJ L 140, 30.4.2004, p. 1.

vehicles or, as the case may be, from the undertakings managing the contractual investment vehicles, without prejudice to any subsequent recourse under national law.

Within two months of the date of notification of the present decision, the Italian Republic shall inform the Commission of the identity of the beneficiaries, the amount of aid granted individually and the methods by which such amounts were determined.

3. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

4. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.

Interest shall be calculated in accordance with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004.

Article 4

The Italian Republic shall inform the Commission, within two months of the date of notification of this decision, of the measures taken and planned to comply with it. It shall provide this information using the questionnaire attached in Annex 1 of this decision. It shall submit within the same period all documents showing that the recovery proceedings have been initiated against the beneficiaries of the unlawful aid.

Article 5

This decision is addressed to the Italian Republic.

Done at Brussels, 6 September 2005.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

Information regarding the implementation of the Commission decision on aid scheme C 19/2004 — Italy: Direct tax incentives for undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets

1. **Total number of beneficiaries and total amount of aid to be recovered**

1.1. Please explain in detail how the amount of the tax incentives to be recovered from individual beneficiaries will be calculated:

— principal

— interest

1.2. What is the total amount of unlawful aid granted under this scheme that is to be recovered (gross grant equivalent; at … prices)?

1.3. What is the total number of beneficiaries from whom the tax incentives unlawfully granted under this scheme are to be recovered:

2. **Measures already taken and planned to recover the aid**

2.1. Please describe in detail what measures have already been taken and what measures are planned to ensure immediate and effective recovery of the tax incentives. Please also indicate where relevant the legal basis for the measures taken/planned.

2.2. By what date will the recovery be completed?

3. **Information by individual beneficiary**

Please provide details for each subject from whom the tax incentives unlawfully granted under the scheme are to be recovered in the table overleaf.

Identity of the subject	Amount of the incentive unlawfully granted (*) Currency: …	Amounts reimbursed (º) Currency: …

(*) Amount put at the disposal of the beneficiary (in gross grant equivalent; at … prices).

(º) Gross amounts reimbursed (including interest).

COMMISSION DECISION

of 23 November 2005

on the State Aid which Italy is planning to implement for Fincantieri

(notified under document number C(2005) 4433)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2006/639/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 regard to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 31 July 2003, Italy notified the Commission of the aid. By letters dated 16 September 2003, 6 November 2003, 1 December 2003, 4 February 2004, 12 February 2004, 26 February 2004, 5 April 2004, 25 May 2004, 23 June 2004 and 8 July 2004, it provided the Commission with further information.

(2) By letter dated 22 October 2004, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

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

(4) The Commission received comments from interested parties. It forwarded them to Italy, which was given the opportunity to react; its comments were received by letter dated 12 April 2005.

(5) Other letters were received from Italy dated 25 November 2005, 18 May 2005 and 12 October 2005.

II. DETAILED DESCRIPTION OF THE AID

(6) Italy requested the Commission to grant an extension of the delivery limit of 31 December 2003 provided for in Article 3 of Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding ('the Shipbuilding Regulation') as a condition for receiving contract-related operating aid. The extension was requested for Fincantieri, for the delivery of five cruise ships, for a total contract value of € 2,1 billion and an aid amount of € 243 million.

(7) Fincantieri is a state-owned company operating eight shipyards (Monfalcone, Marghera, Sestri Ponente, Ancona, Palermo, Castellammare, Muggiano, Riva Trigoso) in Italy. It is specialised in building cruise ships but also builds other types of seagoing vessels and military ships.

(8) Italy explained that the final contracts for the ships concerned were signed in December 2000 and delivery, according to the contracts, was planned for June and December 2003. The ships were ordered by various subsidiaries of Carnival Corporation ('Carnival'), a US cruise operator. Italy promised, on this basis, contract-related operating aid for the building of the ships.

(9) Italy stated that the shipowner requested a postponement, in the autumn of 2001, of the delivery dates to various dates in 2004 and 2005. This request was motivated by the severe impact on the cruise industry of the terrorist attacks of 11 September 2001. Fincantieri agreed to this and Italy requested an extension of the delivery limit so that the ships could still qualify for operating aid.

(10) In their notification the Italian authorities referred to the Commission's decision of 5 June 2002 [4] authorising a similar extension of the delivery date for a cruise ship under construction at Meyer Werft, Germany. Italy emphasised the similarities between the two cases in terms of (i) the reason given for the extension (the impact of the 11 September 2001 terrorist attacks), (ii) the relevant market (cruises) and (iii) the commercial dependency existing between the shipyard and the shipowner (Carnival is Fincantieri's largest customer).

[1] OJ L 202, 18.7.1998, p. 1.
[2] OJ C 30, 5.2.2005, p. 12.
[3] See footnote 2.
[4] OJ C 238, 3.10.2002, p. 14 (state aid case N 843/01).

(11) By decision dated 20 October 2004 the Commission granted the extension of the delivery limit for four of the ships, but expressed doubts that it could grant the extension for the fifth. The doubts concerned ship 6079 with planned delivery in October 2005. This ship was originally intended to be delivered in 2005 but the delivery date was changed to December 2003 in late 2000; otherwise the ship would not have been eligible for operating aid.

(12) The aid amount that Italy would grant to Fincantieri if the Commission were to extend the delivery limit for ship 6079 is approximately € 33 million (9 % of the contract value of the ship).

(13) There were chiefly two reasons for initiating the formal procedure. One was doubts concerning the feasibility of the plan, whereby one of the five ships (ship 6077) was to be built at the Ancona shipyard, involving a complex production process in which hull sections had to be moved for assembly to a second yard (ATSM Trieste) and back to Ancona, since the length of Ancona's dock is shorter than the ship. Furthermore, Ancona had never built a ship of similar complexity before, casting doubts on the ability to manage this operation, not least concerning outfitting. Linked to this, the construction of ship 6077 at Ancona would have implied an exceptionally high amount of outfitting at the Palermo shipyard because of the shift of production from Ancona to Palermo.

(14) The second reason for initiating the formal procedure was doubts concerning the estimated amount of outfitting that would have had to be done by Fincantieri if all five ships had been delivered in 2003. This would have involved, in the Commission's estimation, twice as much outfitting work in 2003 as Fincantieri had ever done in any other year. Furthermore, for the shipyard at Marghera, the outfitting planned for 2003 would have amounted to around 40 % more than the yard had ever done before. The Commission therefore had doubts as to whether the production plan for Fincantieri in general, and for Marghera in particular, was realistic.

(15) For these two reasons the Commission doubted that all five ships could have been delivered in 2005. However, on the basis of the same information and analysis, the Commission accepted that it could have been possible to deliver four of the ships.

(16) The Commission considered that the main doubts concerned ship 6079, which is the third sister ship to 6077, built at the same yard, Marghera, with planned delivery in October 2005. The delivery of this ship was postponed in relation to the December 2000 production plan owing to the decision to build ship 6077 at Marghera. These doubts are also based on indications (letter of intent signed before the final contracts were signed in December 2000) that the current production sequence, with a very late delivery for ship 6079, was originally intended.

III. COMMENTS FROM INTERESTED PARTIES

(17) Fincantieri submitted comments in a letter dated 3 March 2005.

(18) It stated that any of the company's yards, irrespective of whether they were part of the cruise ship or transport vessel divisions, were in a position to build the same ship components, without any need to alter production engineering choices or executive planning in the workshop, as it would be possible to count on a network of subcontractors that could meet quality and quantity requirements.

(19) It also stated that the Ancona shipyard would have had no problems building an entire cruise ship of the dimensions and design characteristics of ship 6077 (the sister ship of 6079), including all fittings, using only its own production facilities, infrastructure and plant, if only the agreement between Fincantieri, the local and regional authorities, the port authorities and the metalworkers' unions set out in the memorandum of intent of 6 December 1999 had been implemented immediately. However, this did not take place.

(20) When the production engineering of ship 6077 was examined it was decided to build the ship in two parts: the larger section at Ancona and the smaller section at Riva Trigoso. The same production plan had been devised for building the aircraft carrier Conte di Cavour at the Riva Trigoso and Muggiano yards, and had been employed for the construction of the Disney Magic cruise ship at the Ancona and Marghera shipyards in 1997. The so-called jumboisation was planned at the ATSM dry dock in Trieste. As the latter had a dock that was suitable for fitting out and finishing ships, it could have overcome any production difficulties encountered at the Ancona shipyard while offering the significant advantage, which should not be underestimated, of proximity to the industrial area around the shipyard at Monfalcone.

(21) In the final analysis, in choosing to build the 6077 at Ancona, at least for a large section of the hull and much of the outfitting work, Fincantieri adopted an effective and far-sighted strategy which, should problems arise, offered a number of alternatives that would take advantage of the integrated nature and flexibility of its yards to ensure that it would be possible to deliver the ship by the end of 2003 as required by the contract.

IV. COMMENTS FROM ITALY

(22) The comments from Italy following the initiation of the formal procedure reflect the comments made by Fincantieri, i.e. that the December 2000 plan was challenging but realistic. Italy considers that the delivery dates could have been kept thanks to Fincantieri's production flexibility, in other words its ability to 'pool' the construction process by outsourcing to other yards (including some not normally engaged in the building of cruise ships), through an infrastructure and plant investment project dedicated to that end and through advanced building techniques.

(23) Concerning the planned involvement of ATSM in the construction of one of the ships, Italy's comments reflected those of Fincantieri, i.e. that ATSM could easily have combined the two outfitted sections of vessel 6077, although this method of construction is an alternative, and in some ways a less satisfactory one, to the 'normal' sequence of construction phases. In any event, the work of joining sections has now become routine for Fincantieri. As regards the Commission's doubts about Ancona's previous experience in building ships of similar complexity, Italy considers that it had gained such experience with the construction and outfitting of around half of the Disney Magic and with the passenger ship Danielle Casanova.

(24) Italy also argues that the Palermo yard has in the past (1996-97) carried out much more demanding production plans than the one envisaged in 2000. As regards the Commission's estimation that the December 2000 production plan would have involved, in 2003, twice as much outfitting work as Fincantieri had ever done in any other year, Italy refutes that statement and claims that in almost all the yards the December 2000 production plan would have relied on the 'standard capacity' of the yard in question, and only in certain cases would peak capacity have been reached.

(25) In reply to the Commission statement that for the Marghera shipyard the outfitting planned for 2003 would have amounted to around 40 % more than the yard had ever done before, Italy states that the workload (including outfitting) scheduled for the Marghera yard in the plan dating from 2000 was absolutely consistent with the capacities and capabilities actually demonstrated by the yard since it had previously managed to deliver four ships in 15 months, as was planned for 2003.

(26) Italy was also offered the opportunity to comment on the essential elements of the report by the independent expert whom the Commission consulted when it assessed the information provided by Italy prior to the launch of the formal investigation procedure.

(27) In its reply dated 18 May 2005 Italy commented on three main aspects of the expert's report.

(28) First, according to Italy, the expert based his assessments on total delivery in the year 2003, without taking account of the production cycle, in other words the gradual increase in compensated gross tonnage (cgt) that occurs throughout the construction period. By not distributing, over the time-span necessary for actual production, the tonnage relating to the nine ships scheduled for delivery in 2003 (some of which were at an advanced stage of construction by the end of 2002), the expert had concluded by asserting that in 2003 Fincantieri would have had to produce twice the cgt it had produced in the past. That finding was, in Italy's opinion, incorrect since, for the purposes of assessing Fincantieri's production capacities, the tonnage delivered in 2003 did not correspond to the tonnage actually produced in that year. Italy claims that the production data were consistent with capacities observed in the past and in any event did not exceed the maximum capacity levels.

(29) The production data demonstrate in Italy's view that even in the years that would have been most busy, namely 2002 and 2003, the production volumes for the Monfalcone, Marghera and Sestri Ponente shipyards would not have diverged by more than 20 % from historical values. As regards the payload (accommodation and air conditioning), which is the significant and distinctive part of the work on ships of this type, the difference is even more marked in the case of the Sestri Ponente shipyard (which increased its output from 1 863 tonnes in 1998 to 14 303 tonnes in 2003); such a steep increase was facilitated by using subcontractors and extending the scope of their responsibilities via turnkey contracts.

(30) The figures for output in terms of hours of labour (in-house/outsourced) show that, in the years preceding the ones covered by the production schedule, greater use was made of subcontracting than was contemplated in the December 2000 schedule.

(31) Finally, Italy claims that the fear that subcontractors might have been insufficient or unavailable is completely unfounded, also in view of the fact that the fitting-out of the 'hotel' part of the ships (which coincides with the last phase of production in the shipyard) involves the very subcontractors with whom Fincantieri has long-term cooperation relationships. Even in the unlikely event of a shortage or unavailability of skilled workers, the problem would easily be overcome through outsourcing the work to the building sector, mainly firms involved in the construction of large hotels, given the similarity of the furnishings and fittings in the 'hotel' part.

(32) Italy concludes by fully endorsing the comments made by Fincantieri.

(33) By letter dated 12 October 2005 Italy commented on the conclusions reached by the second expert consulted by the Commission in order to assess the arguments put forward by Italy in its reply to the decision initiating the formal procedure.

V. ASSESSMENT OF THE AID

Legal basis

(34) According 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 shall, insofar as it affects trade between Member States, be incompatible with the common market. The Court of Justice of the European Communities has consistently held that the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(35) The Commission notes that the question of extending the delivery limit is decisive for determining whether the ship in question qualifies for contract-related operating aid under Article 3 of the Shipbuilding Regulation. The operating aid in question consists in financing from state resources part of the costs that the yard in question would normally have to bear when building a vessel. Moreover, shipbuilding is an economic activity involving trade between Member States. The aid in question therefore falls within the scope of Article 87(1) of the Treaty.

(36) Under Article 87(3)(e) of the Treaty, categories of aid specified by a decision of the Council acting by a qualified majority on a proposal from the Commission may be considered compatible with the common market. The Commission notes that the Council adopted the Shipbuilding Regulation on that basis on 29 June 1998.

(37) The Commission notes that, according to the Shipbuilding Regulation, 'shipbuilding' means building of self-propelled seagoing commercial vessels. The Commission also notes that Fincantieri builds ships of this type and that it is consequently an undertaking covered by the Regulation.

(38) Italy's request has to be assessed on the basis of the Shipbuilding Regulation, although it expired at the end of 2003. This is because the scheme under which Italy granted the aid was approved in accordance with that Regulation, the aid was granted when the Regulation was still in force, and the rules linked to the three-year delivery limit are laid down in that instrument.

(39) According to Article 3(1) of the Shipbuilding Regulation, a maximum ceiling of 9 % for contract-related operating aid was allowed until 31 December 2000. Under Article 3(2), the aid ceiling applicable to the contract would normally be the one in force at the date of signature of the final contract. However, this does not apply to ships delivered more than three years from the signing of the contract; in such cases, the ceiling applicable is the one in force three years before the date of the delivery of the ship. Consequently, the last delivery date for a vessel qualifying for operating aid was, in principle, 31 December 2003.

(40) Article 3(2) stipulates, however, that the Commission may grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company. It should be noted that Italy bases its request for extension of the delivery limit on such exceptional and unforeseeable circumstances.

(41) The Commission notes that the Court of First Instance interpreted a similar provision in its judgment of 16 March 2000 ([5]), in which it stated that the provision in question must be given a restrictive interpretation.

Appraisal of the compatibility of the aid in the light of the doubts expressed by the Commission and the comments submitted by Italy and Fincantieri

(42) The Commission first points out that the present Decision concerns one ship, but the assessment is based on the entire production planned by Fincantieri in December 2000. Delivery of all five notified ships in 2003, plus other ships already scheduled for delivery in 2003, would have imposed a very heavy workload on the Fincantieri yards. The Commission therefore considered it necessary to verify that Fincantieri would have been technically able to deliver the ships in question by the end of 2003.

(43) The additional information provided by Italy and Fincantieri in response to the doubts raised by the Commission in its decision initiating the formal procedure was analysed by the Commission and by an independent technical expert ([6]) at the Commission's request. The report drawn up by this expert was made available to Italy for comments by a letter from the Commission dated 26 August 2005. Italy commented on this report in a letter dated 12 October 2005.

Production of a ship at the Ancona shipyard and effects on the Palermo shipyard

(44) The first doubt raised by the Commission was the ability of the Ancona shipyard to build, in combination with the ATSM shipyard in Trieste, one of the five cruise ships (6077) covered by the notification.

([5]) Case T-72/98 *Astilleros Zamacona SA v Commission* [2000] ECR II-1683.

([6]) For administrative reasons, a different one from the expert consulted before the formal procedure was initiated.

(45) Italy claims that it would have been possible to build one of the five ships at Ancona and ATSM even though the dry dock at Ancona is shorter than the ship in question, thanks to a special procedure used once before for a cruise ship, i.e. combining two ship sections (jumboisation). The Commission did not state in the decision initiating the formal procedure that such a method would be impossible, but underlined its complexity; Italy agrees with this and acknowledges that it was a 'less satisfactory method of construction'.

(46) In the decision initiating the formal procedure, the Commission noted in this context that Ancona had never built ships of similar complexity before, to which Italy replied that it had built a major section for three similar ships, and a passenger ship approximately half the size of the ship in question (44 000 grt as compared with 82 500 grt). The sections and the ship were thus considerably smaller than the cruise ship 6077 planned to be built. Since in cruise ship construction complexity is closely linked to size, the Commission in this respect concludes that Italy has not successfully refuted the facts set out in the decision initiating the formal procedure.

(47) The decision also stated that construction of one of the cruise ships at Ancona and ATSM in Trieste would have involved moving other planned construction to another Fincantieri yard, Palermo, and that the Commission had doubts that this yard could have coped with the resulting increase in outfitting work. Italy argues that such work would have been theoretically possible. However, no evidence is provided and the reply focused on construction in terms of cgt instead of the precise issue of outfitting. The Commission nevertheless notes that production at Palermo in 2003 was 33 000 cgt, which falls far short of the maximum production claimed by Italy (63 000 cgt) and is far less than the production according to the December 2000 plan (53 000 cgt).

(48) Furthermore, Italy informed the Commission that already in June 2001 (less than six months after the contract for the five cruise ships was signed) there was a production crisis at Palermo, even without the extra work planned, which made it necessary to delay deliveries. The Commission therefore considers that the Palermo yard would not have been able to fulfil the December 2000 plan as regards outfitting, and Italy has not given any reply on this point.

(49) The Commission also notes that the information provided by Italy and Fincantieri shows that it was not clear in December 2000 whether the outfitting of ship 6077 was intended to take place at ATSM or at Ancona. According to the production plan dated December 2000 and exhibit 5 in the letter dated 25 May 2005, the outfitting was to take place at Ancona, but the letter from Fincantieri dated 3 March 2005 states that the outfitting was to take place at ATSM to overcome any production difficulties encountered at the Ancona shipyard.

(50) According to the expert consulted by the Commission, Italy has not come forward with convincing information as regards the organisation and resources to be set up at ATSM's dry dock and he strongly doubts that a yard, mainly used for ship repair and inexperienced in cruise vessels, could be turned into a fully organised yard able to deliver a cruise vessel within a tight deadline.

(51) Italy commented on this aspect in its letter dated 12 October 2005. Italy considers that Fincantieri's organisational skills were sufficient to put, at short notice, ATSM in a position to perform its intended task. It also stresses that in its ship-repair activities ATSM is currently working in synergy with Fincantieri. However, the Commission is still not convinced by Italy's arguments that ATSM could be transformed from a dry-docking facility for ship repairs into a fully functioning shipyard in a short period of time.

(52) The conclusion is thus that Fincantieri itself doubted Ancona's ability to outfit the ship; neither has it provided any proof that ATSM was able to do so. Based on the above observations, the Commission considers that the December 2000 plan was unrealistic and unspecific both as regards the construction of a ship at Ancona/ATSM and as regards the situation at Palermo, confirming its doubts on these points.

Outfitting by the Fincantieri group

(53) In the decision initiating the formal procedure, the Commission estimated that delivery of all five ships plus all the other ships planned would have involved twice as much outfitting work as Fincantieri had ever done before, and that for the Marghera shipyard the outfitting planned for 2003 would have amounted to around 40 % more than the yard had ever done before.

(54) Italy replied, for one thing, that the hull erection capacity was sufficient. This argument is however not relevant, since the Commission did not question the ability to construct the hulls.

(55) Fincantieri and Italy also question the Commission's estimates of the amount of outfitting in relation to previous years and argue for example that the increase was not more than 20 %. They also claim that it would have been possible to accomplish the necessary outfitting within the deadline with the help of the network of subcontractors.

(56) The Commission maintains, however, and is supported in this by its technical expert, that the outfitting issue is as pertinent as stated in the decision initiating the formal

procedure. Although Italy has indicated that individual yards could have increased their production up to their peak level by operating two shifts, to do so simultaneously in all or most of its shipyards would, in the Commission's opinion, involve a very high risk and cost and would place a heavy strain on management capacities, particularly since Italy underlines the central management structure of Fincantieri's production process.

(57) The outfitting work is particularly critical for hulls 6078 and 6079, which were both planned to be built at the Marghera shipyard and delivered before the end of December 2003, with an interval of only two months between them. The Commission's view, supported by the expert's assessment, is that Italy, although providing some figures on how it had planned to accomplish all the outfitting, has not given a proper reply to this important point.

(58) In its letter dated 12 October 2005, Italy comments on this point made by the expert, stating that delivery of two ships within a period of two months was feasible, and that for example nine months had been set aside for ship 6078, compared with seven months for 6079, so as to be able to work on 6079 if necessary. The Commission points out here that the planned outfitting times for sister ships 6075, 6076 and 6077 were nine, eight and ten months respectively. Nine months for 6078 therefore appeared to be not particularly long, and seven months for 6079 extremely short, given that the outfitting work on that vessel was planned to be carried out simultaneously with ship 6078.

(59) The Commission takes note of Italy's statement that the outfitting time for some previous ships was reduced to seven or even six months. However, this took place in shipyards that were able to work in the normal way, outfitting one ship at a time.

(60) The fact that Marghera managed in the past to deliver four ships in 15 months does not dispel the Commission's doubts, since they mainly concern the two planned deliveries within two months. The Commission also notes that real production at Marghera in 2003, which was still considered a busy year for Fincantieri ([7]), was around 130 000 cgt, far less than the planned production of 160 000 cgt for 2003 in the December 2000 plan.

(61) The delivery of four ships in a short timeframe would furthermore, in the view of the expert consulted by the Commission, have caused difficulties for the shipowner, who would probably have had to overcome serious organisational problems in order to be in a position to take delivery of four vessels within two months.

(62) As for ships 6078 and 6079, which were planned to be delivered from the Marghera shipyard, the planned production times of 18 and 19 months were according to the Commission's expert extremely short. In this respect the expert questions the claims made by Italy in its letter dated 25 May 2005 that there would be a learning curve which would reduce the time needed for the later ships in a series. While this assumption is correct when ships are built in the same yard and with the same methods, it is, according to the expert, not correct when the same type of ship is built in different locations, with different teams, as would have been the case under the December 2000 plan.

(63) In its letter dated 12 October 2005, Italy comments on this point. It considers that there is a learning curve even when ships are built in different locations. The Commission can agree that a certain learning curve exists even when production takes place at different yards, e.g. as regards aspects linked to the central management structure and the supply of major equipment. Nevertheless, when ships are built in different locations, and even with different production methods, it is clear that this learning curve is much less significant than when there is repeated production in the same yard.

(64) The Commission notes that the three sister ships 6077, 6078 and 6079 would not have been built at the same yards and with the same production methods under the December 2000 plan. It also notes that according to Italy ship 6079 is in fact not the third in a series but the fifth, and that labour savings of 16 % and 8 % for the first and second sister ships had already been achieved. To expect additional efficiency gains and time savings for each further ship is even less plausible for the last two ships in a series of five than in a series of three ships. The Commission therefore considers that the estimated reductions in production times for ships 6078 and 6079 in the plan dating from 2000 were unrealistic.

Missing evidence

(65) The technical expert consulted by the Commission following the initiation of the formal procedure provided the Commission with some examples of what kind of information Italy/Fincantieri could have provided to show that Fincantieri really had the intention and the capability to deliver all five ships by the end of 2003.

(66) One such example is orders to suppliers for main items such as propulsion systems or main power generators. These have to be ordered at an early stage so as to be sure to receive them in time. Another such example would be contracts with subcontractors, which should have been concluded before the end of July 2001 according to the process description presented by Italy, and in any event before September 2001. However, Italy has only presented a list of subcontractors that potentially work for Fincantieri. A third example of proof that could have been provided would be actual dates of downpayments on contracts or

([7]) According to Fincantieri's annual report for 2003, '2003 was a particularly busy year for the Cruise Ship Business Unit, which was engaged in delivering three ships in a brief period of time'.

performance bonds/bank guarantees arranged for the orders and normally produced against payment of the first instalment for a new ship.

(67) Italy and Fincantieri did not provide any such evidence of Fincantieri's intention and ability to deliver all the ships by the end of 2003, including ship 6079, even though by letter dated 26 August 2005 the Commission informed Italy that precisely this type of information would have been useful. The lack of such information further supports the Commission's view that the December 2000 production plan was unrealistic and that ship 6079 could not have been delivered by the end of 2003.

Expected delivery of the ship

(68) The Commission finally notes that according to a press release issued on 20 June 2005 by the ship operator (Holland America Line), the vessel in question (ship 6079), to be named MS Noordam, is to be delivered in January 2006. The Commission notes that if this information on the delivery date is correct, the aid could not have been granted by Italy even if the Commission had allowed an extension of the delivery limit until the end of October 2005, as requested by Italy.

VI. CONCLUSION

(69) The Commission has analysed the information provided by Italy following the Commission decision to open a formal investigation into the technical ability to deliver all the ships that were scheduled for delivery in 2003 according to Fincantieri's December 2000 plan, and in particular hull 6079. In the Commission's view the information that Italy has provided has not dispelled the doubts it raised concerning the feasibility of the December 2000 plan submitted by Italy. The original doubts were shared by an independent expert. The new information was assessed by another independent expert, who also came to the same conclusion as the Commission. Italy had the opportunity to comment on the conclusions set out in the reports by both experts.

(70) Based on its assessment of all the available facts the Commission comes to the conclusion that the original production plan, with delivery of all five notified cruise ships before the end of 2003, was unrealistic. The doubts concerning the ability to deliver ship 6079 by the end of 2003 have therefore been confirmed.

(71) The Commission notes that it has already authorised an extension of the delivery limit for four ships produced by Fincantieri, in accordance with Article 3(2) of the Shipbuilding Regulation. That provision applies only to unexpected disruptions of a substantial and defensible nature due to exceptional circumstances, unforeseeable and external to the company, and the Court has already stated that it should be given a restrictive interpretation.

(72) On the basis of the conclusion set out in paragraph 70, an extension of the delivery limit is not defensible, and for this reason the Commission cannot authorise an extension of the delivery limit for hull 6079,

HAS ADOPTED THIS DECISION:

Article 1

The three-year delivery limit laid down in Article 3(2) of Council Regulation No 1540/98 cannot be extended for ship 6079 built by Fincantieri.

The contract-related operating aid for the ship may accordingly not 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, 23 November 2005.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 23 November 2005

on the State Aid schemes implemented by Slovenia in the framework of its legislation on Carbon Dioxide Emission Tax

(notified under document number C(2005) 4435)

(Only the Slovene version is authentic)

(Text with EEA relevance)

(2006/640/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]),

Whereas:

PROCEDURE

(1) On 18 October 2002, the Slovene authorities informed the Commission about the existence of a State aid scheme whereby certain categories of companies benefit from a tax reduction under the national CO_2 emission tax. The scheme was registered at the Commission as case SI 1/2003. The scheme had previously been approved by the national State aid authority of Slovenia in conformity with Annex IV, Chapter 3, paragraph 2 of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union ([2]) (Treaty of Accession), on the basis of the Community Guidelines on State aid for environmental protection (Environmental guidelines) ([3]).

(2) Due to the lack of complete information concerning the measure, the Commission asked Slovenia for further clarification and the scheme could not be included in the existing aid list under the Appendix to the Annex IV of the Treaty of Accession.

(3) Further information was submitted to the Commission by the Slovene authorities on 7 November 2002, 1 April 2003, 16 May 2003, 1 October 2003, 4 February 2004, 1 June 2004, 17 September 2004 and 28 September 2004. Two meetings took place between the Slovene authorities and the Commission on 24 November 2003 and 8 March 2004.

(4) Meanwhile, major changes took place in the EU legislation that had a significant impact on the Slovene CO_2 tax system:

— the Council Directive 2003/96 of 27 October 2003 on the taxation of energy products and electricity ([4]) ('Energy Taxation Directive'),

— the Directive 2003/87/EC of the European Parliament and Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowances trading within the Community and amending Council Directive 96/61/EC ([5]) ('Directive on emission trading'), and

— the Directive 2004/8/EC of the European Parliament and Council of 11 February 2004 on the promotion of cogeneration ([6])

have entered into force on their respective days of publication.

(5) Consequently, the Slovene authorities decided to modify their tax scheme, and notified the new — at that time draft — legislation to the Commission. The Commission registered the new scheme in June 2004, under the number N 402/2004.

(6) Based on the information at its disposal, the Commission had doubts as to the compatibility of certain parts of both measures SI 1/2003 and N 402/2004 with the common market. Thus, on 14 December 2004, it initiated a formal investigation procedure on the basis of articles 4.4 and 6 of Council Regulation (EC) No 659/1999 on the rules for the application of article 93 of the EC Treaty ([7]) and requested the Slovene authorities to submit their comments (the

([1]) OJ C 46, 22.2.2005, p. 3.
([2]) OJ L 236, 23.9.2003.
([3]) OJ C 37, 3.2.2001, p. 3.
([4]) OJ L 283, 31.10.2003, p. 51.
([5]) OJ L 275, 25.10.2003, p. 32.
([6]) OJ L 52, 21.2.2004, p. 50.
([7]) OJ L 83, 27.3.1999, p. 1.

'Opening Decision'). A meaningful summary of that Opening Decision was published on 22 February 2005 in the Official Journal of the European Union ([8]). All interested parties were invited to submit their comments within one month of the date of publication.

(7) After the opening of the formal investigation procedure, the Commission registered the case number C 47/2004 for case SI 1/2003 and the case number C 44/2004 for case N 402/2004.

(8) By letter dated 18 January 2005, registered on 20 January 2005, the Slovene authorities submitted their comments with regard to the doubts raised by the Commission in its Opening Decision. On 4 April and 7 July 2005, the Commission sent further questions to the Slovene authorities, which were answered respectively by letters dated 17 May and 8 August 2005.

(9) The Commission did not receive any comments from third parties.

(10) For an easier understanding of the amendments introduced by the new legislation, the Opening Decision covered both the old system of tax reductions (case SI 1/2003) and the new scheme (case N 402/2004). For reasons of clarity and coherence, the present decision also covers both cases C 44/2004 and C 47/2004.

A) *SCHEME C 47/2004 (EX CASE SI 1/2003)*

1. DESCRIPTION OF THE SCHEME

(11) The scheme is based on the *'Regulation on tax for air pollution with CO_2 emissions'* of 17 October 2002, and entered into force in Slovenia in October 2002 (the 'Regulation'). The new, modified legislation (scheme C 44/2004) entered into force on 1 May 2005, and replaced the Regulation.

(12) Therefore, by the present decision the Commission assesses the compatibility of the Regulation with the common market, covering the period of time between 1 May 2004 (date of accession of Slovenia to the EU) and 1 May 2005 (end of application of the Regulation).

(13) The Regulation foresaw a tax levied on the basis of the quantity of CO_2 emitted by each installation. It contained three categories of tax reductions that were submitted to the Commission for approval as operating aid measures under the Environmental guidelines:

(i) Companies that produce electricity in combined heat and power (CHP) installations could be granted a tax reduction if they had an at least 5 % energy saving for existing installations, or 10 % for new installations.

In its Opening Decision, the Commission found this aid compatible with article 87(3)(c) of the EC Treaty.

(ii) The second category of tax reductions concerned all installations that were operating in Slovenia before 1998, had an average of at least 10t CO_2 emissions per year during the period 1986 to 1998, and have asked for an emission permit from the Ministry of Environment before 2002. Special reduction rates were foreseen for the following categories of beneficiaries:

— installations producing heat isolation materials,

— power plants feeding electricity to a high voltage transmission network,

— installations of transport of natural gas in gas networks,

— district heating installations, for CO_2 emissions due to the use of fossil fuels.

In its Opening Decision, the Commission found that the tax reduction for power plants feeding electricity to a high voltage transmission network (second indent above), did not constitute State aid in the meaning of article 87(1) of the EC Treaty.

It initiated a formal investigation procedure concerning all other tax reductions under this category, on the basis of articles 4.4 and 6 of Council Regulation (EC) No 659/1999 on the rules for the application of article 93 of the EC Treaty.

(iii) The third category of tax reductions concerned large combustion plants of power stations delivering electricity to a high voltage transmission network, using domestic coal as fuel.

In its Opening Decision, the Commission came to the conclusion that this measure did not constitute State aid in the meaning of article 87(1) of the EC Treaty.

(14) The investigation procedure of the Commission therefore concentrated on the State aid measures under point (ii) above.

2. DE MINIMIS AID

(15) At the date of the Commission's Opening Decision (14 December 2004), the Regulation was still applicable. However, in their letter dated 17 May 2005, the Slovene authorities confirmed that no administrative decision on CO_2 tax reduction had been taken on the basis of the Regulation as of the date of reception of the Commission's

([8]) OJ C 46, 22.2.2005.

decision by the Slovene authorities (22 December 2004). On 1 May 2005, the new legislation entered into force and replaced the Regulation.

(16) To the Commission's request (letter dated 4 April 2005), the Slovene authorities provided it with a list of all the beneficiaries that had received tax reduction under the Regulation after the date of accession of Slovenia to the EU, as well as the corresponding amounts of tax reduction, until the end of applicability of the Regulation (letter dated 17 May 2005).

(17) According to this information, the overall amount of the tax reduction between 1 May 2004 and 1 May 2005 was 998 771 euros, granted to 153 companies in total. None of the companies have received more than EUR 100 000. In fact, only two companies received more than 27 000 euros, but none of them more than EUR 100 000.

(18) The Slovene authorities therefore argue that, as a consequence of the very short period of application of the Regulation after the accession of Slovenia to the EU, the amount of aid granted under this scheme is lower than the threshold of EUR 100 000 fixed by article 2 of the Commission Regulation on *de minimis* aid ([9]).

(19) In their letter dated 8 August 2005, the Slovene authorities describe in details the system put in place to monitor *de minimis* aid in Slovenia. According to this information, Slovenia has set up a system for monitoring and supervising the granting of aid under the *de minimis* rule by establishing a central register of *de minimis* aid, in the State Aid Monitoring Department of the Ministry of Finance. Before the granting of any *de minimis* aid by any authority, this department must check that the conditions of the Commission Regulation on *de minimis* aid are respected. The central register was established before the accession of Slovenia to the EU.

(20) The Slovene authorities confirmed in their letter dated 8 August 2005 that, due to the use of this centralized system, the beneficiaries of the measure could not receive any aid that would exceed EUR 100 000 per beneficiary over a period of three years.

3. ASSESSMENT

(21) On the date of reception of the Commission's Opening Decision (22 December 2004), the Slovene authorities immediately put an end to the application of the tax reduction scheme at stake. A significantly modified new scheme entered into force a few months later, on 1 May 2005. Thus, the Regulation assessed by the present decision was applicable in Slovenia for a period of one year after accession, but it was *de facto* applied for a period of less then 8 months (from 1 May 2004 to 22 December 2004).

(22) As a result of this short application period, the aid granted under this scheme is lower than the threshold of EUR 100 000 per beneficiary fixed by article 2 of the Commission Regulation on *de minimis* aid.

(23) By their letters of 17 May 2005 and 8 August 2005, the Slovene authorities also undertook to respect all other conditions of the Commission Regulation on *de minimis* aid, and described the monitoring system that ensures the correct application of those rules.

4. CONCLUSION

(24) The Commission therefore concludes that the measure fulfils the criteria of the Commission Regulation on *de minimis* aid and, in line with its article 2.1, is deemed not to constitute State aid in the meaning of article 87(1) of the EC Treaty.

B) *SCHEME C 44/2004 (EX N 402/2004): MODIFICATION OF THE SCHEME C47/2004*

1. DESCRIPTION OF THE SCHEME

(25) In their letter of information registered on 1 June 2004, the Slovene authorities informed the Commission about significant modifications in the Slovene legislation, leading to, *inter alia*, the amendment of the Regulation on CO_2 taxation in force since 2002. The new set of national acts consists of the new Environmental protection act ([10]), the act amending the Law on Excise Duties ([11]) and a governmental decree on the taxation of CO_2 emissions (the 'Decree'), entered into force on 1 May 2005.

(26) The Decree keeps the logic of the previous system of CO_2 taxation unchanged: the tax is based on the quantity of CO_2 emitted by the installations.

(27) It contains three measures of tax reduction that were submitted to the Commission for approval under the Environmental guidelines. All the three measures have a duration of 5 years: from 1 January 2005 till 31 December 2009.

(i) Companies that produce electricity in combined heat and power (CHP) installations can be granted a tax reduction if they achieve certain energy savings.

In its Opening Decision, the Commission found this measure compatible with article 87(3)(c) of the EC Treaty. Although the measure was only a draft Decree at the time of that decision, the Slovene authorities confirmed by their letter dated 17 May 2005 that this measure had not been modified.

([9]) Commission Regulation No 69/2001 of 12 January 2001 on the application of articles 87 and 88 of the EC Treaty to *de minimis* aid

([10]) Ur.l.RS 41/2004.

([11]) Ur.l.RS 42/2004.

(ii) The second category of reductions concerns power plants feeding electricity to a high voltage transmission network, and certain large combustion installations listed under article 23 of the Decree.

As far as the power plants are concerned, the Commission concluded in its Opening Decision that this measure did not constitute State aid. Concerning the large combustion installations, the Commission found their tax reduction compatible with the EC Treaty.

(iii) According to the draft Decree as submitted to the Commission before its Opening Decision, all operators that feed electricity to a high voltage transmission network but are neither energy intensive businesses nor covered by a voluntary environmental agreement or a tradable permit scheme, could benefit from 43 % tax reduction in 2005 decreasing by 8 percentage points each year. District heating installations in the same situation could benefit from a 26 % reduction in 2005 decreasing by 8 percentage points each year.

In its Opening Decision, the Commission raised doubts as to the compatibility of this measure with the common market and, based on articles 4.4 and 6 of Council Regulation (EC) No 659/1999 on the rules for the application of article 93 of the EC Treaty, it initiated a formal investigation procedure. This was the only category of tax reduction in the new draft Decree that was subject to the Commission's State aid investigation procedure.

(28) Following the Commission's Opening Decision, the Slovene authorities modified the draft Decree. The final version of the Decree, as entered into force in May 2005, replaces this category of tax reduction by the following categories:

(29) Under article 18, 3rd indent of the Decree, companies that participate in the EU emission trading scheme, in line with the Directive on emission trading, and are not energy intensive, can benefit from a tax reduction from the national CO_2 tax.

(30) Under article 18, 4th indent, companies that enter into voluntary environmental agreements, can also benefit from tax reduction.

(31) The tax reduction rate is decreasing by 8 percentage points each year:

— 2005: 43 %,

— 2006: 35 %,

— 2007: 27 %,

— 2008: 19 %, and

— 2009: 11 % of tax reduction.

The last year of tax reduction is 2009: no reduction applies as of 2010.

(32) District heating installations benefit from a 26 % reduction in 2005, decreasing by 8 percentage points each year.

2. ASSESSMENT

(33) The Slovene authorities notified the aid measure to the Commission before implementing it.

(34) The measure that is subject to the Commission's investigation procedure is mainly based on articles 18, 3rd and 4th indent; and articles 22 to 24 of the Decree. Although the Decree entered into force during the investigation procedure of the Commission, the Slovene authorities confirm in their letter dated 17 May 2005 that articles 18, 4th indent; 23 and 24 will become applicable only after the Commission's final approval. They therefore comply with their obligation on the basis of article 88(3) of the EC Treaty and article 3 of the Council Regulation (EC) nº 659/1999 on the rules for the application of article 93 of the EC Treaty, as far as these articles are concerned.

(35) However, the tax reimbursement measures under the Commission's investigation procedure can also be based on articles 18, 3rd indent and article 22 of the Decree. The Slovene authorities consider ([12]) that these articles were brought in line with the EC Treaty after the Commission's Opening Decision, and they therefore did not suspend their entering into force until the Commission's final approval. These articles are thus in force since 1 May 2005, in breach of article 3 of the Council Regulation (EC) nº 659/1999 on the rules for the application of article 93 of the EC Treaty.

2.1 *Existence of aid within the meaning of article 87(1) of the EC Treaty*

(36) The Commission is of the view that the amendments introduced by the Slovene authorities in the tax reduction measure since the Opening Decision, do not in any way change the assessment in the Opening Decision concerning the existence of aid within the meaning of article 87(1) of the EC Treaty. Consequently, the Commission considers that the measures under assessment constitute State aid within the meaning of article 87(1) of the EC Treaty.

2.2 *Compatibility of the aid with the EC Treaty*

(37) The Commission notes that the Slovene authorities have structured the scheme on the basis of the Environmental guidelines and the Energy Taxation Directive.

Compatibility with the Environmental guidelines

(38) The Commission assesses the compatibility of the measures in particular with articles 51.2 and 51.1 (b) 1st indent of the Environmental guidelines. The Slovene CO_2 taxation system has been introduced in October 2002. Therefore, according

([12]) See the Slovene authorities' letter dated 17 May 2005.

to article 51.2, the provisions of article 51.1 can only apply if the following two conditions are satisfied at the same time:

(a) the tax has an appreciable positive impact in terms of environmental protection. The logic of the Slovene tax system is to tax companies with a higher rate of CO_2 emissions more than companies that emit less CO_2. Such a taxation system leads inherently to an incentive for the companies to act in a more environmentally friendly manner, by emitting less CO_2. Therefore, the Commission considers that this first criterion of article 51.2 is fulfilled.

(b) the derogation for the beneficiaries must have been decided on when the tax was adopted. The categories of beneficiaries foreseen by the initial act of 2002 on CO_2 taxation are much larger than the categories covered by the Decree under assessment. The modifications introduced are due to the accession of Slovenia to the EU and the subsequent changes in the applicable legislation. The Commission considers that these modifications left the nature and logic of the derogations unchanged. They only reduce the circle of the beneficiaries in line with the applicable EU legislation.

(39) The Commission therefore concludes that this second condition of article 51.2 of the Environmental guidelines is also fulfilled.

(40) As a consequence of the above, in accordance with article 51.2 of the Environmental guidelines, the provisions of point 51.1 may apply to the measures under assessment.

(41) According to article 51.1(b)1st indent, where the tax reduction concerns a Community tax, a maximum 10 year exemption period can be authorised by the Commission if the amount effectively paid by the beneficiaries after the reduction remains higher than the Community minimum.

(42) Since 1 January 2004, the Energy Taxation Directive foresees a harmonised energy taxation in the Member States. The Commission considers, in line with article 4 of that Directive, that the Slovene tax system based on the quantity of CO_2 emitted by the companies, taxes energy products as defined under article 2 of the Energy Taxation Directive and therefore falls within the scope of that Directive. Hence, the Slovene tax system concerns a Community tax, in the meaning of article 51.1(b) 1st indent.

(43) The reduction only applies for a period of less than 5 years which is less than the maximum foreseen by article 51.1.

(44) With regard to the different levels of taxation applicable in Slovenia for different input fuels, the tax rate to be paid by an installation will depend on the nature of the input it will use for its operation. The Commission therefore cannot verify and make sure *a priori* that the minimum levels of taxation fixed by the Energy Taxation Directive will be respected for each installation. In their letter dated 17 May 2005, the Slovene authorities repeated their commitment to ensure for both categories of beneficiaries that the tax they pay after reduction will remain higher than the Community minimum, defined by the Energy Taxation Directive. The tax reductions are granted in the form of tax reimbursements, the competent national authority can therefore verify compliance with the minimum harmonised level for each installation, before executing the reimbursement.

(45) The Commission also takes into consideration the decreasing nature of the tax reductions, leading to significantly lower reductions each year.

(46) On the basis of the above undertaking by the Slovene authorities, the Commission considers that the condition of article 51.1(b)1st indent, whereby the amount effectively paid by the beneficiaries after the reduction has to remain higher than the Community minimum, is fulfilled.

(47) The conditions of article 51.1(b)1st indent of the Guidelines on environmental protection are therefore satisfied for both categories of beneficiaries.

Compatibility with the Energy Taxation Directive

(48) The Energy Taxation Directive requires in its article 17.1 that even if the minimum levels of taxation prescribed in that Directive are respected, Member States can only apply tax reductions if it is in favour of energy-intensive businesses or if the beneficiary has entered into special agreements with environmental protection objectives or is covered by a tradable permit scheme.

(49) The beneficiaries covered by article 18, 3rd indent of the Decree, must participate in the EU emission trading scheme, in line with the Directive on emission trading ([13]), ([13]), in order to benefit from the reduction.

(50) The beneficiaries covered by article 18, 4th indent of the Decree, must enter into voluntary environmental agreements, in order to benefit from the tax reduction. The environmental target to be achieved by the beneficiaries under the environmental agreements is a reduction of CO_2 emissions of 2,5 % by the end of 2008, compared to the emissions during the reference period (1999 to 2002).

([13]) See footnote 3.

(51) In light of the above, the Commission finds that both categories of tax reductions are in line with the requirements of the Energy Taxation Directive,

HAS ADOPTED THIS DECISION:

Article 1

The tax reduction measures, as foreseen by the Slovene governmental Decree on the taxation of CO_2 emissions, entered into force on 1 May 2005, are compatible with article 87(3)(c) of the EC Treaty.

Article 2

The present Decision covers the tax reductions granted on the basis of the Decree, until 31 December 2009.

Article 3

The present Decision is addressed to the Republic of Slovenia.

Done at Brussels, 23 November 2005.

For the Commission
Neelie KROES
Member of the Commission

COMMISSION DECISION

of 21 December 2005

on State Aid C 26/05 (ex N 580/B/03) under the programme submitted by Sicily as part of the assistance scheme for growing citrus fruit in Italy

(notified under document number C(2005) 5354)

(Only the Italian version is authentic)

(2006/641/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 those provisions ([1]),

Whereas:

I. PROCEDURE

(1) By letter dated 15 December 2003, registered on 16 December 2003, the Italian Permanent Representation to the European Union notified the Commission of a number of assistance measures for Italian citrus-fruit cultivation in accordance with Article 88(3) of the Treaty.

(2) By letter dated 20 January 2004, the Commission requested additional information on these measures from the Italian authorities.

(3) By letter dated 30 April 2004, the Commission, having received no response to its request for information of 20 January 2004, sent a reminder to the Italian authorities.

(4) By letter dated 24 May 2004, registered on 25 May 2004, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities in which they requested an extension of the deadline for a reply to the questions asked in the letter of 20 January 2004.

(5) An extension was granted to the Italian authorities by letter dated 3 June 2004.

(6) By letter dated 30 June 2004, registered on 2 July 2004, the Italian Permanent Representation to the European Union sent the Commission the additional information which the Italian authorities had been requested to provide in the letter dated 20 January 2004.

(7) The above-mentioned assistance consisted of an additional budget allocation for funding the measures approved under aid scheme N 313/01 ([2]) but, as indicated in the notification, part of that budget was to be used to finance measures to control citrus *tristeza* virus which had not been examined under aid scheme N 313/01. The Commission, having established that it had all the information necessary to examine the funding of the measures approved under that aid scheme N 313/01 but that it still did not have information on the measures to control citrus *tristeza* virus, decided, so as not to hinder the funding of the measures already approved, to divide the file into two parts: Part A for the funding referred to above and Part B for the measures to control citrus *tristeza* virus.

(8) Part A of the file was approved by the Commission ([3]).

(9) By letter dated 12 August 2004, the Commission asked the Italian authorities for additional information on part B of the file.

(10) By letter dated 27 September 2004, registered on 29 September 2004, the Italian Permanent Representation to the European Union sent the Commission the additional information which the Italian authorities had been requested to provide in its letter dated 12 August 2004.

(11) As the information provided by the Italian authorities was incomplete, the Commission requested a number of further details by letter dated 11 October 2004.

(12) By letter of 25 October 2004, registered on 27 October 2004, and by letter of 9 November 2004, registered on 15 November 2004, the Italian Permanent Representation to the European Union sent the Commission the further details which the Italian authorities had been requested to provide in the letter dated 11 October 2004.

(13) As the information provided by the Italian authorities was still incomplete, the Commission again requested a number of further details by letter dated 23 November 2004.

([1]) OJ C 256, 15.10.2005, p. 18.

([2]) See letter SG(2003) D/228423 dated 7.2.2003.

([3]) See letter SG(2004)-Greffe D/203509 dated 13.8.2004.

(14) In the meantime, by letter dated 19 November 2004, registered on 24 November 2004, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities to which the *tristeza* control programme for Campania was annexed.

(15) By letter dated 19 December 2004, the Commission drew the Italian authorities' attention to the fact that, as the file related to a number of regions, the compatibility of the planned measures would be examined when the *tristeza* control plans of all the regions had been received.

(16) By letter dated 16 December 2004, registered on 20 December 2004, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities requesting that each programme be examined as soon as it had been sent in.

(17) By letter dated 10 January 2005, registered on 11 January 2005, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities to which the *tristeza* control programme for Basilicata was annexed.

(18) In response, by letter dated 19 January 2005, the Commission reminded the Italian authorities that, for the sake of administrative simplification, one single decision would be taken on the control programmes submitted and that the Italian authorities should indicate when they thought that all the *tristeza* control programmes would be submitted. This position was reiterated at a meeting with the Italian authorities held on 25 January 2005, during which it was finally confirmed that the latter would inform the Commission when transmission of the control programmes could be considered complete.

(19) By letter dated 26 January 2005, registered on 27 January 2005, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities to which the *tristeza* control programme for Calabria was annexed.

(20) By letter dated 14 February 2005, registered on 15 February 2005, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities requesting a decision on the measures planned under the *tristeza* control programmes for Calabria, Campania and Basilicata.

(21) By letter dated 28 February 2005, registered on 1 March 2005, the Italian Permanent Representation to the European Union sent the Commission a letter from the Italian authorities to which the *tristeza* control programme for Sicily was annexed.

(22) In the course of March 2005, despite what had been agreed at the meeting on 25 January 2005, the Italian authorities repeatedly requested a separate decision on the *tristeza* control programme submitted by Calabria.

(23) The Commission decided to divide file N 580/03 once more and for one last time to create a part C relating to the *tristeza* control programme submitted by Calabria. At the same time, by letter dated 5 April 2005, it sent a new request for further information on the remainder of part B of the file, in other words the funding of the *tristeza* control measures provided for in the programmes for Campania, Basilicata and Sicily.

(24) By letter dated 13 May 2005, registered on 18 May 2005, the Italian Permanent Representation to the European Union sent the Commission the additional information which the Italian authorities had been requested to provide in the letter dated 5 April 2005, but only for the programmes in Campania and Basilicata.

(25) By letter dated 10 June 2005, registered on 17 June 2005, the Italian Permanent Representation to the European Union sent the Commission the additional information requested in connection with the programme for Sicily in the letter dated 5 April 2005 referred to above.

(26) By letter dated 22 July 2005 ([4]), the Commission informed Italy of its decision not to raise any objections to the Campania and Basilicata *tristeza* control programmes and the prevention and technical assistance measures provided for in the *tristeza* control programme for Sicily, and to initiate the procedure under Article 88(2) of the EC Treaty in respect of the research funding provided for in that *tristeza* control programme.

(27) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([5]). The Commission called on interested parties to submit their comments on the aid concerned.

(28) The Commission did not receive any comments from interested parties.

([4]) See letter SG(2005)-Greffe D/203803 dated 22.7.2005.

([5]) See footnote 1.

II. DESCRIPTION

(29) The *tristeza* control programme submitted by Sicily provides for research to be carried out into the biological and agronomic factors associated with outbreaks of the disease.

(30) The budget forecast to fund these measures in full totals €4 200 000, to be transferred from national resources governed by Decree No 25486 of 29 December 2003 and Decree No 1090 of 14 July 2004. The duration of the measures will depend on the analysis and publication of the findings of the research.

III. INITIATING THE PROCEDURE LAID DOWN IN ARTICLE 88(2) OF THE TREATY

(31) The Commission initiated the procedure laid down for funding the research aspect of the *tristeza* control programme submitted by Sicily as it had concerns regarding compliance with the applicable rules governing State aid for research and development.

(32) Under these rules, research in the agricultural sector may be funded in full only if the four conditions laid down in the 1998 Commission Communication amending the Community framework for State aid for research and development ('1998 rules') ([6]) are met.

(33) The four conditions are as follows:

a) the project is of general interest to the particular sector (or subsector) concerned, without unduly distorting competition in other sectors (or subsectors);

b) information is published in appropriate journals, with at least national distribution and not limited to members of any particular organisation, to ensure that any operator potentially interested in the work can readily be aware that it is or has been carried out, and that the results are or will be made available, on request, to any interested party. This information should be published on a date not later than any information given directly to members of individual organisations;

c) the results of the work are made available for exploitation by all interested parties, including the beneficiary of the aid, on an equal basis in terms both of cost and of time;

d) the aid fulfils the conditions laid down in Annex II, 'Domestic support: the basis for exemption from the reduction commitments', to the Agreement on agriculture concluded during the Uruguay Round of multilateral trade negotiations ([7]) (for these last conditions, funding of research should not give rise to price support for producers and should not imply direct payments to producers or processors).

(34) On the basis of the information available to the Commission, it was not in a position to establish full compliance with these four conditions, given that the Italian authorities had not given any commitments, either on equal conditions for accessing the findings of the research or on compliance with the requirements under Annex II of the Agreement on agriculture concluded during the Uruguay Round of multilateral trade negotiations (there was evidence of compliance with other requirements).

(35) Accordingly, the Commission had to examine the funding of research under the *tristeza* control programme in the light of the Community rules governing State aid for research and development ([8]). On the basis of the information available to the Commission, it was not in a position even to ascertain whether the planned funding complied with these rules. Hence the Commission could merely express concern as to the eligibility of aid forecast to fund the planned research work.

IV. COMMENTS FROM THE ITALIAN AUTHORITIES

(36) By letter dated 16 September 2005, registered on 20 September 2005, the Italian Permanent Representation to the European Union sent the Commission the comments from the Italian authorities following initiation of the procedure under Article 88(2) of the Treaty on the funding of research planned under the *tristeza* control programme submitted by Sicily.

(37) In their comments, the Italian authorities specified that the findings of the research would be made available to all interested parties under equal conditions in terms of cost and time. They also pointed out that the requirements under Annex II to the Agreement on agriculture concluded during the Uruguay Round of multilateral trade negotiations would be respected since neither producers nor processors would be paid any form of direct aid and the measures would not have the effect of price support. Given that the programme concerned fundamental research, it would not directly affect agricultural or agri-food production.

([6]) OJ C 48, 13.2.1998, p. 2.

([7]) OJ L 336, 23.12.1994, p. 3.

([8]) OJ C 45, 17.2.1996, p. 5.

V. ASSESSMENT

(38) According to Article 87(1) of the EC 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 shall, in so far as it affects trade between Member States, be incompatible with the common market. The funding in question corresponds to this definition since it concerns certain undertakings (citrus-growing undertakings) and since it is such that it may affect trade, given the important position occupied by Italy in agricultural production (e.g., in 2003, Italy produced the most vegetables in the EU).

(39) However, in cases covered by Article 87(2) and (3) of the Treaty, some measures may enjoy derogations to be considered compatible with the common market.

(40) The only possible derogation in this case, given the type of scheme in question, is laid down in Article 87(3)(c) of the Treaty, according to which aid may be considered compatible with the common market if it is found to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(41) In order for the derogation to be applicable, the measure in question (funding research in full) must comply with the four conditions laid down in the 1998 rules.

(42) In the light of the clarification provided by the Italian authorities in their comments submitted after initiation of the procedure under Article 88(2) of the Treaty, it would appear that the two conditions of the above-mentioned communication with which compliance remained questionable will indeed be met.

(43) The Commission is therefore in a position to state that the funding of research planned under the Sicilian *tristeza* control programme will be implemented in line with the applicable provisions of the above-mentioned communication.

VI. CONCLUSION

(44) Since the Italian authorities have shown that the research planned under the Sicilian *tristeza* control programme will be funded in line with the applicable provisions contained in the 1998 rules, the funding in question is eligible for the derogation under Article 87(3)(c) as the aid is designed to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The research funding provided for in the citrus *tristeza* control programme for Sicily is compatible with the common market.

Implementation of the aid is therefore authorised.

Article 2

This decision is addressed to the Italian Republic.

Done at Brussels, 21 December 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

COMMISSION DECISION

of 8 March 2006

concerning the aid scheme that the Region of Veneto in Italy plans to introduce to improve processing and marketing conditions for agricultural products

(notified under document number C(2006) 639)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/642/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 above provision [1],

Whereas:

I. PROCEDURE

(1) By letter dated 23 February 2000, registered as received on 28 February 2000, the Office of the Italian Permanent Representative to the European Union notified to the Commission, within the meaning of Article 88(3) of the Treaty, Article 35 of Region of Veneto Law No 5/2000 [2] (hereafter RL No 5/2000), which provides for aid for the processing and marketing of agricultural products.

(2) By letters dated 12 May 2000, registered as received on 18 May 2000, 1 August 2000, registered as received on 7 August 2000, 15 November 2000, registered as received on 16 November 2000, and 24 January 2001, registered as received on 30 January 2000, the Office of the Italian Permanent Representative to the European Union provided the Commission with the additional information requested from the Italian authorities by letters dated 18 April 2000, 5 July 2000 and 21 September 2000 and at a bilateral meeting held on 13 December 2000.

(3) By letter dated 2 April 2001 the Commission notified Italy of its Decision to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of the aid in question.

(4) The Commission Decision initiating the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure in question.

(5) The Italian authorities submitted their comments by letters dated 12 June and 22 June 2001. The Commission did not receive any comments from other interested parties.

II. DESCRIPTION

(6) Article 35 of RL No 5/2000 provides for state aid aimed at improving the processing and marketing conditions for agricultural products. The aid is targeted at projects carried out by agrifood undertakings that applied for funding under Council Regulation (EC) No 951/97 of 20 May 1997 on improving the processing and marketing conditions for agricultural products [4] during the 1994-99 programming period [5]. Some of the undertakings actually went ahead with the work, but failed to receive any public aid due to a funding shortfall.

(7) According to Decision of the Regional Government No 4202 of 14 September 1993, during the above period, the undertakings concerned could submit applications for part-financing under the programme for such projects to the competent authorities (Regional Government — Department for Agriculture and Relations with the EEC) before 30 April and before 30 September each year. On completion of the project-selection procedure, the competent authorities drew up a ranking list of the projects selected and informed the potential beneficiaries of their 'eligibility for financing' by publishing the Decision of the Regional Government approving the ranking list in the Official Journal of the Region of Veneto. Those undertakings whose investment projects had not been selected were sent a letter explaining why their application had been rejected.

(8) In the opinion of the Italian authorities, the publication of the Decision approving the above ranking list amounted (under the law on the publication of official acts [6] to notification by the official authorities of the acceptance of applications for financing for the projects concerned, which, according to those authorities, created in the undertakings on the ranking list a legitimate expectation that aid would be granted.

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[1] OJ C 140, 12.5.2001, p. 2.

[2] Veneto Regional Law No 5/2000 of 28.1.2000. General provisions refinancing and amending regional laws for the preparation of the yearly and multi-annual budget of the Region (2000 Financial Law).

[3] See footnote 1.

[4] OJ L 142, 2.6.1997, p. 22.

[5] The Veneto Regional Operational Programme was approved by Commission Decision of 2 October 1996 (96/2598/EC).

[6] Law No 241 of 7.8.1990, Italian Official Journal (General Series) No 192 of 18.8.1990, lays down 'New rules on administrative procedures and on access to administrative documents'.

(9) According to the Italian authorities, the investments concerned could be made following notification of the eligibility of expenditure on the projects and, in any case, after submission of applications for funding ([7]).

(10) It was planned to compile ranking lists every six months until all the funding provided for in the Veneto Regional Operational Programme (Veneto ROP) had been used up. By Decision of the Regional Government No 4102 of 23 November 1999 ([8]) the final ranking list of applications submitted up until 14 July 1999 was published. The resources were used up before all the projects on the ranking list could be financed. A number of projects could not be financed although they were on the published list of projects eligible for financing.

(11) Faced with this situation, various sources of financing were used (for example, resources from overbooking, agrimonetary funding and funding under Article 29 of Regional Law No 88 of 31 October 1980 ([9])), leaving 36 projects of the 150 contained on the final ranking list as eligible for financing still to be financed.

(12) Article 35 of RL No 5/2000 provided for the financing of the 36 projects that had not received public financing during the 1994-99 programming period but which did, however, figure on the list of selected projects and on some of which work had already started.

(13) The budget allocated for financing the aid was ITL 5 billion (EUR 2 582 284), but the Italian authorities affirmed that if other financial resources became available at a later date they would allocate further financing to those same projects. The scheme would continue until the available budget had been used up (as initially indicated or as subsequently increased).

(14) The planned aid could not be combined with other aid granted for the same purpose.

(15) The regional measure is an extraordinary measure and is of limited duration. It concerns initiatives that, at the time they were approved by means of their inclusion in the published ranking list, complied with the sectoral limits and the requirements laid down in the Veneto ROP, approved by the Commission, with Commission Decision 94/173/EC on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC ([10]) and with Regulation (EC) No 951/97, on the basis of which the regional authorities approved applications for financing.

(16) In addition, the Italian authorities stated that, although the measure involved the 1994-99 programming period, the compatibility of the projects concerned with the common market had to be evaluated on the basis of the 'Community guidelines for state aid in the agriculture sector' ([11]) (hereafter referred to as 'the guidelines'), since the state aid scheme was notified after the entry into force of those guidelines. In particular, the Italian authorities undertook to comply with the conditions, limits and provisions laid down in point 4.2 of the guidelines, i.e:

(a) the aid rate would not exceed 40 % of eligible investments,

(b) no aid would be granted to undertakings in financial difficulty,

(c) to be eligible, undertakings had to comply with minimum standards regarding the environment, hygiene and animal welfare, it being understood that aid would be granted to allow undertakings to comply with newly introduced minimum standards regarding the environment, hygiene and animal welfare,

(d) the regional authorities would verify that normal market outlets for the undertaking's products can be found, obtaining and verifying contracts for marketing such products.

(17) As regards the requirements referred to in point 16(b), (c) and (d), the Italian authorities stated that they would comply with the Rural Development Plan for the Region of Veneto for 2000-06 (Veneto RDP) ([12]). The aid was to be provided in the form of a capital grant not exceeding 40 % of the duly certified eligible expenditure in accordance with the conditions, limits and provisions laid down in point 4.2 of the guidelines. Costs arising from the application of this Article would be borne entirely by the region and combination with other existing aid instruments or schemes is prohibited.

(18) The Italian authorities stated that no aid would be granted to projects in contravention of any prohibitions or restrictions laid down in the common organisations of the market or that concerned the manufacture and marketing of products which imitated or substituted for milk and milk products.

([7]) Under Article 11 of Regional Law No 1 of 8 January 1991 (notified to the Commission as state aid No N100/91, approved by Commission Decision SG (91) D/7024), implementation of initiatives for which public financing of any form is requested must begin after the application for financing has been submitted.

([8]) Official Journal of the Region of Veneto No 112, 28.12.1999.

([9]) The Law introduces aid for structures for improving the value of and protecting agricultural and livestock products (aid approved by means of Commission communication No 16065 of 17 October 1980).

([10]) OJ L 79, 23.3.1994 p. 29.

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

([12]) Approved by Commission Decision C(2000) 2904 of 29 September 2000.

III. **THE ARGUMENTS PUT FORWARD BY THE COMMISSION WHEN INITIATING THE PROCEDURE**

(19) The Commission initiated the procedure provided for in Article 88(2) of the Treaty because it had doubts regarding the compatibility with the common market of the new aid scheme introduced by Article 35 of RL No 5/2000.

(20) The doubts were raised by the fact that the aid could be granted to undertakings that had already made the investments planned under a project for which they had submitted applications for financing for the 1994-99 programming period, i.e. under a part-financed aid scheme.

(21) The Commission could therefore not rule out when it initiated the procedure the possibility that the aid constituted retroactive funding for activities already carried out by the beneficiaries and therefore lacking the necessary incentive element and that it should consequently be regarded as operating aid with the sole aim of relieving the beneficiary of a financial burden.

(22) Under points 3.5 and 3.6 of the guidelines, 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 ([13]).

(23) The notified aid scheme therefore appeared to fall within the scope of points 3.5 and 3.6 of the guidelines. On the basis of the information available to it when it initiated the procedure, the Commission took the view that the reasons put forward by Italy were not sufficient to demonstrate the existence, either under the aid scheme implemented during the 1994-99 programming period nor under the notified aid scheme, of a legal obligation towards the (potential) beneficiaries that might have given rise to (or justified the existence of) a legitimate expectation on their part and therefore constitute a sufficient incentive for starting the work.

(24) The Commission took the view that neither the Law on the publication of official acts ([14]) nor the letters sent by the regional authorities to those concerned to acknowledge receipt of their applications for funding ([15]) nor the fact that the regional authorities had always granted the expected funding to projects that, after assessment, they had decided to put on the ranking list of projects eligible for public financing should have created in the undertakings on that list a legitimate expectation of receiving any of the financing planned for the 1994-99 programming period.

(25) The Commission takes the view that the regional authorities have no legal obligation as regards applications for financing considered to be eligible and entered on the ranking list published in the Official Journal of the Region of Veneto during the 1994-99 period and consequently there is no basis for a legitimate expectation by the undertakings concerned. The absence of such an incentive element is confirmed by the following: the undertakings eligible for financing, when they did not receive the financing concerned from the competent authorities, did not take steps to enforce their rights, rights which the regional authorities moreover consider to be acquired rights, on the basis in particular of Italian administrative law. According to the Commission, no appeals were lodged because, in the absence of a legal obligation on the part of the regional authorities, the applicants probably did not have any right to request payment of the aid.

(26) The Commission expressed doubts as to whether aid for expenditure incurred before it was confirmed that projects had been accepted could still be deemed to be aid to facilitate the development of certain economic activities within the meaning of Article 87(3)(c) of the Treaty. In accordance with the Commission's constant practice, as confirmed by the Court of Justice ([16]), aid to facilitate the development of certain economic activities or certain regions may be considered as such only if the Commission can establish that the aid will contribute to the attainment of one of the objectives specified, which under normal market conditions the recipient undertakings would not attain by their own actions. In the case in point, it is clear that the undertakings carried out the investments in question without the aid.

(27) Another factor that, in the opinion of the Commission, raised doubts about the existence of an incentive element was the drawing up of the ranking lists. Decision of the Regional Government No 4202 of 1993 lays down that applications must be submitted to the regional authorities by 31 January and 30 September each year. The ranking list of applications submitted is then drawn up and the

([13]) See in particular the following cases: C1/98 (ex N750/B/95) concerning the state aid scheme implemented by Italy for the production, processing and marketing of products listed in Annex I to the EC Treaty (Sicilian Regional Law No 68 of 27 September 1995); C 36/98 concerning the aid scheme Italy plans to implement for small and medium-sized enterprises operating in Objective 1 regions; C70/98 concerning the aid scheme notified by Italy (Marche Region) concerning amendments to the single programming document for 1994–99 for assistance from the Community Structural Funds for Objective 5(b) areas.

([14]) See footnote 6.

([15]) The Italian authorities simply supplied a copy of a letter (dated 1º April 1999) from the authorities of the Region of Veneto acknowledging the receipt by an office (responsible for structural measures in the agrifood sector) of an application from a potential beneficiary for the purposes of the usual technico-administrative enquiry. This communication is compulsory under the law on the publication of official acts (see footnote 6).

([16]) See in particular the judgment of the European Court of Justice in Case 730/79 Philip Morris v Commission [1980] ECR 2671.

authorities must notify those applicants whose applications have been rejected because they fail to fulfil the requirements laid down. If this was the way the mechanism was intended to operate, it could be concluded that drawing up a six-monthly ranking list would have enabled the regional authorities accurately to calculate on a regular basis the resources still available, which would have allowed them to refrain from publishing new calls for applications and receiving new applications that could not be accepted because insufficient resources were available.

(28) Further aspects that, in the opinion of the Commission, raised doubts about the existence of an incentive element are the budget provided for in Article 35 of the Law concerned and the intensity and exact amount of the aid. The budget of ITL 5 billion or EUR 2,5 million announced by the regional authorities would be sufficient to finance only a small part of the expenditure already incurred by the potential beneficiaries (around ITL 70 billion or EUR 35 million). The Commission cannot therefore understand why the Italian authorities stated that 'the capital grant will not exceed verified eligible expenditure', since, on the basis of the information available to the Commission, the aid intensity would be less than 10 % ([17]). The fact that the Italian authorities consider such a low rate of aid as adequate to provide an incentive while a much higher rate of aid was considered necessary for the same type of project in the Regional Operational Programme for 1994-99 ([18]) is a further indication of the lack of any incentive to carry out the sort of projects for which aid was being provided.

(29) In addition, the most recent information received (registered as received on 30 January 2001) contradicted that sent previously:

(a) in particular, the ranking list contained 134 projects considered to be eligible rather than 150; the Italian authorities said that financing was still to be provided for 36 of those projects;

(b) in addition, there were discrepancies concerning the exact amount of investments carried out by the beneficiaries: the most recent figure given is ITL 120 081 million rather than the ITL 70 000 million notified previously.

(30) Another aspect to be clarified was the frequency with which the aid is to be granted. The Italian authorities had initially said that this was an extraordinary measure of limited duration (see point 15). This is in contradiction with other statements made by those authorities ([19]) regarding the possibility of granting further financing for the same projects. The initial notification stated that 'if, when additional verifications have been carried out on the applications, further financing is required, this must be no more than is strictly necessary to cover applications carried over from the previous, 1994-99 programming period'. To that end, the regional authorities undertook to notify cases not falling within the scope of the 20 % rule referred to in Commission communication No 54/94/D24823 (of 22 February 1994). The regional authorities have provided no further details of the possibility of additional sources of financing and the relevant methods of payment and such possibility would appear to contradict the assertion that the notified measure is a one-off measure.

(31) Finally, the Italian authorities stated that projects for which aid applications had been submitted and accepted during the 1994-99 programming period but on which work had not already started would be financed under the new Rural Development Plan for the Veneto Region for 2000-06, after their compliance had been checked in the light of the new Community rules in the agricultural sector. This is, however, difficult to reconcile with the data provided on the final general ranking list (i.e. on the applications accepted for financing), submitted with the most recent additional information (registered as received on 30 January 2001). Of the total of 134 projects accepted, 20 had been financed using agrimonetary aid, 10 using aid originating from overbooking, 54 under Regional Law No 88/80, 4 under Decree Law No 173/98 and 10 had been cancelled. On that basis, only 36 projects remain to be financed: even if financing could be granted under the new Rural Development Plan for 2000-06, it is not clear to which 'applications carried over from the previous […] programming period' the Italian authorities are referring to.

(32) The Commission reserved the right to examine the question of the use of agrimonetary aid and aid originating from overbooking: the use of such sources of financing could be construed as misuse of decisions to authorise aid or might even not have been notified to the Commission.

IV. COMMENTS SUBMITTED BY ITALY AND OTHER INTERESTED PARTIES

(33) By letter dated 22 June 2001, Italy sent the Commission its comments on the aid scheme in response to the Decision to initiate the procedure provided for in Article 88(2) of the Treaty. The Commission did not receive any comments from other interested parties.

(34) In their reply, the Italian authorities first of all detailed the administrative procedure for granting aid during the 1994-99 programming period, in order to demonstrate that that procedure created a legal obligation towards potential beneficiaries that might have given rise to (or justified the existence of) a legitimate expectation on their part and therefore constitute a sufficient incentive for starting the work before receiving the aid. In the description of the scheme submitted before the procedure was initiated, the Italian authorities stated that once they had been placed on the single ranking list of undertakings eligible for aid for the

([17]) The ITL 5 billion available to the Region represents less than 10 % of the total investments carried out by the beneficiaries (ITL 70 billion).

([18]) Regulation (EC) No 951/97 authorises aid of up to 55 % for investments outside Objective 1 regions.

([19]) See point 9 of the letter initiating the procedure.

agrifood sector, undertakings remained on that list until financing from the Region was available. As the necessary resources became available (either from the regional budget, under Article 29 of Regional Law No 88/1980, or under the Veneto ROP under Council Regulation (EC) No 866/90 on improving the processing and marketing conditions for agricultural products ([20]) and Regulation (EC) No 951/97 or from the national budget (overbooking and agrimonetary aid)), the regional authorities took an *ad hoc* administrative decision selecting the undertakings to receive financing from the single ranking list, according to criterion of preference and priority, and in particular those undertakings whose applications would ensure that the resources available would be fully used.

(35) The Region therefore had a pool of projects that could be quickly implemented at the appropriate time when financing became available. The regional authorities consider that drawing up a ranking list of eligible projects, even though financing is not immediately available, providing for actual financing at a future date, does not infringe any Community rule.

(36) According to the regional authorities, Article 35 of RL No 5/2000 will be applied to the 36 projects/undertakings remaining on the ranking list. These remaining projects/undertakings have been re-examined and the procedure has been opened to file two of them that do not comply with the guidelines. The competent authorities also say that 15 undertakings have submitted applications under the Rural Development Plan for the Region of Veneto for 2000-06 (Measure 7 — Improving processing and marketing conditions for agricultural products) and therefore, with the prospect of financing being granted for the new 2000-06 programming period, have withdrawn their previous applications. The regional authorities do not rule out other undertakings withdrawing their projects because, for various reasons, they are no longer interested in carrying them out. The number of potential beneficiaries of the aid has therefore been drastically reduced compared with the initial list.

(37) The Italian authorities take the view that the opinion expressed by the Commission in its letter initiating the procedure provided for in Article 88(2) of the Treaty has no legal basis and contradicts the Commission's usual practice.

(38) The Commission initiated the procedure regarding the aid because it could be granted to undertakings remaining on the list that had begun to make or had already made the investments concerned after submitting their aid application for the 1994-99 programming period. The Commission considers that, in the absence of a legal obligation on the part of the regional authorities towards potential beneficiaries, aid granted retrospectively does not provide the necessary incentive element and therefore constitutes operating aid that is incompatible with the common market.

([20]) OJ L 91, 6.4.1990, p. 1.

(39) The Italian authorities take the view that both point 3.6 of the guidelines ([21]) and the way the Commission has applied it ([22]) created in the mind of applicants, from the time they submitted their application to the competent authorities, a legitimate expectation that they would receive financing. Regional Government Decision No 4202/93 laying down the procedure for submitting applications and for drawing up ranking lists and confirming the provisions of Regional Law 1/1991 ([23]) assured potential beneficiaries of the eligibility for public financing of investments commenced after an application had been submitted but before a decision had been taken to grant aid. In addition, the legitimate expectation that arose when the application was submitted was reinforced when the applicant was entered on the list of undertakings eligible for financing.

(40) Furthermore, the potential beneficiaries of aid, knowing that they had submitted their applications correctly and that they fulfilled the legal requirements, could reasonably expect their applications to be accepted, which was then confirmed with their entry on the ranking list, although they had still to await the decision granting aid.

(41) The Italian authorities also point out that it is Commission practice to accept the extension of aid schemes that have already been approved in order to permit them to achieve their objectives ([24]), which is basically what the Italian authorities are requesting for the aid scheme to be implemented under Article 35 of RL No 5/2000. In other words, according to the Italian authorities, the aid would be compatible with the Treaty if it had been granted not later than 1999, i.e. during the period of application of the scheme or schemes for which the applications for financing had been submitted.

(42) The Italian authorities explain that, under Italian administrative law, it is possible to contest in an administrative court acts of the public authorities which infringe either individual rights or legitimate interests. Legitimate interests are defined as the interest of private individuals in the correct use of power by the public authorities, as regards both expectations concerning the extension of their legal sphere (*interessi pretensivi* — interests involving a claim on

([21]) Point 3.6 of the guidelines lays down that 'aid which is granted retrospectively in respect of activities which have already been undertaken by the beneficiary cannot be considered to contain the necessary incentive element, and must be considered to constitute operating aid which is simply intended to relieve the beneficiary of a financial burden. Except in the case of aid schemes which are compensatory in nature, all aid schemes should therefore provide that no aid may be granted in respect of work begun or activities undertaken before an application for aid has been properly submitted to the competent authority concerned.'

([22]) Decisions of 28 November 2000, SG(2000) D/108799 (Aid N 226/2000), 13 March 2001, SG(2001) D 286857 (Aid N 729/a/2000), 28 February 2001 SG(2001) D/286508 and 4 August 2000, SG(2000) D/105958.

([23]) Article 11 of the Law lays down that 'initiatives forming part of a business plan … may be implemented before the decision to grant aid is adopted provided that they are begun after submission of the aid application…'.

([24]) Aid N 63/2001 and aid N 24/2001.

the authorities) and the correct application of the procedural obligations imposed on them (*interessi procedimentali* — procedural interests), in particular under the law on the publication of official acts. In accordance with the case law of the Italian Court of Cassation ([25]), private individuals may take action under administrative law not only to obtain the annulment of an act by a public authority that infringes their legitimate interests or their subjective rights, but also to obtain the adoption of an expected act and compensation for losses caused by the adoption or by the failure to adopt an act.

(43) In the case in question, the legitimate interest of the applicants (for public financing) remaining on the list is an interest involving a claim on the authorities, since the applicants legitimately expected their rights to be extended by the decision granting aid.

(44) On the basis of that case law of the Court of Cassation, the Italian authorities do not rule out that, if an action were brought, an administrative court might decide to order the regional authorities to pay compensation.

(45) The Italian authorities state that none of the undertakings eligible for financing remaining on the list has brought an administrative action in the reasonable expectation of being granted aid. To bring action against the Region of Veneto, the undertakings concerned would have to demonstrate an interest in so doing because of an act that causes them an actual loss. The Italian authorities define that act as a failure to grant financing and the cancellation of the ranking list: an action could legitimately be brought only against a decision to cancel the aid or to repeal Decision 4102/99, since this would damage their legitimate and actual aspiration to obtain the aid concerned.

(46) As regards the Commission's reservations concerning the use of agrimonetary aid and aid originating from overbooking referred to in point 31 of the letter initiating the procedure, the Italian authorities state that:

(a) the aid scheme relating to initiatives in the agrifood sector, which is covered by Regulation (EC) No 951/97 and which used funding resulting from the revaluation of the Italian lira in accordance with Council Regulation (EC) No 724/97 ([26]), falls within the programme of measures for Italy approved by the Commission by note No 5372 of 2 July 1998;

(b) the overbooking amounts originate from financing additional to that already granted by the rotating fund for implementing Community policies for the Veneto ROP covered by Regulation (EC) No 951/97, the Veneto ROP constituting a legal basis, as approved by the Commission in Decision C(96) 2598 of 2 October 1996.

(47) The Italian authorities do not agree with the method used for calculating the aid and the argument put forward by the Commission in point 27 of the letter initiating the procedure. They state that the sum made available (ITL 5 billion, or around EUR 2,5 million) is to be used so as to ensure a significant contribution, i.e. 30 % of the investments eligible for aid, which total ITL 15 billion, or around EUR 7,5 million. This total for eligible investments is purely hypothetical, since a technical re-evaluation of projects has to be carried out, as have a new analysis of projects, a new verification of the eligibility of applicants, a new calculation of the investment volume, etc. The re-examination will be carried out when there are definite prospects for financing so as not to cause potential beneficiaries any further problems.

(48) As regards the financing of investments remaining on the ranking list from funds made available under the RDP for the Region of Veneto for 2000-06 (15 undertakings remaining on the list have submitted applications under the RDP, see point 32), the competent authorities have affirmed that they will be eligible for financing provided that they meet all the requirements of that RDP, including the requirement that work for which financing is requested must not have been started.

V. ASSESSMENT OF THE AID

(49) In accordance with Article 87(1) of the EC Treaty, any aid granted by a Member State or using 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. The measures covered by the Decision in question correspond to this definition for the following reasons.

(50) The measures in question, financed by the Region of Veneto, favour certain undertakings and certain operators (undertakings processing and marketing agricultural products) and may affect trade, since Italy accounts for 14,07 % of European agricultural production ([27]).

(51) However, in cases covered by Article 87(2) and (3) of the Treaty, some measures may enjoy derogations and be considered compatible with the common market.

(52) Given the nature of the measures described above, the only possible derogation is laid down in Article 87(3)(c) of the Treaty, according to which aid may be considered compatible with the common market if it is to facilitate the development of certain economic activities or of certain

([25]) Joined Chambers of the Court of Cassation 500/1999.
([26]) OJ L 108, 25.4.1997, p. 9.
([27]) Most recent data available from Eurostat, which are from 2003 and therefore refer to the EU-15.

economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(53) To benefit from the derogation provided for in Article 87(3)(c) of the Treaty, aid for investments for the processing and marketing of agricultural products must comply with the relevant provisions of Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products ([28]). Where that Regulation does not apply, or if all the requirements laid down are not met, the aid must be appraised in the light of the relevant provisions of the Community guidelines for state aid in the agriculture sector.

(54) Since the scheme in question is not limited to small and medium-sized undertakings, Regulation (EC) No 1/2004 does not apply. Therefore, the appraisal of the compatibility of the aid must be based on the guidelines, and more particularly points 3.5, 3.6 and 4.2 thereof.

(55) In accordance with points 3.5 and 3.6 of the guidelines, the Commission takes the view 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 and that aid granted for work already undertaken by the beneficiary does not contain the necessary incentive element and must therefore be considered to be operating aid. Except in the case of aid schemes which are compensatory in nature, all aid schemes should therefore provide that no aid may be granted in respect of work begun or activities undertaken before an application for aid has been properly submitted to the competent authority concerned.

(56) The aid scheme that Article 35 of RL No 5/2000 intends to introduce provides exclusively for the financing of projects implemented by agrifood undertakings that had submitted applications for aid under a part-financed aid scheme during the 1994-99 programming period and had been declared eligible for financing by being entered on the list drawn up by the regional authorities, but had failed to receive any financing due to a funding shortfall (hereafter referred to as projects remaining on the list). Investments for some of the projects remaining on the list were begun after the applications for financing were submitted for the 1994-99 programming period.

(57) On the basis of the information gathered during the formal investigation procedure, the Commission takes the view that the notified scheme is compatible with the common market, but to be eligible for the aid provided for under the scheme, those projects remaining on the list must fulfil the conditions laid down in point 4.2 of the guidelines. Aid may therefore be granted only:

(a) to economically viable holdings;

(b) to holdings that comply with minimum standards regarding the environment, hygiene and animal welfare;

(c) if the aid rate does not exceed 50 % of eligible investments in Objective 1 regions and 40 % in the other regions;

(d) if the eligible expenditure is for the construction, acquisition or improvement of immovable property, new machinery and equipment and general costs up to 12 % of that expenditure;

(e) if there is sufficient proof that normal market outlets for the products concerned can be found. In granting the aid, the Italian authorities must take account of any restrictions on production or limitations of Community support under the common market organisations. In particular, no aid may be granted in contravention of any prohibitions or restrictions laid down in the common market organisations and no aid may be granted which concerns the manufacture and marketing of products which imitate or substitute for milk and milk products.

(58) As an exceptional measure, aid may be granted for investment projects for which applications were submitted during the programming period ending on 31 December 1999 and that were then considered to be eligible but which were not processed because of a shortage of funds, it being understood that that only those investment projects begun after the submission of applications to the competent authority for financing may receive aid.

(59) After examining the documentation concerning the administrative procedures used by the competent authorities for granting aid during the 1994-99 programming period and in accordance with the interpretation used at the time, the Commission also considers the investments referred to in point 57 to be eligible ([29]). According to that interpretation, under an aid scheme that is presented as completing a previous scheme, aid granted for work already begun by the beneficiary after submission of the aid application in response to the previous call for applications has the necessary incentive element and cannot therefore be considered to be operating aid, provided that the work was begun or the activities undertaken after the aid application was properly submitted to the competent authority and that that authority had declared the project eligible for financing.

(60) The Commission would point out to the Italian authorities that its current interpretation is to consider that aid granted for activities undertaken after an application for aid has been submitted to the competent authority but before that application has been accepted by means of an act that places a legal obligation on the public authorities towards the (prospective) beneficiaries has no incentive effect ([30]).

([28]) OJ L 1, 1.1.2004, p. 1.

([29]) The Commission has previously so ruled with regard to Aid 715/1999, letter SG(2000) D/105754 dated 2 August 2000.

([30]) This is stipulated in Article 17 of Regulation (EC) No 1/2004, see footnote 20.

(61) Regarding the use of agrimonetary aid and aid originating from overbooking to finance projects remaining on the list before 31 December 1999, the Italian authorities stated that the use of funds released by the revaluation of the Italian lira under Regulation (EC) No 724/97 for measures provided for under the Veneto ROP referred to in the Regulation had been approved by the Commission by means of letter No 5372 dated 2 July 1998, while the overbooking amounts originate from financing additional to that already granted by the rotating fund for implementing Community policies under the Veneto ROP. The Commission therefore concludes there was no misuse of decisions to authorise aid or failure to notify aid, since the financing was granted for measures provided for by the ROP then in force.

(62) As regards the one-off nature of the scheme, the authorities responsible explained that this term was used to mean that the scheme cannot be combined with other schemes, that it is exclusively for undertakings remaining on the list and that it cannot be used for other operations: once the list has been exhausted, the scheme will no longer have any legal or financial effects. The competent authorities stated that the initial budget would be around EUR 2,5 million but that this could be increased should this be insufficient to ensure that public aid would constitute a significant contribution to projects accepted for financing. The competent authorities undertook to notify the Commission of any increase of more than 20 % of the original budget.

(63) It is Commission practice to accept increases in the original budget of existing schemes. This practice was confirmed by Article 4(1) of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([31]). The Commission takes the view that, under that provision, an increase in the original budget of an existing aid scheme by up to 20 % should not be considered an alteration to existing aid and that where the national authorities exceed that percentage, the alteration must be notified in accordance with Article 4(2) of Regulation (EC) No 794/2004. There is therefore nothing to prohibit the Italian authorities from increasing the original budget of the scheme under examination provided this is done in accordance with the rules.

VI. **CONCLUSIONS**

(64) In the light of the above, the Commission considers that the aid provided for in Article 35 of RL No 5/2000 in favour of undertakings involved in the processing and marketing of agricultural products is in accordance with point 4.2 of the Community guidelines for state aid in the agriculture sector. The aid measure is therefore eligible for the derogation provided for in Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid that Italy intends to implement under Article 35 of Region of Veneto Law No 5/2000 is compatible with the common market, subject to fulfilment of the conditions laid down in Article 2 of this Decision.

Article 2

The Italian authorities shall notify the Commission of any increase of more than 20 % in the original budget of the aid scheme provided for in Article 35 of Region of Veneto Law No 5/2000.

Article 3

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

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 8 March 2006.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

([31]) OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION

of 4 April 2006

on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority

(notified under document number C(2006) 650)

(Only the English text is authentic)

(Text with EEA relevance)

(2006/643/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By letter dated 19 December 2003, registered by the Commission on 22 December 2003, the United Kingdom notified the Commission of the State aid implications of the draft law setting up the Nuclear Decommissioning Authority (NDA), hereinafter 'the Measure'.

(2) By letter D/51248 of 20 February 2004, the Commission asked questions on the Measure. The United Kingdom replied by letter dated 29 March 2004, registered by the Commission on 15 April 2004.

(3) By letter D/54319 of 16 June 2004, the Commission asked further questions on the Measure. The United Kingdom replied by letter dated 14 July 2004, registered by the Commission on 19 July 2004.

(4) The United Kingdom submitted additional information on the Measure by letter dated 10 September 2004, registered by the Commission on 14 September 2004, and by letter dated 14 October 2004, registered by the Commission on 19 October 2004.

(5) By letter dated 1 December 2004, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(6) The Commission decision to initiate the procedure (hereafter 'the Opening of Procedure') was published in the *Official Journal of the European Union* [2]. The Commission called upon interested parties to submit their comments.

(7) The United Kingdom provided the Commission with its comments on the Opening of Procedure by letter dated 31 January 2005, registered by the Commission on the same day.

(8) The Commission received comments from interested parties. It forwarded them to the United Kingdom, which was given the opportunity to react. The United Kingdom's comments were received by letter dated 4 March 2005, registered by the Commission on 7 March 2005.

(9) Meetings between the United Kingdom authorities and the Commission took place on 20 April, 25 August and 11 October 2005.

(10) The United Kingdom submitted additional information on the Measure by letter dated 23 January 2006, registered by the Commission on the same day. An amendment to this letter was sent by letter of 1 February 2006, registered by the Commission on the same day. Further additional information on the Measure was submitted by the United Kingdom by letter of 7 February 2006, registered by the Commission on the same day. Further additional information was submitted by the United Kingdom by letter of 7 February 2006, registered by the Commission on 10 February 2006. Further additional information was submitted by the United Kingdom by letter dated 29 March 2006, registered by the Commission on 30 March 2006.

2. DETAILED DESCRIPTION OF THE AID

(11) The United Kingdom was one of the first countries worldwide to engage in nuclear technologies, both for civil and military purposes.

[1] OJ C 315, 21.12.2004, p. 4.

[2] See footnote 1.

(12) At the time these technologies were first introduced, the emphasis of the industry was on scientific improvements and on gains in efficiency. The management of nuclear liabilities was generally not taken into consideration, or only in a very limited way.

(13) The rising awareness of the need to ultimately decommission nuclear sites progressively resulted in funds being set aside for the management of nuclear liabilities. However, these funds were generally insufficient to face liabilities the estimated amount of which was still very uncertain, but growing. Even at the end of the 20th century, the management of nuclear liabilities was still handled independently by each of their owners, and very much on a case by case basis.

(14) The UK Government considered that this kind of management had reached its limits and that a new and more efficient method should be put in place in order for nuclear liabilities to be more efficiently handled, while preserving the highest level of safety.

(15) In 2001, the United Kingdom Government decided to start a review of ways in which the management of public sector nuclear liabilities could be concentrated in the hands of a single public body. A White Paper entitled *Managing the Nuclear Legacy — A strategy for action* was published in July 2002. After a consultation process, the ideas of the White Paper were implemented in legislation in the form of the 2004 Energy Act.

(16) Under the provisions of this legislation, a new non-departmental public body, known as the Nuclear Decommissioning Authority (NDA), was created. The NDA will progressively be made responsible for the management of most public sector nuclear liabilities in the United Kingdom ([3]). For this purpose, the ownership of nuclear sites and assets will be transferred to the NDA. Along with the ownership of the assets and sites, the NDA will take over the responsibility for the nuclear liabilities linked to them as well as all financial assets that are clearly attached to these sites.

(17) The management of nuclear liabilities in an efficient and safe way is the NDA's objective. The NDA can continue to operate the physical assets that are transferred to it if the continued operation of these assets covers more than their avoidable costs and therefore contributes to reducing the value of their liabilities. The NDA is a public authority and does not have a commercial objective. It will not invest in any new asset nor enter any new activity.

([3]) This does not include British Energy's liabilities, although this company has been classified by the British Office of National Statistics as a public sector company after its restructuring.

(18) The NDA does not itself decommission the sites for which it will have responsibility. It will contract this task out to other entities. The continued operation of nuclear assets may similarly be contracted by the NDA. Entities contracted by the NDA to manage a site are known as Site Licensee Companies (SLCs). Initially, SLCs will be the former owners of the sites. Later on, they will be selected via competitive procedures, with a view to triggering the development of a real nuclear decommissioning and clean-up market.

(19) In order to fund its activities, the NDA uses the value of the transferred financial assets and the net revenues that the transferred physical assets generate. Since it is very likely that these resources will not be sufficient to pay for the entire costs of management of the nuclear liabilities, the State will finance the shortfall.

(20) Assets belonging to the United Kingdom Atomic Energy Agency (UKAEA) have been transferred to the NDA. This aspect of the Measure has already been decided upon by the Commission in the decision referred to in recital (5) above. The Commission found that this aspect of the Measure did not include State aid within the meaning of Article 87(1) of the EC Treaty.

(21) The NDA has also received assets belonging to British Nuclear Fuels Limited (BNFL). This aspect of the Measure is the object of the present decision. It must be noted that transitional arrangements were put in place by the United Kingdom to ensure that, even though BNFL's assets were formally transferred to the NDA, no State aid is granted until the Commission takes a final decision on the case.

(22) BNFL is a publicly owned limited company that operates in many fields in the nuclear sector. It is present in nearly all steps of the nuclear fuel cycle: it enriches uranium (through Urenco), supplies nuclear fuel, generates electricity and manages spent nuclear fuel.

(23) Most but not all of BNFL's nuclear activities and sites have been transferred to the NDA. It has received:

— all Magnox electricity generation sites and the Mawntrog station;

— the Sellafield site, including in particular the Thermal Oxide Reprocessing Plant (THORP) and the Sellafield Mox Plant (SMP). The Sellafield site also includes one of the Magnox plants referred to above (the Calder Hall station) and a small Combined Heat and Power plant (the Fellside plant);

— the Springfields site, which is dedicated to nuclear fuel manufacturing;

— the Drigg low level waste disposal site;

— the Capenhurst site, the decommissioning of which is nearly completed, and which will eventually focus on the storage of uranium materials.

(24) Other BNFL activities, in particular the ones linked to Urenco and Westinghouse, will not be transferred to the NDA. They will be reorganised, resulting in a smaller residual group.

(25) Together with the sites mentioned above, BNFL transfers to the NDA a number of financial assets linked to these sites, which were set up in the past to fund at least in part their decommissioning. These assets are:

— the Nuclear Liabilities Investment Portfolio;

— the Magnox Undertaking;

— other, more minor, contributions, including in particular the Springfields gilts, which are funds earmarked to cover decommissioning costs at the Springfields site.

(26) Technically, these assets are not transferred directly to the NDA, but rather consolidated in a Government fund, the Nuclear Decommissioning Funding Account. The Government will in turn fund the NDA by grants.

(27) In their notification, the UK authorities had provided the Commission with an estimate of the nuclear liabilities and assets that would be transferred to the NDA, together with a split of these amounts between the ones that originate from commercial activities and the ones that originate from non-commercial activities.

(28) All liabilities linked to UKAEA sites were viewed as non-commercial in the Opening of Procedure.

(29) In order to estimate the share of the liabilities linked to BNFL sites that originate from non-commercial activities, the United Kingdom had taken the approach that only financial liabilities still recognised by either the Ministry of Defence (MOD) or the UKAEA were non-commercial. Liabilities linked to assets with dual (commercial/non-commercial) use which were still not recognised by either the MOD or the UKAEA were attributed to BNFL's commercial activities, since BNFL was the operator and owner of these assets, even if they had been used by the MOD or UKAEA in the past.

(30) The estimated liabilities associated with sites then owned by BNFL, split between commercial and non-commercial activities, was as follows:

Table 1

Nuclear Liabilities to be transferred to the NDA, estimates as of March 2003, 2003 prices, discounted at 5.4 % nominal, amounts in billion GBP [1].

	Non-commercial	Commercial	Total Liabilities
Magnox stations sites (except Calder Hall/Chapelcross)	0	3,9	3,9
Sellafield site (except Calder Hall station)	3,8	10,1	13,9
Calder Hall/Chapelcross [2]	0,2	0,6	0,9
Springfields site	0,1	0,2	0,2
Capenhurst site	0	0,2	0,3
Total	**4,1**	**15,1**	**19,1**

[1] Note: in all Tables, totals may not exactly match the sums of items because of rounding.

[2] Unlike the other magnox plants, these two power plants feature some non-commercial liabilities since they were originally military power plants.

(31) The following table was also provided by the United Kingdom authorities in their notification. It compared the estimated value of the commercial part of the liabilities linked to sites to be transferred to the NDA by BNFL and the economic value of the assets to be transferred to the NDA along with these sites. For physical assets, the economic value was considered to be equal to the cash flows that their continued operation was expected to generate.

Table 2

Difference between commercial liabilities and assets value as of 31 March 2004, 2004 prices, discounted at 5,4 % nominal, amounts in billion GBP ([1]).

Total commercial nuclear liabilities	-14,7
Magnox stations future cash flows	-0,1
Sellafield operations cash flow (THORP & SMP)	2,3
Springfields future cash flows	0,2
Nuclear Liabilities Investment Portfolio	4,3
Magnox Undertaking	7,9
Other customer contributions not included above	0,2
Cash and liquid assets	0,1
Total	**0,0**

([1]) Values are discounted at 5,4 % nominal.

3. GROUNDS FOR OPENING THE PROCEDURE

(32) In the Opening of Procedure, the Commission first raised doubts as to which entity would be in receipt of State aid within the meaning of Article 87(1) of the EC Treaty. The Commission took account not only of the situation of the NDA, which might receive direct payments from the State, but also that of BNFL, which could be relieved of charges that it might otherwise have had to bear under the polluter-pays principle.

(33) The Commission then analysed whether such State aid could be found compatible with the EC Treaty. It expressed serious doubts that this aid was compatible under the guidelines on State aid for environmental protection ([4]). It also expressed serious doubts that the aid could be found compatible with the Community guidelines on State aid for rescuing or restructuring firms in difficulty ([5]).

(34) The Commission then assessed whether such State aid could be found compatible in direct application of Article 87(3)(c) of the EC Treaty, and in the light of the objectives of the Euratom Treaty. The Commission took the view that such an approach could indeed be undertaken in principle, but also expressed doubts that the United Kingdom authorities had submitted sufficient proof that the positive impact of the aid on fulfilling the objectives of the Euratom Treaty outweighed its negative impact on competition in the internal market.

(35) Finally, the Commission raised doubts about the possible absence of State aid due to the fact that, before actual competitive procedures can take place, BNFL would act as SLC on a temporary basis.

4. COMMENTS FROM INTERESTED PARTIES

(36) Following the publication of the Opening of Procedure, and within the deadline laid down by that publication, the Commission received comments from three third parties. They are summarised below:

Electricité de France (EDF)

(37) EDF supports the general orientation of the Measure. It considers that it contributes to the achievement of the objectives of the Euratom Treaty. It considers that it is necessary to establish proper conditions for the final disposal of nuclear waste. As regards the financing of the decommissioning of nuclear sites, EDF considers that financial and industrial responsibility must go together and that proper funds must be set aside and secured during operation time. EDF supports the Commission's actions to set up a Community-wide framework for solving such problems, and welcomes the fact that the Commission takes account of the Euratom Treaty in the matter.

British Energy plc (BE)

(38) BE welcomes the establishment of the NDA. It does not see the Measure as likely to have anti-competitive effects in its regard.

(39) BE points out that it is also a customer of BNFL's current fuel supply and waste management activities. After the transfer of these activities to the NDA and the tendering of their operation by the authority, it may well be that one of the selected new operators will be a competitor of BE. BE is concerned by this situation where it could end up being a customer of one of its competitors.

(40) BE also draws the Commission's attention to the fact that the setting up of the NDA and its analysis by the Commission should not endanger its own restructuring plan, as approved by the Commission.

([4]) OJ C 37, 3.2.2001, p. 3.

([5]) In view of the date of notification of the Measure, the applicable guidelines would be the ones that were published in OJ C 288 of 9.10.1999, p. 2.

(41) BE goes on to explain that it does not believe that the Measure has any impact on trade as regards the supply of AGR fuel and reprocessing of AGR spent fuel because, even if BNFL's only EU competitor, AREVA, were to settle in the United Kingdom, BE would not be in a position to switch to it because it already has arrangements with BNFL for the lifetime requirements of its AGR stations.

(42) As regards Magnox power plants and the electricity market, BE believes that the Measure, even if it reduces BNFL's power plants' Short Run Marginal Costs (SRMCs), cannot have an effect on the price at which BE can sell its own nuclear and fossil output. Based on its own experience, BE also believes that the Measure will not artificially prolong the lifetime of BNFL's plants, since, still according to BE's estimates, these power plants should reasonably be in a position to cover their SRMCs.

(43) BE gives its view of the interactions between the EC and Euratom Treaties. This aspect of the company's comments, though not easy to interpret, seems to suggest that only measures that are not necessary for or that go beyond what is necessary for achieving the objectives of the Euratom Treaty can be analysed under the EC Treaty.

Greenpeace

(44) Greenpeace considers that the Measure includes State aid within the meaning of Article 87(1) of the EC Treaty. It states that it is fundamental to ensure the safe decommissioning of nuclear sites, and equally fundamental that the polluter-pays principle should apply to the nuclear industry.

(45) Greenpeace considers that the aid should not be found compatible with the common market. It considers that the positive impact on the achievement of the safe and efficient management of nuclear liabilities does not outweigh the impact of the Measure on competition.

(46) Greenpeace's submission is very substantial in size and includes many annexes. An important part of the comments relate to Greenpeace's scepticism about nuclear energy in general and the way it has been handled in Britain in particular. According to Greenpeace, nuclear energy entails very significant risks for the environment. Also, the reprocessing of nuclear waste, as opposed to direct disposal, would be a dangerous and costly option.

(47) According to Greenpeace, BNFL, one of the most important actors of this sector in the United Kingdom and under public ownership, has been managed in a particularly hazardous and opaque way. Its accounts are difficult to analyse. Poor management of cash and risky investments that have ultimately proved uneconomic have jeopardised the company's ability to fund its nuclear liabilities. Part of the provisions aimed at matching these liabilities are not liquid, or, as in the case of the Magnox Undertaking, are of a virtual nature. Furthermore, BNFL has always underestimated its liabilities and overestimated its future income, which has worsened its position further. Greenpeace submits a report that analyses and criticises BNFL's investment policy and accounts.

(48) As regards the Measure more specifically, Greenpeace contends that it should be looked upon as a way for the United Kingdom Government to restructure an ailing company — BNFL — by ridding it of its worst assets and the potentially unfunded liabilities attached to them, in order to allow it to stay on the market and continue as a successful company.

(49) Greenpeace also questions the nature of the future relationship between BNFL and the NDA. According to Greenpeace, with BNFL becoming an SLC for the NDA, it is difficult to tell which of the two entities is of a commercial nature. If it were the NDA, deriving profit from commercial activities would be contrary to its aim. Furthermore, because of this difficulty in deciding which of the two entities is actually the commercial one, it would be also very difficult to decide who is in receipt of State aid.

(50) Greenpeace adds that the NDA will probably be creating new waste with its operations, and that it is not clear whether it will set aside monies to pay for waste management.

(51) Greenpeace also questions the future of Westinghouse, a company owned by BNFL but not transferred to the NDA. Greenpeace questions the viability of Westinghouse without its parent's support. The Commission understands that Greenpeace suggests that, should Westinghouse continue its operations as a part of the BNFL, the historic as well as future ties between BNFL and the NDA might result in a cross-subsidisation from the NDA to Westinghouse. Greenpeace also fears that such a cross-subsidisation might affect the interests of Westinghouse's competitors in the nuclear reactor design business. These cross-subsidisation concerns would be increased if, as Greenpeace suspects, there are plans to sell parts of BNFL to the private sector.

(52) Greenpeace goes on to consider the specific case of BNFL's reprocessing activities. Greenpeace challenges the United Kingdom authorities' argument that State support to these activities cannot affect trade because nuclear wastes are difficult to transport, and it would therefore be uneconomic for competitors to invest in new reprocessing assets in

Britain. According to Greenpeace, this disregards the fact that nuclear wastes do not necessarily have to be reprocessed, but can also be disposed of via direct storage. New investment in direct storage facilities would be a viable economic alternative to be offered by BNFL's competitors.

(53) Greenpeace also notes that, according to figures available to it, prices offered by BNFL in its fuel reprocessing contracts appear to be too low to cover costs. BNFL, and hence the NDA, would therefore generate even greater losses with these activities, creating the need for operating aid. To support this comment, Greenpeace quotes a figure of GBP 140 000/tonne for fixed payments by BE to BNFL for managing its spent fuel. Greenpeace compares this figure to estimates of between GBP 330 000/tonne and GPB 533 000/tonne for the comprehensive management of such waste according to independent studies from the University of Harvard and NIREX.

(54) Greenpeace questions the forecasts for the operation of the SMP. SMP would be difficult to commission, and MOX fabrication would be a decreasingly attractive option for plutonium management.

(55) Regarding the Magnox plants, Greenpeace considers that their continued operation affects competition in the electricity market, in particular from renewable energies. Greenpeace also submits that Magnox spent fuel should be directly disposed of rather than reprocessed.

5. COMMENTS FROM THE UNITED KINGDOM ON THE OPENING OF PROCEDURE

(56) The United Kingdom first recalls its commitment to nuclear decommissioning and clean-up. The United Kingdom views the establishment of the NDA as a unique means in Europe attempt to deal with historical nuclear liabilities in a systematic way. The NDA would be expected not only to make decommissioning safer and more efficient but also to pave the way for a real nuclear decommissioning market.

(57) The United Kingdom believes that the Measure does not constitute State aid to BNFL, since BNFL will no longer own any of the assets whose decommissioning costs may be funded in part by the State. The United Kingdom adds that the transition period during which BNFL will be SLC before SLCs can actually be selected by competitive procedures will not lead to any State aid to BNFL either, since all payments to the company in this period will be benchmarked against international comparators.

(58) The United Kingdom contends, however, that, even if the Commission were to consider that the Measure includes State aid to BNFL, this aid should be found compatible with the EC Treaty as supporting several objectives of the Euratom Treaty (promoting R&D, health and safety, investment, regular and equitable supply, common market and competition benefits in the nuclear sector). Moreover, the Measure would also deliver environmental benefits consistent with the objective of Article 174 of the EC Treaty.

(59) The United Kingdom states that it accepts that the Measure is an aid to the NDA. In this case again, it contends that the aid should be found compatible with the common market, for the same reasons. The United Kingdom provides a list of benefits brought by the Measure in the light of the objectives of the Euratom Treaty. For all of these benefits, a qualitative assessment is given, together with a quantitative estimate of the gains where deemed possible.

(60) The United Kingdom gives a detailed list and assessment of the activities that will remain with BNFL. It also explains how BNFL will be paid for when operating as SLC in the temporary period until SLC can be selected by competitive procedures. BNFL will receive payments for allowable costs only. This will include a duty for NDA to achieve efficiencies of 2 % cost reduction per year. Allowable costs will in principle exclude any return on capital. They will also be capped by the budget of the annual site funding limit as set by the NDA.

(61) Payments may also include so called 'performance based incentives', which will be awarded only if challenging costs-based performance targets are achieved. The value of these incentives is based on careful benchmarking of the average profit margins of international engineering and construction companies.

(62) The United Kingdom then gives its views on the impact of the Measure on competition in each of the markets concerned by the sites that are transferred by BNFL to the NDA.

(63) As regards Magnox power plants, the United Kingdom believes that the Measure will not have any impact on the electricity market. The rank of the magnox plants in the SRMCs order would be always under the marginal plant, even at periods of minimum demand. This would imply that any reduction in SRMCs resulting from the Measure could affect neither the time during which competitors can run their plants nor the price at which they could sell their output.

(64) As regards the THORP plant of the Sellafield site, the United Kingdom explains that it reprocesses AGR and LWR nuclear spent fuel. New entry into AGR spent fuel reprocessing would be economically very unattractive, due in particular to transport costs to and from Britain, which is the only country where such fuel is used. While storage would indeed be a possible alternative to reprocessing of AGR fuel,

the United Kingdom also contends that the tight time and regulatory constraints for the construction of any new AGR storage site even in Britain would make it also economically unattractive for new entrants, in particular in view of the limited size of the AGR spent fuel disposal market. The same types of arguments are also used for the Springfields plant, which produces only AGR and Magnox fuel.

(65) Concerning LWR spent fuel, the United Kingdom argues that most of this type of fuel to be reprocessed by THORP is already in Britain and that the difficulty of shipping it to the continent would limit the economic incentive for competitors.

(66) As regards the SMP plant of the Sellafield site, the United Kingdom argues that it would be detrimental to competition if it were to cease operation. Indeed, it would remove an important actor in a very concentrated market. Furthermore, the closure of SMP would mean that significant amounts of plutonium would have to be transported regularly out of the United Kingdom, which would be very costly to customers and also potentially dangerous.

(67) As regards the Drigg low level waste repository, the United Kingdom argues that, since most countries do not allow the import of foreign radioactive waste for storage or disposal, the only way to offer competition would be to build another site in Britain. This would be an unattractive investment since obtaining all necessary consents would be difficult. It would also result in excess capacity which would make investment even less attractive. Tendering by the NDA of the operation of the Drigg site would be a more efficient way to promote competition on this market.

6. REPLIES FROM THE UNITED KINGDOM TO COMMENTS FROM INTERESTED PARTIES

EDF's comments

(68) The United Kingdom welcomes the support of EDF for the Measure.

BE's comments

(69) The United Kingdom welcomes BE's supporting comments for the Measure.

(70) The United Kingdom believes that proper legal measures will ensure that no problems will arise from the potential operation of some of the NDA's sites by BE's competitors.

(71) The United Kingdom is confident that the Commission will take the terms of its decision on the restructuring plan of BE ([6]) fully into account when considering the facts of the present case.

Greenpeace's comments

(72) The United Kingdom considers that its comments on the Opening of Procedure already provide significant details on issues addressed by Greenpeace. Its replies to Greenpeace's comments are therefore limited to certain statements of a general nature.

(73) The United Kingdom states that the Measure is in fact wholly consistent with the polluter-pays principle. The BNFL group would contribute to over 88 % of the liabilities through assets transferred to the NDA ([7]). The aid from the United Kingdom Government would be limited to what is required in recognition of the Government's ultimate responsibility for nuclear safety and security in the country. BNFL would not benefit directly from the assets and commercial revenues it will transfer to the NDA. It will only benefit from potential performance-based incentives for the time it operates the sites if it outperforms the objectives fixed by the Government.

(74) The United Kingdom gives a detailed explanation of the new structure of the BNFL group and its relationship with the NDA.

(75) The United Kingdom also states that the principal function of the NDA is site decommissioning. If operating certain assets on a commercial basis allows the NDA to secure this objective in a less costly way while keeping the same high level safety standards it is authorised to do so. The NDA will make such decisions, not BNFL.

(76) The United Kingdom notes that the Commission has already addressed the issue of the price charged by BNFL to BE for the management of its spent fuel in its decision on the British Energy restructuring aid.

(77) Finally, the United Kingdom challenges Greenpeace's view that the operation of the NDA would be opaque and could lead to cross-subsidisation with BNFL. The United Kingdom claims that, on the contrary, the NDA would be a 'champion of public information'. Its statutes would include several transparency mechanisms for its accounts, expenditures and overall programming.

([6]) Commission Decision 2005/407/EC of 22 September 2004 on the State aid which the United Kingdom is planning to implement for British Energy plc (OJ L 142, 6.6.2005, p. 26).

([7]) The United Kingdom later on submitted updated figures demonstrating that, according to the United Kingdom, more than 100 % of the liabilities are covered.

7. ASSESSMENT

(78) At least part of the Measure concerns issues covered by the Euratom Treaty and therefore has to be assessed accordingly ([8]). However, to the extent that it is not necessary for or goes beyond the objectives of the Euratom Treaty or distorts or threatens to distort competition in the internal market, it has to be assessed under the EC Treaty.

7.1. Euratom treaty

(79) The establishment of the NDA and the manner in which it will be funded will, by definition, have an impact on the management and funding of nuclear liabilities, including the decommissioning of many nuclear installations and the treatment of large quantities of radioactive waste. Decommissioning and waste management constitute an important part of the life-cycle of the nuclear industry, giving rise to risks which have to be responsibly addressed, and of the costs covered by the sector. In fact, the need to address the risks linked to the dangers arising from ionising radiation constitutes one of the major priorities of the nuclear sector. The Commission notes that after over 50 years of operation of the nuclear industry in the United Kingdom, the issues of decommissioning and waste management are becoming increasingly important, as more facilities reach the end of their lives and important decisions and efforts are required to ensure the health and safety of workers and of the population.

(80) In this regard, the Euratom Treaty deals with this important health and safety issue and at the same time aims at creating the 'conditions necessary for the development of a powerful nuclear industry which will provide extensive energy sources…'. Article 2(b) of the Euratom Treaty provides that the Community, in order to perform its task, is to establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied. Article 2(c) of the Euratom Treaty also provides that the Community must facilitate investment where appropriate in the nuclear sector. On this basis, the Euratom Treaty establishes the European Atomic Energy Community, creating the necessary instruments and attributing responsibilities to achieve these objectives. In this regard, and as confirmed by the Court of Justice, nuclear safety is a Community competence which must be linked to the protection against the dangers arising from ionising radiations laid down in Article 30, Chapter 3 of the Euratom Treaty, relating to Health and Supply. ([9]) The Commission must ensure that the provisions of this Treaty are applied and can therefore adopt decisions in the manner provided for in this Treaty or deliver opinions if it considers it necessary.

(81) The Commission takes note of the elements provided by the United Kingdom authorities that the effects of the notified measure will be, *inter alia*, to ensure the safety of nuclear facilities both active and obsolete, to provide for the correct, timely and safe decommissioning of obsolete nuclear facilities, and to store and provide long-term solutions for spent nuclear fuel and radioactive waste.

(82) When assessing this information, and notably in determining whether the Measure is necessary or falls within the objectives of the Euratom Treaty, the Commission notes that the financial support granted by the Government to the NDA is designed to facilitate the previously mentioned objectives of the Treaty. The United Kingdom authorities have decided to create and fund the NDA to ensure the correct establishment of a process of decommissioning and management of the wastes that would adequately protect the health and safety of the workers and the population. The Commission therefore acknowledges that the United Kingdom authorities have addressed their obligations under the Euratom Treaty to provide for safe and adequately provisioned decommissioning in a correct and responsible manner which is compatible with the objectives of the Euratom Treaty.

(83) The notified measure further reinforces the fulfilment of the Euratom Treaty objectives by ensuring that the public intervention will not be used for other purposes than the decommissioning of obsolete nuclear facilities and the safe management of radioactive waste in the context of the discharge of nuclear liabilities. A system of cap and threshold will ensure that enough funds are available for the fulfilment of these goals, while restricting the intervention to the minimum necessary for their achievement.

(84) The Commission concludes that the measures proposed by the United Kingdom authorities are appropriate to address the combination of objectives pursued and are fully in line with the objectives of the Euratom Treaty.

([8]) Article 305(2) of the EC Treaty lays down that 'the provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community'.

([9]) Ruling of the Court of Justice of 10 December 2002 in Case C-29/99.

7.2. Aid within the meaning of Article 87(1) of the EC Treaty — Application of the polluter-pays principle.

(85) According to Article 87(1) of the EC Treaty, State aid is defined as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States.

(86) In order to analyse whether the Measure includes State aid to BNFL and/or to the NDA, the Commission first assessed whether it provided an advantage to these entities.

(87) Providing an advantage has to be understood in this respect as the State paying for costs that should normally have been borne by each of the two companies. It is therefore necessary to first establish a benchmark for normal costs to be borne by a company in order to analyse later whether the State is paying part of these costs.

(88) Under Article 174 of the EC Treaty, the Community policy on the environment shall be based in particular on the principle that the polluter should pay.

(89) Under Article 6 of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of the Community policies.

(90) In practical terms, it is Commission practice to consider that the implementation in State aid policy of the polluter-pays principle requires that the costs of pollution be internalised by polluters ([10]). This means that such costs should be considered precisely as costs normally to be borne by the polluter, which, in turn, means that their payment by the State should be considered as an advantage granted by the State.

(91) In the present case, the State will undertake to cover any shortfall in the NDA's ability to cover the costs linked to the nuclear liabilities of the assets that will be transferred to the NDA. Since these liabilities relate to the clean-up of sites contaminated by radioactivity, the Commission considers that they are pollution costs which, as explained above, should normally be borne by the polluters, namely, the operators of the sites. Since the State will pay for part of these costs, these payments should be considered as granting an advantage to the polluters.

(92) In this respect, the Commission disagrees with the United Kingdom's claim that the Measure fulfils the polluter-pays principle because, according to the United Kingdom's figures, over 88 % of these costs will be paid for by the operators. The Commission considers that these estimates show that about 12 % of the pollution costs will not be covered by the polluters, which demonstrates that the Measure does not fully implement the polluter-pays principle.

(93) Whilst, as explained above, it is relatively easy to determine in this case that the Measure results globally in polluters being granted an advantage because they do not pay the full costs arising from their pollution, it is more difficult to determine the precise extent to which each of the operators is a polluter, and therefore the precise extent to which each of them is relieved of bearing its pollution costs.

(94) Indeed, the majority of the pollution costs at stake in this case are costs linked to the decommissioning of nuclear power plants that were operated by several operators during their total lifetime. Implementing the polluter-pays principle in this case requires the ability to decide which of the successive operators is responsible for what part of these costs.

(95) Decommissioning costs are generated in one go in the very first moments of the operation of the plants. Later increments in these costs are marginal as compared with those created at the outset.

(96) A completely direct implementation of the internalisation of costs principle, which is the translation of the polluter-pays principle, would therefore require that all the plant's decommissioning costs be factored in the price of the first units of energy sold by the plant.

(97) It is obvious that such an interpretation of the polluter-pays principle would be in complete contradiction with the economics of electricity generation and would be so impracticable that it would not even achieve its own goal. It is therefore generally accepted that, in order to apply the polluter-pays principle to these costs in a way that would be practical, a means should be found of spreading the pollution costs (or, to be more exact, the legal duty to cover them) over at least the expected lifetime of the plant.

(98) The way these pollution costs are spread has a particular relevance for the application of State aid rules where the State intervenes to pay the decommissioning costs of plants that have been owned by several owners. Indeed, in such a case, the spread of the pollution costs between the successive owners also drives the spread of the potential advantage granted by the State to each of them.

([10]) See in particular the Community guidelines on State aid for environmental protection (OJ C 37, 3.2.2001, p. 3) in this respect. This approach has also been upheld by the Court in its judgment of 20 November 2003 in Case C-126/01.

(99) There is no harmonised Community-wide system for allocating decommissioning costs to the successive owners of a nuclear plant. Member States have different systems for implementing a legal duty to meet nuclear liabilities, these systems resulting in different possible attributions of costs between successive plant owners ([11]).

(100) Despite the lack of a harmonised system, the Commission considers that it is still possible to identify two broad categories.

(101) The first type of system consists in treating decommissioning liabilities as investment costs. In this case, the liability to cover these costs is created at the time the plant is turned on, and the cost becomes unavoidable from then on. In accounting terms, liabilities are similar to a debt to a hypothetical decommissioning operator. Like all debt, this one may be repaid in instalments, as well as purchased or sold by various parties. But it is in any event completely triggered as from the beginning of operations.

(102) The second type of system consists in treating decommissioning liabilities as operating costs. In such cases, the legal liability to cover these costs is created periodically, normally on a yearly basis, as a counterpart for the operation of the plant. Future instalments therefore remain avoidable. In accounting terms, liabilities are similar to an annual tax paid to a hypothetical decommissioning operator. The legal charge for this equivalent of a tax is not completely triggered as from the beginning of the operations, but on a continuous basis during the operation of the plant.

(103) The two systems above may in practice lead to the same behaviour in many cases, in particular for economically efficient power plants ([12]). In this case, operators covered by the first system would tend to put money aside to meet their originally triggered liability in the same regular way as they would if they had to meet an annual payment.

(104) However, they lead to two very different interpretations in State aid analysis in cases where an economically inefficient power plant is transferred from one owner to another under the promise by the State to pay for a shortfall in decommissioning costs.

(105) Under the first system, liability for funding the whole decommissioning cannot be avoided by the first owner. If he cannot sell a part of this liability under market conditions to the new owner he remains liable for this part, and the new owner cannot be held liable for it, irrespective of the size of this part as compared to the actual time during which the first owner operated the plant. This can lead to a situation where the first owner has to face a burden which is disproportionately high in relation to the time during which it operated the plant and, conversely, the new owner is faced with a burden which is disproportionately low. The economic situation of the power plant is the factor that determines the spread of liabilities. In the extreme case where the power plant is so inefficient that it covers no more than its operating costs, the first owner would be liable for all decommissioning costs and the new one for none. State intervention would then have to be interpreted as an advantage to the first owner only.

(106) Under the second system, the new operator would in any event have to pay for amounts that would be charged to it under the periodical liability mechanism in the future. These liabilities, on the other hand, are avoidable for the first operator, since the legal duty to pay them is only triggered upon actual operation of the plant. Therefore, the first operator cannot be charged for future liabilities by the new operator under a market transaction unless it receives proper compensation. Under this system, operators therefore always remain liable for their share of the decommissioning costs, whatever the economic situation of the power plant.

(107) The United Kingdom's method for treating nuclear liabilities is neither of the two reference systems to implement the polluter-pays principle described in recitals (101) and (102) above, since, as has already been mentioned, it does not implement fully the polluter-pays principle. It is nevertheless necessary to refer to one proper benchmark in order to assess the Measure, otherwise it would not be possible to assess the extent to which the polluter-pays principle has not been implemented.

(108) At the present stage of its legal analysis, the Commission is not in a position to decide whether Community law allows it to impose one of the two methods above in the context of analysing the implications of the polluter-pays principle under the State aid rules. The Commission finds that, in any event, it is not necessary to decide on this question for the present case, since, as will be demonstrated below, the two methods come to the same conclusion as regards BNFL and the NDA, that is, that the Measure does not include State aid to BNFL and includes a State aid to the NDA that can be found compatible with the common market.

([11]) It must be noted however that, in many Member States with a nuclear industry, the question of successive owners of plants is theoretical since all plants have always been owned by a single operator.

([12]) In this framework, an economically efficient power plant is deemed to be one that generates enough revenue to cover all its costs, including all decommissioning costs.

7.3. Aid within the meaning of Article 87(1) of the EC Treaty — Absence of aid to BNFL.

(109) The Commission has analysed whether the Measure includes an advantage to BNFL under each of the two reference systems described in recitals (101) and (102) above. As is explained above, both analyses aim at making sure that, consistently with the polluter pays principle, BNFL has covered the part of the nuclear liabilities that is attributable to it by its own means only –and in particular not by State support.

(110) In conducting these two analyses, the Commission took account of the history of the ownership of the assets under consideration, as well as the history of State intervention in their favour, which is summarised below.

(111) The Magnox power plants were originally owned and operated by two publicly owned companies that also owned other, non-Magnox, power plants in the United Kingdom. The British nuclear sector was then restructured in several steps.

(112) In a first step, Magnox plants were separated from non-Magnox plants. The former were grouped together in a single publicly-owned company known as Magnox Electric. A debt corresponding to the book value of the transferred plants was created. This debt was owed to Magnox Electric by the companies now owning only the non-Magnox plants (hereunder referred to as 'the Non-Magnox Operators'). The debt later on was earmarked for covering the Magnox plants' complete nuclear liabilities.

(113) In a second step, the UK Government purchased the debt from Magnox Electric and replaced it with an undertaking to pay for the shortfall of nuclear liabilities, capped with the same value as the debt, and indexed with the same rates. It should be noted that this step did not change Magnox Electric's position as it was entitled to receive this money as a result of the first step. On the other hand, by this step the State alleviated the debt burden to the Non-Magnox Operators.

(114) In a third step, BNFL purchased Magnox Electric from the Government for a symbolic price of one pound. At that time, the Government undertaking mentioned above was replaced by a new one, fixed at the newly estimated negative net book value of the power plants: GBP 3,7 billion. It must be noted that, in contrast to what the Commission believed at the time of the Opening of Procedure, this undertaking bears no relationship with the letter of comfort which was approved by the Commission under State aid Case N 34/90 ([13]).

([13]) Commission Decision in State aid case N 34/90. Letter SG(90)D/2049.

(115) The Measure represents the fourth and last step of the restructuring. BNFL transfers the power plants to the NDA, together with all financial assets attached to them, including the aforementioned undertaking (hereinafter the Magnox Undertaking).

(116) The Calder Hall and Chapelcross Magnox plants represent an exception to the process described above. They have been the responsibility of BNFL since 1971, when BNFL was set up and these stations were transferred to it. BNFL assumed ownership and responsibility for the Springfields site at the same time.

(117) The other assets concerned by the transfer to the NDA, and in particular THORP and SMP, were owned by BNFL from the beginning of their operations until their transfer to the NDA.

7.3.1. *Analysis under the first reference system (decommissioning costs as investment costs).*

(118) Under this analysis, as explained in recital (105), if an installation changes ownership the buyer cannot be held responsible for nuclear liabilities in excess of those he would be ready to acquire from the seller. This means that, in this reference system, where an asset has a negative book value that consists in nuclear decommissioning liabilities, the burden stays with the seller, and, should the buyer agree to take responsibility for the liabilities, it is entitled to receive payment for these liabilities as a negative price.

(119) In this reference system, when it acquired the plants from Magnox Electric BNFL was therefore entitled to receive the value of the Magnox Undertaking as a negative price for their negative book value. The Magnox Undertaking cannot therefore be interpreted as an advantage given to BNFL, and could be rightly included in the company's balance sheet as an asset it owned. Thus it can be counted as a contribution by BNFL towards meeting the nuclear liabilities for which it had assumed complete responsibility.

(120) The same reasoning must be used for the transfer of the assets from BNFL to the NDA: since the NDA takes over all liabilities under this reference system, BNFL should at the same time provide the NDA with positive assets of a total value equal to that of the liabilities transferred. If it did not do so, the difference would constitute aid to BNFL.

(121) The following table, which was provided by the United Kingdom, gives an update of the values of the liabilities and assets transferred by BNFL to the NDA as provided before the Opening of Procedure. It is worth underlining that, as was explained above, the full value of the Magnox Undertaking can be considered as a contribution by BNFL since BNFL was entitled to get this value itself as a payment at the time it purchased the plants.

Table 3

2005 estimates of assets and liabilities to be transferred from BNFL to the NDA showing BNFL contribution towards its Nuclear Liabilities. March 2005 prices, discounted at 5,4 % nominal, amounts in GBP billion.

Total Economic Nuclear Liabilities	-15,1
Sellafield operations cash flow (THORP & SMP)	2,6
Springfields future cash flows	0,2
Magnox future cash flows	0,2
Magnox Undertaking	8,3
Nuclear Liabilities Investment Portfolio	4,0
Other customer contributions not included above	0,3
Cash and liquid assets	0,7
Total	**1,1**

(122) The table above is based on BNFL's accounts. These accounts have been audited. Apart from the increase in value of the Magnox Undertaking due to its indexation, the main change as compared to the figures contained in the Opening of Procedure consists in the fact that BNFL will be transferring more financial assets to the NDA.

(123) The Commission is aware that estimates for future revenue from the Sellafield site can be controversial. Greenpeace attached to its submission a report questioning the pertinence of investment in these assets, and in particular for SMP.

(124) The Commission notes however that THORP's future cash flow is based mostly on contracts which have already been signed and which will be executed in the remaining lifetime of the plant. Estimates of THORP future cash flow are therefore unlikely to be significantly flawed. It may indeed be possible, as Greenpeace argues, that reprocessing will not be the best environmental solution for nuclear waste final management. However, the Commission considers that the power to make this decision lies solely with the countries concerned and is immaterial to the Community State aid policy.

(125) The situation for SMP is different, since SMP still has to contract most of its operations. The Commission compared the value submitted by the United Kingdom authorities with the one that resulted from the procedure of assessment of BNFL's economic case for the Sellafield MOX plant ([14]). The Commission found that the figure used by the UK authorities is within the average range of reasonable scenarios resulting from the analysis undertaken by independent consultants for this assessment ([15]).

(126) The Commission notes Greenpeace's comment that the aforementioned assessment of BNFL's economic case for the Sellafield MOX plant took place after most of the investment costs in SMP had been sunk. This timing meant that investment costs were not taken into account when deciding on the economic rationale for or against operating the plant. The Commission understands that, in this context, the positive result of the assessment could give the wrong impression that investment in SMP was a profitable decision overall, whereas in fact, the result meant only that, since the investment had already been made, it was more logical to operate it in the hope of losing less money overall. However, the Commission notes that this distinction only affects the validity of the choice of the timing of the assessment, not the validity of future cash flow estimates in the assessment.

(127) The estimated future cash flow for Magnox plants takes account of the latest electricity prices in Great Britain. Electricity prices in Britain were particularly high at the end of 2005. It is unclear whether they will stay at that level for a sustained period. However, some of the reasons usually

([14]) See http://www.defra.gov.uk/environment/consult/mox/ for all reports submitted in this public consultation.

([15]) Due to the differences between the discount rates used by consultants and the Commission reference rate, the Commission could only compare reasonable orders of magnitudes and not exact figures.

put forward for high electricity prices, in particular the increase in gas prices and the effect of emission trading, are likely to remain, and could even grow in the case of the effect of emission trading. Furthermore, the figures used for estimating this cash flow, although they take account of the rising trend, are still very cautious as compared to prices witnessed today ([16]). The Commission therefore believes that this estimate is acceptable for the few years during which Magnox plants will continue to operate.

(128) The NDA computes and publishes its own estimates of total nuclear liabilities. These estimates are higher than the ones used in BNFL's accounts. They do not distinguish between economic and non-economic liabilities, since this distinction, which is significant for State aid control, is irrelevant for the NDA's activities. However, according to the United Kingdom, splitting the NDA's latest estimates ([17]) for total liabilities into economic and non-economic liabilities in the same proportion as that used for the above computation results in estimated total economic nuclear liabilities reaching GBP 18,2 billion in March 2005 prices (compared to GBP 15,1 billion from BNFL's accounts). The total BNFL contribution resulting from the same computation as in Table 3 above would become negative by GBP 1,9 billion (instead of a positive GBP 1,1 billion ([18]).

(129) The Commission acknowledges that nuclear liabilities are difficult to estimate, since they relate to activities that will take place a long time in the future, and of which we still have little experience. This is particularly true of decommissioning activities that concern very specific sites like the ones transferred to the NDA. In view of these uncertainties, the Commission is of the opinion that a GBP 3,1 billion margin of uncertainty out of a total of about GBP 15 to 18 billion is acceptable.

(130) It is understandable that BNFL's estimate of the liabilities is smaller than the NDA's. Indeed, it is clearly in BNFL's interest to have smaller liabilities in its balance sheet. On the other hand, it is in the NDA's interest to be conservative to get sufficient funding for its activities, especially in a period of budgetary restrictions. The fact that the NDA is under an obligation to achieve a 2 % p.a. gain in efficiencies adds to the incentive to present rather conservative first estimates.

(131) The UK Government indicates that similar but already more advanced experience in the USA shows that decommissioning costs estimates tend to follow a curve whereby, after an initial growth, they eventually decrease as a result of increased experience and technology improvements.

(132) Over the last ten years the United States Government has introduced performance-based contracts for nuclear clean-up. This is the approach to clean-up that the NDA is now committed to implementing. Experience in the US has been that over a period of five years or so it is possible to reverse the tendency for liability estimates to increase and in contrast to reduce liability estimates through accelerating work and cost reductions. For example the US Treasury Financial Report for 2003 notes that the Department of Energy reduced its environmental liability by USD 26,3 billion or 12,5 % in fiscal year 2003; this is the second year in a row that Energy's environmental liability has decreased. The decrease in 2003 was primarily due to restructuring the clean-up programme to focus on its core mission and accelerating clean-up ([19]). A more recent report by the United States Government Accountability Office (GAO) reviewed the Department of Energy's cost reduction target for nuclear clean-up. The GAO report identified that as at March 2005 the Department of Energy was on track or ahead of schedule for many of the 16 clean-up activities it measures and behind schedule for three challenging and costly activities. The GAO report stated that the Department of Energy is still expecting significant cost reductions of the initial target of 50 billion USD ([20]).

(133) In view of the above, the Commission considers that it can reasonably consider that, of the two estimates, BNFL's estimate will probably prove to be closer to reality.

(134) Therefore, the Commission concludes that the Measure does not include any aid to BNFL within this reference system.

7.3.2. *Analysis under the second reference system (pollution costs as operating costs).*

(135) To calculate BNFL's contribution under this reference system, the first step consists in allocating nuclear liabilities properly to the successive owners of the assets, in a way that is consistent with the fees that a hypothetical decommissioning operator would have charged to each of them. The profile of such a fee would be likely to be tightly linked to the assets' revenues.

(136) For the Magnox plants, the Commission considers that the most appropriate way to do this is to allocate liabilities on a time proportion basis, since the output of these power plants remains very stable over time.

([16]) These estimates of electricity prices are in the range of GBP 28MWh to GBP31MWh). As a reference, April 2006 baseload prices are GBP 54,48 MWh and annual 2007 baseload prices (calculated as the average of summer and winter prices) are GBP 53,75/MWh (Source: United Kingdom authorities quoting Platts European Power Daily, 8 February 2006).

([17]) This estimate is referred to as Lifecycle Baseline 2.

([18]) Sums may not match perfectly because of rounding.

([19]) See 2003 Financial Report of the United States Government, p. 11 http://fms.treas.gov/fr/03frusg.html.

([20]) GAO Report to the Chairman and Ranking Minority Member, Subcommittee on Energy and water Development, Committee on Appropriations, House of Representatives *Nuclear Waste* July 2005.

(137) In the case of Springfields, the allocation distinguished between liabilities linked to the reprocessing of Magnox spent fuel, liabilities linked to the reprocessing of AGR spent fuel and other liabilities. Magnox liabilities are allocated using the same pattern as the one used for Magnox plants above, since nuclear waste generation is directly linked to the plant's electricity output. AGR liabilities are allocated to BNFL in accordance with its arrangement with BE whereby BE retained responsibility for these liabilities until 1995. The same method is used for Magnox-related liabilities of the Sellafield site ([21]).

(138) Other (non-Magnox and non-AGR) liabilities in Springfields are allocated on a time proportion basis. The same time proportion method is used for the Drigg and Capenhurst sites.

(139) The situation is different for the THORP and SMP plants of the Sellafield site. These assets were built by BNFL. THORP was operated first by BNFL, but will continue to be operated by the NDA. SMP will be operated exclusively or almost exclusively by the NDA. Allocating liabilities on a time proportion basis would therefore lead to the attribution of an important share of these liabilities to the NDA.

(140) However, unlike power plants or fuel supply plants, these assets are not meant to have a steady business plan. They are generally commercially managed in such a way as to generate most of their revenue at the very beginning of their operations. The first contracts that are signed in this respect are known as 'baseload' contracts. Operators aim at recovering if possible all decommissioning costs from the revenue generated by these contracts. This is typically the case for THORP and SMP. In such cases, the Commission believes that, even in this reference system, it is reasonable to allocate all liabilities to the first owner, because a diligent regulator would be likely to fix contributions to repay the full decommissioning costs in such a way as to charge most if not all of them on baseload contracts signed by this owner.

(141) The Commission notes that comments from Greenpeace point to the fact that it is quite likely that the business prospects for THORP and SMP are not as good as they originally seemed. The Commission however believes that this should not be a reason to deviate in the allocation method, since even if the global activity of the plants is decreased, the overall profile of their revenue generation (that is, with most of the revenues generated in the beginning) should remain the same.

(142) Accordingly, the Commission has allocated all nuclear liabilities of the THORP and SMP plants to BNFL.

(143) The second step in the computation consists in calculating the value of BNFL's contribution to these liabilities.

(144) This contribution must first take account of liabilities that have already been discharged by BNFL. Indeed, a certain number of sites, including in particular some Magnox plants, have already ceased operation, and decommissioning has started. BNFL has spent GBP 5,1 billion for meeting these liabilities. While doing so, BNFL did not check whether the liabilities it was discharging were 'attributable' to it under the present reference system. However, the whole of this contribution can be included in the computation since either discharged liabilities were attributable to BNFL and therefore can be directly included in the computation, or they were not attributable to it and in this case BNFL provided contribution for more liabilities than it should have, and would have deserved compensation for it.

(145) Second, the contribution must also take account of the financial assets that BNFL will provide to the NDA. From the value of these assets that will be transferred to the NDA must be subtracted the value that was received by BNFL at the time it purchased the Magnox plants, since only the increase in value of the assets constitutes a contribution from BNFL.

(146) Finally, future cash flow for SMP and THORP, which will be received by the NDA instead of BNFL, should also be counted as BNFL's contribution, in order to be consistent with the aforementioned decision to attribute all the liabilities of these plants to BNFL.

(147) The chart below summarises the results of the computation under this reference system:

Table 4

Estimate of contribution from BNFL to its allocated share of liabilities. 2005 prices, discounted at 5,4 % nominal, amounts in billion GBP.

Non-Thorp and Non-SMP liabilities allocated to BNFL	a		-8,0
Thorp and SMP liabilities allocated to BNFL	b		-1,4
Total Liabilities to be funded by BNFL	c	a+b	-9,4
Funds to be provided to NDA			
Magnox Undertaking	d		8,3
NLIP	e		4,0
THORP and SMP Future Cash flows	f		2,6
Other assets	g		0,7
Total value of funds	h	d+e+f+g	15,6
Funds provided to BNFL under Magnox transaction			
Magnox Undertaking	i		-5,3
Other funds	j		-4,0
Subtract total funds provided to BNFL	k	I+j	-9,4

([21]) Except THORP and SMP, which are treated separately.

Value of net funds	l	h-k	6,2
Liabilities discharged by BNFL	m		5,1
Funds Provided towards liabilities	n	l+m	11,4
Result of BNFL administration	o	n-c	2,0

(148) The table above was submitted by the United Kingdom authorities. It is based on figures from BNFL's accounts, as in Table 3.

(149) The considerations developed in recitals (128) to (133) apply in this case too.

(150) Therefore, the Commission concludes that the Measure does not include any aid to BNFL within this reference system.

7.4. Aid within the meaning of Article 87 (1) of the EC Treaty — Presence of aid to the NDA

(151) The two computations described above could also be applied to determine whether and to what extent the Measure gives an advantage to the NDA.

(152) However, the Commission considers that, in this case, the computation is not necessary. Indeed, the Measure provides an unlimited guarantee that the State will cover all the NDA's expenses if these expenses cannot be covered by the authority's revenues from commercial activities or by financial assets transferred to it. Nor is this guarantee is neither limited in scope nor in time. It does not exclude costs linked to competitive activities, in particular where these activities may generate added incremental liabilities, and is not limited in amount.

(153) The Commission considers that this unlimited guarantee is in itself an advantage that is granted by the State to the NDA.

(154) Since this guarantee is financed by the resources of the State and is specifically aimed at the NDA, and since the NDA will continue to have some commercial activities in markets where there is trade between Member States, the Commission concludes that the Measure involves State aid to the NDA within the meaning of Article 87(1) of the EC Treaty.

(155) The Commission notes that the United Kingdom did not challenge the fact that the measure constitutes State aid to the NDA.

7.5. Compatibility assessment of the aid to the NDA under the EC Treaty

(156) Article 87(1) of the EC Treaty provides for the general principle of prohibition of State aid within the Community.

(157) Article 87(2) and 87(3) of the EC Treaty provide for exemptions to the general incompatibility set out in Article 87(1).

(158) The exemptions in Article 87(2) of the EC Treaty do not apply in this case because the Measure does not have a social character and is not granted to individual consumers, it does not make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(159) Further exemptions are set out in Article 87(3) of the EC Treaty. Exemptions in Articles 87(3)(a), 87(3)(b) and 87(3)(d) do not apply in this case because the aid does not promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, it does not promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a Member State, and it does not promote culture and heritage conservation.

(160) Only the exemption in Article 87(3)(c) of the EC Treaty may therefore apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(161) The Commission practice is to interpret the text of Article 87(3)(c) as meaning that a measure can be found compatible with the Treaty where its positive contribution to the fulfilment of certain Community objectives outweighs its negative impact on competition on the internal market.

(162) Section 7.1 explains in some detail the compatibility of the Measure with the objectives of the Euratom Treaty. The Commission welcomes the establishment of the NDA and views it as an excellent measure for handling in an efficient way the burden of nuclear liabilities arising from the distant past when environment policies had not yet reached present-day standards. The Commission considers that the NDA will contribute in a decisive way to the best possible implementation of the back end of the nuclear cycle. In this way, it will clearly contribute to the fulfilment of the Community's nuclear policy as set out in the Euratom Treaty. The positive contribution of the Measure is therefore very important, and well established in the Commission's view.

(163) Had the NDA been under an obligation to cease as soon as possible the commercial operation of the assets for which it will be responsible, there would probably have been no significant negative impact of the Measure on competition. However, the United Kingdom did not make this choice, and allowed the NDA to continue the commercial operation of assets under certain conditions. The Commission can only note that, by doing so, the United Kingdom has made it possible for the NDA's operations to have an

impact on the internal market. This makes it necessary to analyse the magnitude of this impact in order to assess the Measure.

(164) The Commission considers that the continuation of the commercial operation of the assets by the NDA, with the underlying aid from the State, has a very similar impact on competition to that which would result from the continuation of operations of a company in receipt of restructuring aid. The parallelism with the BE restructuring case ([22]) is striking in this respect. In view of these similarities, the Commission considers that the most appropriate way to assess the impact of the Measure on competition and to establish the limits within which it may be found compatible with the common market consists in using the underlying reasoning of the Community guidelines on State aid for rescuing or restructuring firms in difficulty ([23]), and in particular the need to find proportionate compensatory measures to mitigate the effects of the aid where necessary.

(165) Before entering into a detailed analysis of the competition situation for each of the assets, the Commission has two general remarks concerning the impact of the Measure on competition.

(166) The first remark is that the statutes of the NDA themselves mitigate the impact of the Measure on competition even for assets that will continue in operation. A company with a commercial goal would be likely to use operating aid to reduce its costs and sell at low price. In contrast, the NDA will operate assets only if the operation can add value for its main duty, the decommissioning of the plants. The NDA will therefore have no incentive to use aid to provide services below the market price, and certainly no interest in using the aid to decrease its costs. Furthermore, whilst the NDA will continue to operate the existing assets, it will not invest in any new ones. It will therefore not be in its interests to have a commercial policy aimed at gaining influence and market share.

(167) The NDA will neither invest in new assets nor engage in new activities. The cash flow it will generate by continuing the operation of certain assets will be used solely for the purpose of providing more funding for the discharge of nuclear liabilities. The operating framework for the NDA strictly ringfences all NDA's revenues, preventing them to be used for other purposes.

(168) All nuclear plants operators should cover in principle their proper share of nuclear liabilities under the polluter pays principle. For this purpose, the UK undertook to require the NDA and Site Licensee Companies for the power plants to undertake to use all reasonable efforts in their prices to recover the share of the liabilities that are attributable to the NDA. In the circumstances where this goal would not be reached, the UK will report to the Commission and inform it on the reasons why it could not be reached.

([22]) See footnote 9.

([23]) See footnote 8.

(169) The second remark is that the competitive system that the United Kingdom will put in place to designate SLCs will in itself have a very beneficial effect on competition in the internal market. It will create the basis for a real market in the operation of some nuclear sites in the United Kingdom and, more importantly, their decommissioning. The Commission considers that the development of this market is an excellent opportunity for the Community economy as a whole. It will allow the spread of know-how to the whole Community industry. The Measure will therefore have significant positive externalities, which will be useful in particular in view of the numerous nuclear assets that will have to be decommissioned in the Union in the coming decades.

(170) The Commission has also analysed the competition situation of each of the types of assets that the NDA will continue to operate commercially.

7.5.1. *Magnox power plants*

(171) The Magnox power plants are operating on the very competitive Great Britain electricity market.

(172) The Commission notes the United Kingdom's microeconomic arguments that the Measure, even if it decreased the plants' SRMCs, would not impact the time during which competitors run their plants and the price at which they sell their electricity.

(173) The Commission has reservations in this respect. Indeed, these arguments may be valid in a single, mostly short term, perfect market, with perfect information, preferably pool based. However, the present electricity market in Great Britain is not such a market. It is mostly based on bilateral contracts, with several futures markets. Furthermore, the market is fundamentally divided between wholesale and direct supply to business, the second segment being apparently more commercially valuable. Without affecting the actual amount of electricity sold by one of the NDA's competitors, the Measure may force it to switch partly to a less attractive part of the market, which would impact its results.

(174) The Commission therefore considers that the Measure distorts or threatens to distort competition on this market which must be mitigated.

(175) The ideal way to mitigate the negative impact of the aid on the market would be to cease the operations of the power plants.

(176) The Commission appreciates however that closing down these power plants immediately might have a negative impact on the efficiency and safety of the decommissioning operations. Indeed, because the Sellafield site would not be in a position to start waste reprocessing for several power

plants at such short notice, temporary storage solutions would have to be provided. This would complicate decommissioning works, adding costs and potentially safety concerns. It might also cause problems for security of electricity supply in the already tense Great Britain market. The Commission considers that requiring the immediate closure of the plants is therefore not a proportionate measure for mitigating competition concerns.

(177) The Commission notes that, whilst the plants will not be closed immediately, the United Kingdom already has a programme to close all of them in the relatively short term, the last station being scheduled to close in 2010. This implies that any impact of the Measure on competitors would decrease and end soon. In particular, the period between the time of this decision and the last closure is of the same order of magnitude as the time necessary for a new entrant on the market to develop a new electricity plant project until commissioning. The NDA also will not start new electricity generation activities nor build any other new asset.

(178) In order to mitigate the impact of the Measure on the market in the meantime, the Commission examined the possibility of requiring measures from the NDA which would be equivalent in effect to the ones it required from BE in the framework of the State aid case for its restructuring ([24]). There were three such compensatory measures.

(179) The first compensatory measure consisted in requiring the separation of BE's nuclear generation, non-nuclear generation and trading business. In the present case, the NDA does not have any significant non-nuclear generation business. The Commission therefore considers that such a compensatory measure would not be meaningful for the present case.

(180) The second compensatory measure consisted in imposing on BE a six-year ban on increasing capacity. In the present case, in practice, the NDA will not only not increase its electricity generation capacity, but will also gradually phase it out over four years. The effects of this measure are therefore already achieved by the normal functioning of the NDA.

(181) The third compensatory measure consisted in prohibiting BE from selling electricity on the direct sale to business segment below wholesale market prices.

(182) The Commission considers that a similar measure is necessary in the case of the NDA. The United Kingdom has undertaken to implement it.

(183) In practice, the same type of derogations as the ones accepted for BE in cases of exceptional market circumstances will apply. The Commission considers that such exceptional derogations are necessary in order not to jeopardise the very aim of the Measure. Experience of monitoring the Commission decision in the BE case shows that the derogations did not lead to abuse.

(184) In the present case, as in the case of BE, the existence of exceptional market circumstances will be defined by the use of concrete and operational tests.

(185) The tests will however be slightly less cumbersome than in the case of BE. The Commission considers that this is justified and proportionate because NDA's share of the market is much smaller than BE's and the impact of the Measure on the electricity market is therefore less.

(186) The United Kingdom authorities have offered to implement the measure with the rules defined in recitals (187) to (190).

(187) Under normal market circumstances, where the NDA wishes to enter into new contracts for sales to end-users, the Secretary of State will appoint an independent expert to report on an annual basis that such contracts have been at prices where the energy component has been set at or above the prevailing wholesale market price.

(188) Under exceptional market circumstances, the NDA may sell new contracts where the energy component is set below the prevailing wholesale market price but only after the auditors of the NDA, or of companies operating on its behalf, have reached the opinion that one of the two tests set out below for exceptional market circumstances have been met.

— Test A: the NDA, or a company operating on its behalf, offers to sell […] (*) for a period of […] a minimum of […] for a winter season trade and […] for a summer season trade at the prevailing wholesale market price in the wholesale market and at the end of that period such offers have not been accepted.

— Test B: reported trades of season ahead baseload electricity on the United Kingdom wholesale electricity market have totalled less than […] (gross), averaged over the preceding […].

(189) If either test is fulfilled, a period of exceptional market circumstances would commence. The NDA would then be able to sell new contracts for up to […] to end-users for contracts at prices below the prevailing wholesale market price on the assumption that such pricing behaviour is a commercial necessity during such a period of exceptional market circumstances.

(190) A period of exceptional market circumstances may not exceed […]. In order for a subsequent period of exceptional market circumstances to commence either Test A or Test B must again be satisfied.

([24]) See footnote 9.

(*) Business secret.

(191) The Commission considers that this mechanism is a suitable way to implement the compensatory measure. It is based on sufficiently transparent and practicable criteria to enable decisions to be made in a sound and efficient way. It will make it possible to mitigate significantly the distortion of competition in the market during the period pending the closure of Magnox plants.

(192) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the fact that the plants will close soon and by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure on the achievement of the Euratom Treaty objectives.

7.5.2. *THORP*

(193) The Commission considers that the impact of the Measure as regards the continuation of THORP activities by the NDA is very limited.

(194) First and foremost, an important part of the reprocessing in THORP is of AGR fuel. In this respect, it does not have any competitors at present. Since BE is now the only source of spent AGR nuclear fuel in Europe, the Commission considers that it is clear no market investor would consider any investment in a new AGR nuclear fuel reprocessing plant.

(195) Greenpeace argues that direct storage might be an alternative to reprocessing AGR fuel and could be a more attractive solution for an investor.

(196) The Commission considers however that, even though investment in direct storage may be less costly, it would still remain a very unattractive option. Indeed, as the United Kingdom rightly remarks, BE, as the only source of spent AGR fuel, already has life-time agreements for the managing of its spent AGR fuel. The Commission points out that, contrary to what Greenpeace seems to claim, BNFL was under no obligation to actually reprocess this waste. It is only under a duty to manage it. According to the information available to the Commission, BNFL did not intend to reprocess it all.

(197) These agreements are the result of a renegotiation of the initial arrangements during the restructuring of the company. Prices are therefore particularly interesting for BE, since, within such a framework, BNFL, like any private investor in a market economy, was ready to offer prices going as low as its marginal costs, surrendering part or all of its fixed costs (it should be noted however that the fixed GBP 140 000/tonne mentioned by Greenpeace and reported in recital (53) is incorrect, since prices in these arrangements depend on electricity prices, as is described in Table 7 of the aforementioned Commission decision on the restructuring of BE).

(198) The Commission considers it impossible that a competitor, which would have to either build a new storage facility with significant fixed costs, or factor in high transport costs for hazardous material, could make any competitive offer to BE in such conditions.

(199) Competition concerns are therefore limited to THORP's LWR spent fuel reprocessing activities.

(200) For these activities, the Commission considers that direct storage is not a real competitor to reprocessing. Indeed, under the economic conditions prevailing now and for the foreseeable future on the uranium market, reprocessing of waste fuel is a significantly more costly option than direct storage ([25]). The choice of reprocessing over direct storage is therefore very often a policy choice by Governments of countries where the nuclear plants are operated. Such a policy choice, which is often implemented by law or regulation, leaves very little if any room for competitive arbitrage by operators between the two options.

(201) For the reprocessing of non-AGR fuel THORP has therefore only one competitor in the Union: the French company Areva.

(202) In this context, the Commission considers that requiring advance closure of THORP to mitigate competition concerns raised by the Measure would potentially create more competition issues than it would solve. Indeed, it would establish Areva as a monopoly that would certainly be of very long duration in view of the technological and financial difficulty of entering this market.

(203) The Commission believes that in view of the above, a better way to mitigate the impact of the Measure on competition is to ensure that, during the NDA operations, government resources will not be used to enable THORP to compete on a biased basis with Areva.

(204) It was demonstrated in section 7.3 that BNFL had put aside enough monies to pay for THORP's fixed decommissioning costs. The Commission therefore considers that, in order to ensure that the NDA will not be in a position to offer anticompetitive pricing, it is sufficient to require that the NDA will, for any new contract for THORP, price in all costs, including all incremental nuclear liabilities.

(205) The United Kingdom has undertaken to implement this complete pricing mechanism. It will apply to all new contracts entered into by the NDA after the date of the present decision. This restriction will not be applied to contracts entered into before the date of the Commission decision or to contracts where formal offers approved by the Nuclear Decommissioning Authority and the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before that date or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

([25]) See OECD/NEA, 'The Economics of the Nuclear Cycle', 1994, which is one of the most complete studies on this aspect to that date.

(206) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

7.5.3. *SMP*

(207) SMP's competition situation is also very specific. SMP fabricates MOX fuel. MOX can be used only in a limited number of nuclear power plants that have been designed or adapted for its use. SMP only has two commercial competitors at present: Areva and Belgonucléaire. These two competitors have significant ties. In particular, the Commission understands that, whilst Belgonucléaire has the technological capacity for producing MOX, it is dependent on Areva to assemble a final product for use in nuclear power plants. Moreover, Belgonucléaire sells its products via Commox, a jointly owned subsidiary of Areva (60 %) and Belgonucléaire (40 %).

(208) Should SMP disappear, competition in the market would be restricted, at best to two companies with important common interests, and possibly even to a single company. It is not impossible that Japanese and Russian operators, which today own non-commercial MOX fabrication installations, may begin commercial operation in the next years. However, this is not certain, and the overlap between the operational life of SMP and these possible new non-EU commercial operators may be restricted to a few years.

(209) Within this context, the Commission considers that requiring early closure of SMP to mitigate competition concerns raised by the Measure would potentially create more competition concerns than it would solve.

(210) The Commission believes that in view of the above, a better way to mitigate the impact of the Measure on competition is to ensure that, during the NDA operations, Government resources will not be used to enable SMP to compete on a biased basis with Areva and/or Belgonucléaire.

(211) It was demonstrated in section that BNFL had put aside enough monies to pay for SMP's fixed decommissioning costs. The Commission therefore considers that, in order to ensure that NDA will not be in a position to offer anticompetitive pricing, it is sufficient to require that the NDA will, for any new contract for SMP, price in all costs, including all incremental nuclear liabilities.

(212) The United Kingdom has undertaken to implement this complete pricing mechanism. It will apply to all new contracts entered into by the NDA after the date of the present decision. This restriction will not be applied to contracts entered into before the date of the European Commission's decision or to contracts where formal offers approved by the Nuclear Decommissioning Authority and the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before that date or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

(213) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

7.5.4. *Springfields*

(214) By the end of 2006, Springfields' activities will be limited to the production of Magnox and AGR nuclear fuel.

(215) Such nuclear fuels are used only in the United Kingdom. Magnox fuel is used only in the Magnox plants, the last of which will close by 2010. AGR fuel is used only by BE, which renegotiated its long term agreements with BNFL for AGR fuel delivery within the framework of its restructuring.

(216) The same arguments apply as are developed in recitals (196) to (198). No competitor would find it economically attractive to invest in an asset to compete with Springfields' activity. The Commission therefore considers that the impact of the Measure on competition as regards the Springfields site is negligible, and calls for no compensatory measure.

(217) In view of the above, the Commission considers that the distortion of competition resulting from the measure is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

7.5.5. *Drigg*

(218) The Drigg installation is a repository for low level nuclear waste. It is the only one in Britain.

(219) The United Kingdom authorities informed the Commission that this repository would have sufficient capacity to accommodate all such waste produced in the United Kingdom until 2050. The NDA will be the source of about 90 % of this waste.

(220) Long distance transport of nuclear waste is not recommended, and some countries even ban its import.

(221) The Commission considers that, in these conditions, the scope for a new entrant to compete with the Drigg installation is very limited, and would make the construction of a competing low level waste repository unlikely to have any economic value.

(222) The Commission therefore considers that the impact of the Measure on competition as regards the Drigg site is negligible, and calls for no compensatory measures.

(223) In view of the above, the Commission considers that the distortion of competition resulting from the measure is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

7.6. **BNFL as temporary SLC**

(224) In the Opening of Procedure, the Commission expressed concern that BNFL might receive aid from the NDA in the time during which it will be the temporary SLC of the NDA's site before a competitive process can be put in place to designate SLCs.

(225) The Commission notes that the United Kingdom has delivered a complete and detailed explanation of the way SLCs –including BNFL- will be remunerated. Only necessary costs will be paid for, with annual caps. Profit will be excluded from normal payment, and may only be received if efficiency objectives set by the Government are met. Even in this case, these profits will be compared to international benchmarks in the sector.

(226) The Commission considers that this process makes it possible to conclude that SLC funding involves no State aid.

(227) In this respect, the Commission also stresses that it can find no *a priori* reason to believe that SLC contracts, even with BNFL, will entail cross subsidy. On the contrary, it believes that the framework put in place offers much better prospects for transparency than the situation where BNFL operated all its activities within a single group.

8. **CONCLUSION**

(228) The Commission concludes that the Measure does not include aid within the meaning of Article 87(1) of the EC Treaty to BNFL, and that it does include aid within this meaning to the NDA. Insofar as there is no State aid, this decision is without prejudice to the application of the Euratom Treaty. Insofar as this aid is in line with the objectives of the Euratom Treaty and does not affect competition to an extent which is contrary to the common interest, the Measure in question is compatible with the common market. This decision does not prejudge the Commission's view on potential State aid to other subjects than BNFL and the NDA,

HAS ADOPTED THIS DECISION:

Article 1

1. The establishment of the Nuclear Decommissioning Authority by the United Kingdom, notified to the Commission on 22 December 2003, which consists in the transfer to the Nuclear Decommissioning Authority of British Nuclear Fuels Limited's Magnox nuclear power plants, physical assets of the Capenhurst, Driggs, Sellafield and Springfields sites, financial assets linked to these sites, and responsibility for covering their nuclear liabilities does not include State aid within the meaning of Article 87(1) of the EC Treaty to British Nuclear Fuels Limited.

2. The establishment of the Nuclear Decommissioning Authority as described in paragraph 1 includes aid within the meaning of Article 87(1) of the EC Treaty to the Nuclear Decommissioning Authority which is compatible with the common market and the objectives of the Euratom Treaty, subject to compliance with the conditions set out in Articles 2 to 9 of this Decision.

Article 2

As soon as expenditure corresponding to the nuclear liabilities referred to in Article 1 exceeds GBP 15 100 000 000 at March 2005 prices, the United Kingdom shall submit enhanced additional reports to the Commission demonstrating that the expenditure is restricted to meeting the liabilities referred to in that Article, and that proper steps have been taken to limit expenditure to the minimum necessary to meet those liabilities. Such reports shall be submitted yearly.

For the purpose of calculating amounts at March 2005 prices the United Kingdom shall use the reference and discount rate published by the Commission for the United Kingdom, updating this rate every five years.

Article 3

1. The United Kingdom shall require the Nuclear Decommissioning Authority and Site Licensee Companies for power plants to undertake not to offer to supply non-domestic end-users who purchase electricity directly from the Nuclear Decommissioning Authority and Site Licensee Companies for power plants on terms where the price of the energy element of the contract with the users is below the prevailing wholesale market price. However, in exceptional market circumstances, where the objective tests set out in Article 4(1) are satisfied, the Nuclear Decommissioning Authority and Site Licensee Companies for power plants may, while such exceptional circumstances continue to prevail, price the energy element of the contract at below the prevailing wholesale market price in good faith where necessary to enable the Nuclear Decommissioning Authority and Site Licensee Companies for power plants to respond to competition, under the conditions set out in Article 4.

2. The United Kingdom shall report to the Commission each year on the compliance of the Nuclear Decommissioning Authority and Site Licensee Companies for power plants with this condition.

Article 4

1. Exceptional market circumstances shall be deemed to exist if:

(a) the Nuclear Decommissioning Authority offers to sell […] for a period of […] a minimum of […] for a winter season trade and […] for a summer season trade at the prevailing

wholesale market price in the wholesale market and at the end of that period such offers have not been accepted (Test A); or

(b) reported trades of season ahead baseload electricity on the United Kingdom wholesale electricity market have totalled less than […] (gross), averaged over the preceding […] weeks (Test B).

2. If either test is fulfilled, the Nuclear Decommissioning Authority and Site Licensee Companies for power plants may sell new contracts for up to […] to end-users for contracts at prices below the prevailing wholesale market price on the condition that such pricing behaviour is a commercial necessity during such a period of exceptional market circumstances.

3. A period of exceptional market circumstances shall not exceed […]. In order for a subsequent period of exceptional market circumstances to commence, either Test A or Test B must again be satisfied.

Article 5

1. The United Kingdom shall require the Nuclear Decommissioning Authority to undertake that the Nuclear Decommissioning Authority and Site Licensee Companies for the Thermal Oxide Reprocessing Plant (THORP) and the Sellafield Mox Plant (SMP) will not supply spent fuel reprocessing and storage services or manufacture of MOX fuel supply contracts at prices less than the relevant projected incremental costs of supply. Such incremental costs shall include related incremental operating costs and any related incremental costs of decommissioning and waste management, and shall comprise such costs as projected shortly before the commencement of the contract.

2. Paragraph 1shall not be applied to contracts entered into before the date of this decision or to contracts where formal offers approved by the Nuclear Decommissioning Authority and the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before this date, or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

Article 6

The United Kingdom shall submit a yearly report on the implementation of Articles 3 to 5. The report shall in particular state whether exceptional market circumstances existed in the year concerned and specify the conditions of the resulting contracts. The report shall also state whether contracts were signed in application of the provisions of Article 5(1) in the year concerned, and indicate the conditions of these contracts. The report shall also comment, where applicable, on the evolution of the estimated future cash flow of the assets that were transferred by British Nuclear Fuels Limited to the Nuclear Decommissioning Authority. It will also comment on whether the Nuclear Decommissioning Authority achieved its goal to recover the share of the nuclear liabilities of the power plants that are attributable to the Nuclear Decommissioning Authority, and the reasons why it could not if it did not.

Article 7

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 4 April 2006.

For the Commission

Neelie KROES

Member of the Commission