II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 11 May 1999
on State aid which the Italian authorities have implemented in favour of the sugar sector

(notified under document number C(1999) 1363)

(Only the Italian version is authentic)

(1999/605/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 [1] pursuant to the above Article,

Whereas:

I. PROCEDURE

(1) On 15 February 1995, 27 June 1995 and 27 July 1995 the Commission received a report concerning aid implemented by the Italian authorities in favour of companies owning two sugar factories.

(2) By letter dated 22 August 1995 the Permanent Representation of Italy to the European Union notified the aid in question.

(3) By letter dated 25 November 1996, the Commission informed the Italian authorities of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid described in Title II. In this letter, the Commission invited Italy to submit its comments within one month of the date of notification of its decision.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited the other Member States and interested parties to submit their comments on the aid within one month of the above publication.

(5) The Italian authorities submitted preliminary comments by letter on 3 April 1997. On 8 June 1998 they submitted detailed comments regarding the procedure initiated by the Commission.

(6) On 17 April 1997, the Commission received comments from an undertaking operating in the same sector as the two recipient companies of the aid in question and transmitted them to the Italian authorities.

II. DESCRIPTION OF THE AID

(7) The aid with regard to which the Commission initiated the procedure was granted to the proprietors of two sugar factories located at Celano (point A) and Castiglion Fiorentino (point B). It was granted chronologically after other public intervention approved by the Commission as investment aid for restructuring the two factories, described in points A and B below. The dates in brackets refer to the decisions of the Interministerial Commission for Economic Planning (hereinafter 'CIPE') which approved the granting of the aid.

(8) All the aid was provided through RIBS SpA (hereinafter RIBS), a public joint stock company for intervention in the agri-foodstuffs sector.

(9) According to the information submitted by the Italian authorities, the legal basis for granting the aid is to be found in Acts Nos 700/83 and 209/90, which govern the intervention of RIBS and provide for the adoption of a national plan for restructuring the sugar sector in Italy, even if some of the aid provided does not correspond to the types of aid specified by these acts.

[1] OJ C 88, 19.3.1997, p. 4.
[2] See footnote 1.

The 1984/85 to 1989/90 national plan for restructuring the sugar sector and its extension

(10) By letter dated 15 May 1984, the Commission informed the Italian authorities of its decision concerning the national plan for restructuring the sugar sector relating to the years from 1984/85 to 1989/90 (hereinafter 'PN 84/90'). As this plan fixed the aims and some of the procedures for the restructuring in a general manner, without providing enough details to permit a concrete assessment of the compatibility of the aid measures to be implemented, the Commission, when informing the Italian authorities that it did not intend to raise objections regarding Act 700/83, reserved the right to examine the specific intervention plans envisaged in the above law, which would have to be notified to it under Article 88(3) case by case.

(11) On the basis of the PN 84/90 the Italian authorities notified two specific intervention plans, aimed, respectively, at the Castiglion Fiorentino sugar factory and at the Celano and Strongoli works. The two projects were approved by the Commission by letters dated 13 December 1984 and 5 August 1985.

(12) The two plans respectively envisaged the following:

for investments for the restructuring of the Castiglion Fiorentino sugar factory:

(a) a holding by RIBS in the capital of the company, Zuccherificio Castiglionese SpA ('Castiglionese'), for a sum of ITL 12 billion;

(b) the granting of a loan at a subsidised rate by RIBS to the above company for a sum of ITL 24 billion;

for investments for the restructuring of the sugar factories at Celano and Strongoli:

(a) a holding by RIBS in the capital of the company, Nusam SpA ('Nusam'), for a sum of ITL 10 billion.

(b) the granting of a loan at a subsidised rate by RIBS to the above company for a sum of ITL 35 billion.

(13) The duration of this first national restructuring plan for the sugar sector was extended to the year 1990/91. By letter dated 20 June 1991, the Commission approved this extension and gave its initial approval to the 1984 plan for the period from 1991/92 to 1995/96, again reserving the right to 'examine the measures adopted in implementation of the updated restructuring plan, which must be notified later under Article 88(3) of the Treaty'.

(14) In that same decision the Commission asked the Italian authorities not to make commitments with regard to the potential recipients of the aid before it had made known its decision with regard to the measures provided for in the restructuring plan. The aid which is the subject of this Decision falls into this context as it was granted during the period the national plan for restructuring the sugar sector was in force and is therefore considered by the Italian authorities to comply with the above-mentioned plan.

A. ***Aid relating to the Celano works***

(15) The aid for restructuring the Celano sugar factory was initially granted to Nusam and then to the company, Sadam Abruzzo SpA (hereinafter 'Sadam Abruzzo'), of the Sadam group, which bought the factory in liquidation from Nusam on 17 December 1991 after being its lessee from 11 August 1989. This is the aid referred to in points 15.1 to 15.6:

(15.1) a decision of the Interministerial Committee for Economic Planning ('CIPE decision') on 12 April 1988 granted aid in the form of a stake in the capital of Nusam, proprietor of the Celano sugar factory, for a sum of ITL 5 billion lire. This new stake was taken on the occasion of an increase in the capital following a reduction (from ITL 26 to ITL 13 billion lire) to cover the company's losses. The new stake was later written off to cover the operating losses;

(15.2) With a CIPE decision on 12 September 1989 aid was granted in the form of a surety for ITL 2 billion in favour of Sadam Abruzzo, lessee and later proprietor of the same sugar factory; the surety, granted when Sadam Abruzzo leased the factory from Nusam, guaranteed the commitments of the latter with respect to third party creditors;

(15.3) With a CIPE decision on 2 February 1990, aid was granted in the form of a surety for ITL 11 billion in favour of Sadam Abruzzo. Tfie amount of the guarantee corresponded to the costs borne by Sadam Abruzzo for investments made on behalf of the proprietor (Nusam) during the period when it was the lessee of the factory;

(15.4) Aid of ITL 2,5 billion was granted in the form of a stake in the re-capitalisation of Nusam after writing off the capital to cover the operating losses. The stake was taken in the form of a waiver to a part of the mortgage credit from Nusam for the same sum;

(15.5) With a CIPE decision on 26 July 1990, RIBS was appointed to implement all the measures required to prevent the bankruptcy of Nusam and permit the sale of its property, the Celano factory, to Sadam Abruzzo (1990 specific intervention plan).

The measures implemented were the following:

(a) waiver to the mortgage on the Celano factory guaranteeing the payment of Nusam's residual(judgment debt of ITL 17 504 billion owed to RIBS. This waiver implied the downgrading of the credit to an unsecured credit and therefore allowed Nusam to avoid bankruptcy and to come to an arrangement with creditors ([3]);

(b) deferment of the credit, which had become unsecured, until after the other unsecured credits. This credit was lost definitively with the bankruptcy of Nusam on 29 December 1997;

(c) sale of the Celano factory, the property of Nusam, to Sadam Abruzzo by means of the acceptance by the latter of the residual debt to RIBS of ITL 15 billion (on the same conditions);

(d) granting of a new pre-amortisation period of five years (payment of the subsidised interest only) for the payment of the above debt of ITL 15 billion.

(15.6) The following aid was granted in the same CIPE decision of 26 July 1990:

(a) aid in the form of a stake in the capital of Sadam Abruzzo for the sum of ITL 8 billion;

(b) a loan of 11 billion lire at a subsidised rate granted by RIBS to Sadam Abruzzo.

B. ***Aid relating to the Castiglion Fiorentino factory***

(16) All the aid was granted to Castiglionese, whose capital stock was shared between RIBS and Federconsorzi SpA (majority shareholder). Following the liquidation of the latter and the resulting difficulties for the companies it controlled, the shares belonging to Federconsorzi SpA were sold to SECI SpA ('SECI') and Castiglionese became part of the Sadam group on 29 July 1992. The aid was as follows:

(16.1) On 2 August 1991, aid was granted in the form of a surety in favour of Castiglionese, proprietor of the Castiglion Fiorentino sugar factory, for the opening of a line of credit of 41 billion lire to cover expenditure in 1991.

(16.2) In a decision dated 16 April 1992, CIPE approved an intervention plan ('1992 specific intervention plan') in favour of Castiglionese aimed at restoring the financial situation (the company had applied for an arrangement with creditors in August 1991). The measures implemented were as follows:

(a) extension for an additional period of ten years of the stake acquired in 1984 for a sum of ITL 12 billion (the aid constituted by this first stake was approved by the Commission);

(b) conversion into capital of a part (20 billion lire) of the loan at a subsidised rate granted by RIBS to Castiglionese in 1984 (the aid consisting of the granting of the loan was approved by the Commission);

(c) spreading the reimbursement of the residual part of the loan of ITL 24 billion over 15 years;

(d) a new RIBS stake in the capital of Castiglionese for a sum of ITL 10 billion;

(e) granting by RIBS of a loan of ITL 20 billion at a subsidised rate to Castiglionese;

(f) redemption by Sadam Abruzzo of the RIBS shares referred to in points (a), (b) and (d) at their face value.

III. **MOTIVATION FOR INITIATING PROCEDURE**

(17) The reasons for the Commission's decision to initiate the procedure under Article 88(2) can be summed up as follows.

(18) The aid granted by RIBS in implementation of the various CIPE decisions already mentioned does not come under the restructuring plans for the sugar sector approved by the Commission in 1984 and in 1991.

(19) It was not envisaged in the specific intervention plans, as requested by the aforesaid restructuring plans. Moreover, the specific intervention plans were to be notified to the Commission under Article 88(3) of the Treaty, as, in giving its outline approval to the restructuring plans, it specifically reserved the right to decide on the compatibility of the measures envisaged therein.

(20) Italy's argument that it would have been possible to demonstrate *a posteriori* the existence of a causality link between the aid granted by RIBS and the making of investments by the recipient companies is unacceptable. The Commission could not find any link between the aid and the investments made.

([3]) Possible only if the debtor is able to cover all its preferential credits and 40 % of unsecured credits.

(21) It cannot be accepted that the aid was granted under Article 46 of Council Regulation (EEC) Nos 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector [4], as last amended by Commission Regulation (EC) No 1148/98 [5], under which (like the similar provision in Council Regulation (EEC) No 1254/89 [6], as amended by Commission Regulation (EC) No 260/96 [7], valid for the years 1989/90 and 1990/91), aid for restructuring the beet and sugar sector in Italy must meet the following conditions:

— it must be motivated by exceptional needs associated with the current plans for restructuring the sugar sector in Italy;

— it must comply with the said restructuring plans.

(22) Outside the juridical context of Article 46 of Regulation (EEC) No 1785/81, the aid under examination cannot be considered either as aid to investment or, taking account of the situation which the recipients were in at the time of the various payments, aid to undertakings in difficulty.

(23) In the light of the rules governing aid to investment in the agricultural product processing and marketing sector, this aid falls under the prohibition of granting aid to investment in the sugar sector.

(24) As far as the rules governing aid for rescuing and restructuring firms in difficulty are concerned, the Commission considered that neither the criteria applicable to the agricultural sector at the time the procedure was initiated, nor those laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty [8] seem to have been respected. These guidelines were modified in 1997 to take account of the specific criteria applicable to the agricultural sector [9].

IV. **COMMENTS FROM INTERESTED PARTIES**

(25) By letter dated 17 April 1997, a private company notified comments to the Commission in the framework of the procedure initiated under Article 88(2). The company is one which produces and markets beet sugar and which is therefore a direct competitor of the Sadam group.

(26) This company shared both the Commission's factual and juridical analyses, i.e. that all the intervention examined by the Commission in favour of the Celano and Castiglion Fiorentino sugar factories, currently the property of Sadam, was implemented through aid which in the end was to the benefit of Sadam. The latter became the proprietor of two factories, the one in Celano belonging to Nusam and the one in Castiglion Fiorentino formerly belonging to Castiglionese, on favourable conditions which are not acceptable in a market economy.

(27) However:

— this company did not agree with the Commission's conclusion regarding the CIPE decision on 6 August 1987 which authorised RIBS to raise the loan at a subsidised rate in favour of the Celano sugar factory to ITL 35 billion. In its view, failure to implement the CIPE decision, and consequent failure to pay the sums provided for therein, is not sufficient to rule out the conclusion that the nature of the measure in question was one of aid, since by merely announcing that these resources were available would have allowed Nusam to obtain loans from the banking system which it would not otherwise have obtained;

— it claimed that the Commission did not take account of the distortive effects provoked by the measures, envisaged but not implemented, in the CIPE decision of 12 April 1988, as the fact that they were simply envisaged would have allowed Nusam to obtain other loans from the banks.

(28) The argument of the company in question seem to be based on the view that the announcement of the availability of new resources in favour of the recipient company would have given rise to the same effects as the granting of a State guarantee.

(29) None of the information available leads to the conclusion, however, that in the absence of the abovementioned announcement, the undertaking in question would have been unable to obtain loans from the banking system or that the loans which it was able to obtain were granted at an interest rate which was lower than that normally applied by financial institutes for similar loans to other undertakings.

V. **COMMENTS FROM ITALY**

(30) The Italian authorities made preliminary comments by letter dated 3 April 1997. On 8 June 1998 it made detailed comments regarding the procedure initiated by the Commission and which we will now summarise.

[4] OJ L 177, 1.7.1981, p. 4.
[5] OJ L 159, 3.6.1998, p. 38.
[6] OJ L 126, 9.5.1989, p. 1.
[7] OJ L 34, 13.2.1996, p. 16.
[8] OJ C 368, 23.12.1994.
[9] OJ C 283, 19.9.1997, p. 2.

(31) According to the Italian authorities, the aid described in Part II granted in implementation of the CIPE decision comes under the national plan for restructuring the sugar sector approved by the Commission in its decision of 15 May 1984 (PN 84/90) and subsequently extended and updated for the period from 1991/92 to 1995/96 (the extension and updating of the PN 91/96 plan were approved by the Commission in its decision of 20 June 1990). In particular, the above aid was a coherent continuation of the measures provided for in the two specific intervention plans approved by the Commission in its decisions of 13 December 1984 for the Castiglion Fiorentino sugar factory and of 5 August 1985 for the Celano factory. The two specific intervention plans were approved by the Commission which deemed them in compliance with the notified and approved restructuring plan for the sugar sector.

(32) The Italian authorities maintain that the plans for the sector approved by the Commission represent the reference parameter for the legitimacy of the measures adopted in the aforesaid CIPE decisions, in accordance with the case law of the European Court of Justice in its judgment of 5 October 1994 in Case C 47/91 — Italy v Commission (italgrani) ([10]).

(33) According to this case law, when the Commission has before it a specific grant of an aid alleged to be made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. (...) it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it ([11]).

(34) In the same judgment, the Court also states 'if following the examination thus circumscribed the Commission finds that the individual aid is in conformity with its decision approving the scheme it must be regarded as authorised aid, and thus as existing aid' ([12]).

(35) According to the Italian authorities, the fact that the Commission made approval of the two plans for the sector conditional on prior notification of the individual intervention plans constitutes a procedural aspect only. The finding of failure to fulfil the prior notice obligation would therefore have no effect on the assessment of the compatibility of the aid with the plans for the sector. In particular, this failure would not, in any way, prevent the aid in question from being considered to be approved and therefore from existing under Article 88(1) of the Treaty, and paragraph 3 of that Article would not therefore be applicable to it.

(36) The aid measures disputed by the Commission should be deemed to be restructuring aid as they restored the profitability of the recipient undertakings in the medium-to-long term while respecting the prohibition against exceeding the production quotas laid down in the decisions approving the plans for the sector. According to the Italian authorities, the principle of proportionality between the aid paid and the costs and benefits of restructuring has also been respected. The same authorities provided figures intending to prove that the two factories effectively reached economic and financial efficiency.

(37) Moreover, the Italian authorities pointed out that the relationship between the aid granted and the investments made in the two sugar factories during the same period was respected.

(38) In particular, in the Celano sugar factory for which the plan envisaged investments of ITL 93,8 billion (62,8 of which was provided for in the specific plan of 1985 ([13]) approved by the Commission), investments of ITL 105,9 billion were actually made, with intervention by RIBS totalling ITL 84 billion (50 billion of which was provided for in the specific plan for 1985). The grant-equivalent of this aid would be 42,34 % if compared with the investments envisaged in the plan, and 35,81 % if compared with the investments actually made.

(39) In the Castiglion Fiorentino sugar factory, for which the plan envisaged investments of ITL 109,5 billion (62 billion of which ([14]) was provided for in the specific plan of 1984 approved by the Commission), investments of ITL 126,5 billion were actually made, with intervention by RIBS totalling ITL 66 billion (36 billion of which was provided for in the specific plan for 1984). The grant-equivalent of this aid would be 44,51 % if compared with the investments envisaged in the plan, and 36,06 % if compared with the investments actually made.

(40) According to the Italian authorities, the investments made not only concerned the technological modernisation of the machinery but also the improvement of production capacity (expressed as processing potential in tonnes of beet per year). The Italian authorities provided figures to support this statement.

([10]) ECR [1994] I-4635.
([11]) ECR [1994] I-4635, point 24 of the judgment.
([12]) ECR [1994] I-4635, point 25 of the judgment.

([13]) These figures refer to intervention in the two sugar factories which were the property of Nusam at the time (Celano and Strongoli).
([14]) See footnote 13.

(41) It is therefore Italy's view that the restructuring of the two sugar factories did not involve changes in the competitive equilibrium which existed before the implementation of the measures in question, nor an increase in the sugar production quotas in Italy. This is because the aid was not for the benefit of a given company but was for restructuring two sugar factories, whoever they belonged to, in the framework of the objectives established in the plans for the sector.

(42) In particular, PN 84/90 laid down the following:

(a) the intervention by RIBS would constitute a specific instrument for restructuring the sugar sector;

(b) RIBS would act in accordance with the specific intervention plans drawn up for each of the companies to be restructured;

(c) RIBS would use the instruments laid down in Act No 700/83, that is, the stakes, the participatory loans and the loans at a subsidised rate;

(d) the RIBS intervention would upvalue the shareholdings of beet growers in the processing undertakings to a achieve a better agri-industrial balance;

(e) efficiency and the definition of economic management criteria, both for the agricultural component and for the industrial one, were to be considered among the fundamental objectives of the plan;

(f) in central Italy, production was to be concentrated in the Castiglion Fiorentino sugar factory with the closure of the Cecina works;

(g) In southern Italy, Celano was to remain among the sugar factories in production with the closure of the Capua and Avezzano plants;

(h) RIBS intervention was to be availed of to reconfigure the proprietary framework of the plants in new forms for the purposes of achieving higher efficiency in the whole sector.

(43) In updating PN 84/90 (PN 91/96), note was taken that the RIBS intervention implementing the 1984 sector plan involved stakes amounting to an overall sum of ITL 84 billion and loans amounting to a total of ITL 327 billion. It was also found that it was necessary to limit the intervention to existing plants, the need to continue with the creation of an industrial processing pole in Central Italy was confirmed, and the use of new resources for intervention by RIBS was envisaged on the basis of the specific intervention plans.

(44) According to the Italian authorities, the specific intervention plans for the investments in Celano and Castiglion Fiorentino, approved by CIPE, clearly show that the objective pursued by public intervention was the agricultural and industrial restructuring of the beet and sugar sector in accordance with the national plans for the sector and with Article 46(4) of Regulation (EEC) No 1785/81.

(45) In particular, again according to the Italian authorities, the industrial restructuring objective was achieved, *inter alia*, by concentrating the processing activities in the two sugar factories in question, with the closure of the other three works at Cecina, Avezzano and Latina, while the technical, economic and financial concentration of the processing activities in one plant gave rise to benefits in terms of economies of scale and the jobs were maintained without having to make use of State welfare mechanisms. The objective of the participation of the beet growers in the industrial activities was achieved by the participation of the beet growers' national finance company, Finbieticola, in the capital of the company which owns the Castiglion Fiorentino plant. The companies which benefited from the RIBS intervention regained lasting profitability and were able to satisfy the conditions for the reimbursement of the RIBS loans and stakes. The objective of maintaining the agricultural supply basins (and therefore the income of the operators in the beet sector) was achieved without increasing the production capacity of the aforesaid basins. According to the Italian authorities, the latter would have been dispersed without the intervention, because the other processing plants are located at a distance of over 250 km compared with Celano and Castiglion Fiorentino and because, under Community provisions which fix the intervention price of sugar, the compensation of transport costs is such as to cover a distance of 50 km only.

(46) From a more general point of view, the Italian authorities underlined that the Commission looks favourably on the privatisation of public companies. According to the Italian authorities, both in the case of Celano (the property of Nusam, a company in which regional public bodies had holdings) and in the case of Castiglion Fiorentino (belonging to Castiglionese, a company controlled by Federconsorzi) the intervention led to real and effective privatisation.

(47) The Italian authorities maintain that no aid was provided for the purchase of the two sugar factories.

(48) In both cases in fact, the property transfer operations took place in the framework of the liquidation procedures under the control of the competent bankruptcy court. Any other operator interested would have been able to reply to the sales offers on the same conditions and the RIBS intervention in favour of the purchasers occurred after the transfer of the property.

Respect for the Community guidelines on State aid in favour of companies in difficulty

(49) With regard to respect for the conditions laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty, the Italian authorities made the following comments.

— *Restoration of profitability*: the aid granted by RIBS came within a specific technical and financial restructuring plan aimed at restoring the long-term profitability of the firm. This objective was achieved in the case in question: the companies which benefited from the intervention regained industrial, economic and financial efficiency.

— *Absence of distortive effects on competition produced by the restructuring aid*: this condition was respected as the production capacity resulting from the RIBS intervention did not exceed the national quota assigned to Italy, nor the quota relating to the beet production basins covered by the plans. Furthermore, as the restructuring of the two sugar factories was accompanied by the closure of the nearby plants, the RIBS aid did not affect the production of sugar beet in the basins in question.

— The RIBS aid which preceded the specific 1990 and 1992 intervention plans must be deemed to be *rescue aid* as defined in the relevant Community guidelines as it referred to temporary measures, aimed at supporting the recipient undertakings awaiting restructuring.

Intervention for restructuring the Celano sugar factory

(50) According to the Italian authorities, the RIBS intervention in favour of the Celano sugar factory should be assessed in the light of the following considerations.

(51) During 1988, the financial situation of Nusam, proprietor of the two sugar factories at Celano and Strongoli, made it impossible to achieve the objectives set when adopting the 1984 specific intervention plan, approved by the Commission in 1985. In fact, the 1988 financial year concluded with overall losses amounting to almost ITL 16 billion, of which ITL 6 billion was for operating losses at the Strongoli plant.

(52) The analysis of the financial figures showed that it was possible to keep the Celano sugar factory in operation (its balance sheet for the same year showed a surplus of about ITL 2,8 billion), while the impossibility of maintaining the Strongoli plant was also evident. Excessive financial charges connected with the company's short-term debts were also found.

(53) The company's situation described in a report to the Agriculture Ministry after the approval of the 1988 balance sheet highlighted the need for short-term loans of ITL 39 billion lire (over and above the debt to RIBS for reimbursement of the ITL 35 billion loan granted in implementation of the 1984 specific intervention plan).

(54) Given the situation, the Ministry of Agriculture made a decision in principle to separate the destinies of the two sugar factories so as to prevent the probable bankruptcy of Nusam from leading to the closure of the Celano pant, and to hand over its management to Sadam, the company which had leased it.

(55) To implement the provisions, with decisions dated 12 September 1989 and 2 February 1990 (see points 15.2 and 15.3), CIPE authorised RIBS to provide a surety of ITL 2 billion in favour of Sadam, on one hand, to guarantee Nusam's tax obligations and, on the other hand, to provide a surety to guarantee Nusam's debts to Sadam for the investments made by the latter during the lease period (ITL 11 billion).

(56) On 2 March 1990, to permit the leasing of the Strongoli sugar factory, which would not have been possible if the company had been declared bankrupt, it was decided at a Nusam shareholders' meeting to cover the losses for the 1998/89 year (amounting to ITL 31 037 million in ways which included writing off the capital stock (ITL 26 billion) and converting a part of the RIBS credit (ITL 1 542 million) At the same time, the meeting decided to reconstitute Nusam's capital stock by converting another part of the RIBS credit (ITL 954 million) and using payments from other shareholders (ITL 1 530 million) (see point 15.4.).

(57) On 18 October 1990, Nusam made an application to the Court of Rome for an arrangement with creditors with the transfer of assets. The application was accompanied by an offer from Sadam, its lessee, to purchase the Celano sugar factory.

(58) The purchase offer envisaged the following:

(a) a purchase price of ITL 26 billion, 15 billion of which consisting of the assumption by the purchaser of a part of Nusam's residual debt to RIBS ([15]), and ITL 11 billion represented by waiving the credit against Nusam for a sum con-esponding to the costs borne by Sadam for the investments made when it was the lessee of the plant;

([15]) The remainder of this credit (ITL 17 504 million) was lost following the declaration of bankruptcy by Nusam.

(b) the restitution to RIBS of the sureties provided to Sadam;

(c) the employment of the workforce of the Celano sugar factory by the new proprietor.

(59) In a judgment of 18 July 1991, the bankruptcy court approved the arrangement and authorised the conclusion of the contract for the sale of the Nusam-owned plant to Sadam Abruzzo SpA of the Sadam group.

(60) According to the Italian authorities, the entire sales procedure took place under the control of the court, which could have taken account of any other purchase offers from any other interested parties.

(61) The Strongoli sugar factory was closed by Nusam at the end of the 1992 financial year.

(62) It is in this context that the aid in the CIPE decision on 26 July 1990 (see points 15.5 and 15.6) must be assessed, as it regarded measures aimed at preventing the bankruptcy of Nusam and, as a consequence, the dispersion of the Celano business (positive profitability or goodwill, production quotas, supply basin, employees). The abovementioned CIPE decision and the specific relevant intervention plan effectively assured that the aims of the plan for the sector were achieved, i.e., the concentration of the processing activities, the maintenance of the beet growing basins and the completion of the technical restructuring of the plants.

(63) The Commission believes that the price paid by Sadam for the sugar factory is lower than the real value of the property but according to the Italian authorities the calculated value of ITL 31 800 million was effectively an estimate of the value of the property which did not take account of the negative profitability (bad will) of Nusam at the time of the contract.

(64) The new specific plan established by the abovementioned decision also obliged Sadam to make investments amounting to several tens of billions of lire.

(65) Bearing in mind the above, the measures implementing the CIPE decision of 26 July 1990 should be considered to constitute a restructuring plan aimed at modernising the plant, reducing the production costs and restoring medium-to-long term profitability.

(66) The restructuring of the machinery in the Celano sugar factory irivolved modernising all the production stages. The investments made produced the following results:

(a) an increase in processing capacity from 3 700 to 7 500 tonnes of beet per year, thereby assuring the acceptance of all the beet production in the interested basin after the closure o the Avezzano and Latina plants;

(b) an increase in the crystallising capacity from 480 to 800 tonnes per day, which allowed reduction in the storage costs of liquid products;

(c) a reduction in energy consumption from 402 to 320 kg of fuel oil per tonne of sugar;

(d) the creation of a plant for drying the pulp.

(67) With regard to the aid in the CIPE decisions of 12 April 1988 and of 28 June 1990 (see points 15.1 and 15.4), i.e. the participation of RIBS in the re-capitalisation of Nusam in two stages, the first of ITL 5 billion in 1988 and the second of ITL 25 billion in 1990, the Italian authorities maintain that they are justified by the fact that the intervention plan for 1985 in favour of the Celano plant (approved by the Commission) was modified in 1987 to increase the volume of the investments provided for (supplementary investments of ITL 13 billion). Moreover, the scope of this aid was to safeguard the interests of RIBS as a Nusam shareholder and not to compromise the implementation of the new guidelines in the revised plan for the sector (in particular the creation of the sugar pole in central Italy).

(68) The aid referred to in points 15.2 and 15.3 (CIPE decisions of 12 September 1989 and of 2 February 1990) took the form of guarantees provided by RIBS in favour of Sadam, lessee of the sugar factory, to cover Nusam's obligations of a tax nature relating to the activities of Nusam itself during the period prior to leasing the plant, and to cover Nusam's debt to Sadam for investments made by the latter during the period of the lease (the sureties amounted respectively to ITL 2 billion and to ITL 11 billion. In this regard, the Italian authorities underlined that the sureties provided by RIBS did not involve actual allocations of financial resources, as they were not invoked and that, moreover, they were not provided to cover loans but to cover contractual obligations. The two guarantees were 'returned' (sic) by Sadam to RIBS when the Celano sugar factory was purchased.

Intervention for restructuring the Castiglion Fiorentino sugar factory

(69) In the opinion of the Italian authorities, the aid in the form of a guarantee provided for in the CIPE decision of 2 August 1991 (see point 16.1) was justified by the crisis in Federconsorzi, the controlling shareholder of Castiglionese, with the consequent suppression of the bank credits in favour of the controlled companies. In particular, at the beginning of the 1991/92 financial year, Castiglionese had to apply for judicial settlement without, therefore, being able to guarantee payment for the beet to the beet growers.

(70) The ITL 41 billion surety provided by RIBS to Castiglionese was to guarantee any loans granted by the banks to Castiglionese to pay the beet growers. Moreover, it was not used to guarantee effective lines of credit from the banks, but had in fact the function of providing an external guarantee to the beet growers, as the banks had granted Castiglionese advances guaranteed exclusively by pledging the sugar subsequently produced.

(71) According to the Italian authorities, the RIBS intervention provided for in the CIPE decision of 16 April 1992 (see point 16.2) should be considered as intervention implementing PN 1984/1990 and PN 1991/1996. Its scope was to ensure the continuity of the processing activities in the only sugar factory in the beet producing basin in Tuscany and Umbria without compromising the intervention already made by RIBS in favour of the Castiglion Fiorentino plant (among other things, the recovery of the loans at subsidised rates was endangered by the Federconsorzi crisis).

(72) In particular, the Italian authorities do not agree with the Commission's analysis according to which the intervention implemented on the basis of the same decision can be deemed to be aid for the purchase of the Castiglion Fiorentino sugar factory in favour of Sadam, for the following reasons.

(73) The sale of the Federconsorzi shares in Zuccherificio Castiglionese SpA was carried out under the control of the bankruptcy court of Rome in the framework of the arrangement with the Federconsorzi creditors. Therefore, as the sale took place in compliance with the rules adopted by the court and after all the interested operators had been invited to take part, it is evident, according to the Italian authorities, that any other successful bidder would have been able to benefit from the RIBS intervention on the same terms as Sadam. The abovementioned sales rules and the call for bids from Sadam, and from the other company which had shown interest in taking part, were sent to the Commission.

(74) The intervention approved by the CIPE decision of 16 April 1992 did not therefore refer to a precise recipient but concerned any possible successful bidder in response to the sales offer who could meet the conditions fixed in the decision.

(75) The extension of the RIBS stake in Castiglionese's capital (under current rules, this possibility is subject to the condition that the beet growers can take shareholdings in the recipient company) was granted following the transfer by Sadam to Finbieticola SpA of 35 % of the Castiglionese shares at the same sales price. Finbieticola S.p.A. also purchased 35 % of the shares corresponding to the increase in capital made by RIBS (payment over fifteen years without interest) and undertook to redeem a further 35 % of the shares RIBS bought with its first stake in the Castiglionese capital, after fifteen years from the transfer of the above shares.

(76) The plant restructuring in the Castiglion Fiorentino sugar factory consisted of modernising some of the machines and replacing others. The investments made gave the following results:

(a) an increase in the processing capacity from 3 500 to 8 500 tonnes of beet per day, permitting the factory to purchase all the production in the basin after the closure of the Cecina processing plant;

(b) an increase in the crystallising capacity from 400 to 850 tonnes per day, leading to a reduction in the storage costs for liquid products;

(c) the reduction of energy consumption from 368 to 302 kg of fuel oil per tonne of sugar;

(d) restructuring and increasing the power of the machinery for pressing and drying the pulp;

(e) upgrading of the machinery to meet current environmental regulations.

(77) According to the Italian authorities, the aid granted over the years by RIBS in favour of Nusam, Castiglionese and Sadam Abruzzo for restructuring the two sugar factories at Celano and Castiglion Fiorentino allowed the following objectives to be achieved:

(a) the completion of the investment plans, whose realisation would not otherwise have been possible to the considerable detriment of the investments already made by RIBS in the recipient companies;

(b) the concentration of the technical, economic, financial and commercial management in a single undertaking, making economies of scale possible;

(c) the establishment of a sugar production pole in Central Italy, an objective laid down in the national plan for the sector, with the reduction of the average supply distance and the modification of the raw material harvesting conditions to better adapt them to the needs of the producers;

(d) the participation of the growers in the management of the processing undertaking (for the Castiglion Fiorentino sugar factory only);

(e) maintenance of employment;

(f) restoration of the profitability of the undertakings;

(g) the restructuring of production capacity (with an overall drop in the processing capacity of beet per day in the supply basins involved following the closure of the three plants at Cecina, Avezzano and Latina).

(78) The RIBS intervention in the undertakings mentioned in point 76 was, on the one hand, exclusively destined for investment and modernisation plans (excluding any operating aid) and, on the other hand, entirely in accordance with the objective, laid down in the plans for the sector, to maintain activity in the two sugar factories at Celano and Castiglion Fiorentino so as to ensure the survival of the beet basins involved in the closure of the other processing plants.

VI. ASSESSMENT OF THE AID

Application of Article 87(1) of the Treaty

(79) Pursuant to Article 44 of Regulation (EEC) No 1785/81, Articles 87, 88 and 89 of the Treaty are applicable to the sugar production and marketing sector.

(80) It is the view of the Commission that the various benefits granted by RIBS to Nusam, Sadam Abruzzo and Castiglionese constitute State aid subject to the provisions of Article 87(1) of the Treaty. It was funded with national resources (the capital of RIBS is 100 % publicly owned) and distorts competition by favouring some undertakings with respect to their competitors. According to the information provided by the Italian authorities, the aid granted was aimed at concentrating sugar production in the affected regions in the two aforesaid factories through the closure of other factories in the same regions. Aid of this kind can also affect trade between Member States to the extent that it favours national agricultural production, by facilitating exports of the product from the Member State involved and obstructing imports of the same product from the other Member States.

Economic data for the sugar sector in Italy [1]	Quantities (million tonnes)	Value (ECU million)
Imports from the Community (sugar)	281,2	209,3
Imports from the Community (isoglucose)	25,0	11,1
Export to the Community (sugar)	57,8	44,5
Export to the Community (isoglucose)	7,4	2,3
Sugar beet production		
Italy	13,3	
Community 15	120,7	
Value of production		
Italy		5 613
Community 15		713

[1] *Source:* Eurostat 1997.

(81) Under Article 46 of Regulation (EEC) No 1785/81, national aid can be granted in Italy by way of derogation from the rules for state aid in the sugar sector, if motivated by exceptional needs associated with the implementation of current restructuring plans for the sector in the country.

Relevance of the 'Italgrani' case law

(82) In the Commission's view, the Italian authorities' observations regarding the criteria to use for assessing the aid cannot be taken into consideration. It can be deduced from the 'Italgrani' case law to which the Italian authorities refer (confirmed by the judgment of the Court of First Instance on 6 July 1995 (Joined Cases 447-449/93 AITEC et al./Commission) [16] that the aid under examination must be assessed in the light of the competition rules in the Treaty.

(83) In the abovementioned 'Italgrani' judgment, the Court of Justice considered that the Commission, when it examines an individual aid measure which, it is maintained, has been granted on the basis of a scheme which has already been approved, cannot immediately examine it with respect to the Treaty but, before initiating any procedure, must only establish if the aid falls within the general scheme and meets the conditions fixed by the decision to approve the same (see below 32 and 33).

(84) However, the Court also specified that this obligation only exists where the Commission, when approving the general scheme, does not express reservations with respect to the examination of the individual cases of application of the scheme.

(85) In the above-mentioned judgment of 6 July 1995, the Court of First Instance declared [17] that the obligation of specific notification of each aid measure implementing the scheme approved by the Commission constituted a reservation on approval of the same type as that defined in the 'Italgrani' judgment.

(86) It is quite evident that the approval of the national restructuring plans in the sugar sector in Italy (.PN 84/90 and PN 91/96), subject to the explicit condition of prior notification of the specific cases of application of the scheme cannot be deemed to be approval of all the aid provided on the basis of these plans.

[16] ECR [1995] II-1971.
[17] ECR [1995] II-1971, point 129 of the judgment.

(87) It can be seen from the above that, while the Commission must verify that the aid has been provided in accordance with the indications contained in the plans PN 84/90 and PN 91/96, this verification cannot, under any circumstances, exempt it from the obligation to examine the aid's compatibility with the competition rules relating to the various types of aid granted.

(88) The conformity of the measures with the national plans for the sector must be assessed from two points of view: first of all it is necessary to check that the aid granted falls within the type of intervention envisaged in the plans and, secondly, that its objectives and effects correspond with those envisaged in the plans. The result of these two checks must be positive in both cases so as to be able to establish that the aid complies with the national plans for the sector.

Type of aid

(89) The type of intervention envisaged, described in detail in the plans for the sector and in the rules governing RIBS intervention in the sugar sector, involves taking stakes in capital, participatory loans and loans at a subsidised rate. There is no provision for aid involving the granting of public guarantees or waiving credits or guaranteeing credits. Neither is there provision for RIBS to permit the capital of the companies in which it has holdings to be written off to cover the losses, thereby waiving the restitution of the invested capital, or for RINS to intervene in the liquidation procedure aimed at permitting the sale of certain assets in favourable conditions.

(90) Therefore, the following aid agreed by RIBS does not fall within the type of intervention provided for in the national plans for the sector:

1. the aid referred to in points 15.2, 15.3 and 16.1: surety in favour of Sadam Abruzzo granted during the period in which this company was the lessee of the Celano factory and the surety in favour of Castiglionese for the loan of the sums required to start the activities in the sugar factory in the 1991 financial year;

2. the aid referred to in point 15.5: the RIBS intervention in the procedure for the arrangement with creditors of Nusam (waiver of the credit guarantees, deferment of the credit, assent to the transfer of Nusam's residual debt to Sadam in exchange for the Celano factory).

(91) As a consequence, this aid cannot be considered to comply with the national plans for the sector from 1984 to 1990 and from 1991 to 1996, simply because its forms do not correspond with the forms laid down in the relevant national provisions; it must therefore be assessed exclusively in light of the general criteria.

Aid not envisaged in a specific intervention plan

(92) Some of the aid granted is not even envisaged in the specific intervention plans, as required by the national plans for the sector: it was in fact decided to grant it following the discovery of immediate and contingent problems, without the intervention being justified by more wide-ranging planning.

(93) After the beginning of the procedure referred to in Article 88(2) of the Treaty, the Italian authorities forwarded the two CIPE decisions of 26 July 1990 and 16 April 1992 to the Commission; they related respectively to the approval of the new intervention plan in favour of Nusam for the Celano factory and to the new intervention plan in favour of Castiglionese for the Castiglion Fiorentino factory.

(94) The aid measures implemented by RIBS not provided for in the above-mentioned decisions therefore also lie outside the planning framework envisaged in the national plans for the sector. Once again they involve the provision of sureties (see points 15.2, 15.3 and 16.1) and shareholdings in favour of Nusam taken before the CIPE decision of 26 July 1990 (see points 15.1 and 15.4).

(95) In light of the above, it is the view of the Commission that the measures consisting in the provision of sureties by RIBS (referred to in points 15.2, 15.3 and 16.1), in taking stakes in the capital of Nusam (referred to in points 15.1 and 15.4) and in the intervention of RIBS in the procedure for the arrangement with creditors of the same company (point 15.5) do not comply with the national plans for the sector.

Rescue aid

(96) According to the Italian authorities, the measures which do not fall under the type of aid envisaged in the national plans for the sector or which are not envisaged in a specific intervention plan (as required by the national plans) should be considered as rescue aid under the relevant Community guidelines.

(97) This argument cannot be accepted. According to the Community guidelines, State aid for rescuing and restructuring undertakings in difficulty must meet the following requirements:

(a) it must consist of liquidity help in the form of loan guarantees and reimbursable loans provided at an interest rate equivalent to that of the market;

(b) its amount must be limited to that required to maintain the undertaking in business (for example, to cover wage costs, current supplies);

(c) it must only be paid for the period necessary (generally not more than six months) for devising the necessary and feasible recovery plan;

(d) it must be motivated by acute social difficulties and must have no unjustifiable negative effects on the industrial situation in other Member States.

(98) The information available does not make it possible to state that the above conditions have been respected in the case of any of the disputed aid measures.

None of the RIBS loans, stakes or sureties have been granted at an interest rate or premium equivalent to the market rate. As the shareholdings were redeemed at face value at the end of the agreed period, the applicable interest rate was 0 % ([18]). For example, the loan of ITL 11 billion was granted to Sadam Abruzzo for a period of 15 years (at a rate of 2.025 % for the first five years and 8,1 % for the remaining 10 years). No premium seems to have been paid for the provision of the guarantees.

The aid was not destined exclusively to cover the wage costs or the expenses required to run the undertakings for the brief period required for devising the restructuring plan. Furthermore, the duration of all the aid was greater than the six-month period laid down in the guidelines referred to in point 96.

Aid under the national plans for the sector

(99) The other RIBS measures for restructuring the Celano and Castiglion Fiorentino factories (see points 15.6 and 16.2) involved stakes in capital and loans at a subsidised rate, as provided for in the plans for the sector.

(100) With regard to their conformity with the aims of the national plans for the sector, the Commission could accept the arguments made by the Italian authorities to demonstrate that the scope and effect of the aid in question was to achieve the programme objectives described in a general manner in the national plans for the sector, in particular the creation of a sugar production pole in the regions of Central Italy. Other objectives have only been partly achieved: for example, the participation of the growers in the management of the sugar factories was only achieved in the case of Castiglionese, but not in the case of Sadam Abruzzo. Furthermore, on the basis of the indications in the national plans, the specific intervention projects in the factories located in the South of Italy should have contained procedures for implementing activities for supplementing or replacing sugar production. For this purpose, RIBS should have carried out a preliminary feasibility and economic/financial study. The fact remains, however, that none of the specific intervention plans notified by the Italian authorities makes reference to the execution of such a study, nor to its results, or to assessments made by RIBS in this regard.

(101) In any case, for the reasons given above, the conformity of these measures with the national plans for the sector could not, as such, be sufficient to permit the compatibility of the aid with the common market to be declared. Besides, this is why the Commission, when it examined the national plans in question, was only able to give initial approval to the pursuit of the objectives in them (restructuring the sugar sector) and asked the Italian authorities to present the specific intervention plans for the purposes of prior approval, under Articles 87 and 88 of the Treaty.

(102) For all the aid referred to in this Decision, the Commission must therefore decide if it is possible to apply the derogation provisions laid down in Article 87(2) and (3) of the Treaty and if it is possible to apply Article 46 of Regulation (EEC) No 1785/81, under which the aid must be motivated by exceptional needs associated with the current restructuring plans for the sugar sector in Italy.

(103) The Italian authorities' arguments are based essentially on two points: the aid complies with Community guidelines and, secondly, it respects the intensity limits normally taken into consideration for the purposes of assessing aid in favour of investments in the agricultural products processing and marketing sector.

(104) The Italian authorities maintain that all the aid under examination can be considered to be compatible with the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(105) It would seem appropriate to proceed with a separate examination of the aid granted to Nusam and Sadam Abruzzo for restructuring the Celano factory on one hand, and to Castiglionese (before and after it joined the Sadam group) for restructuring the factory at Castiglion Fiorentino, on the other hand.

([18]) The reference rate in Italy was 14,66 % in 1990 and 14,4 % in 1992.

(106) Above all, the aim of the assessment in both cases is to check that a real restructuring plan exists and then, if the plan exists, that it complies with Community guidelines.

Aid to Nusam and Sadam Abruzzo for the Celano factory

Recipient of the aid

(107) In the case of the Celano factory, there is a supplementary problem to be faced first: to identify the recipient of the aid granted by RIBS.

(108) On the basis of the Italian authorities' arguments, the public intervention was made, leaving the proprietor of the factory out of consideration and therefore in favour of the economic entity itself (sugar production in the Celano plant), originally managed by Nusam and then by the new company, Sadam Abruzzo.

(109) This argument must be rejected.

(110) The theory of continuity clashes with the immediate observation that the aid was agreed during the first phase, that is, before the CIPE decision of 26 July 1990, in favour of Nusam as proprietor of the two factories at Celano and Strongoli and, subsequently, pursuant to the aforesaid decision in favour of Sadam Abruzzo.

(111) The Commission could accept this argument regarding the continuity of the 'Celano undertaking' on only the assumption that the transfer of the property had concerned not only the factory (which in fact was the case) but also any other constituent elements of the commercial undertaking, including any liabilities associated with its economic business. In other words, only a succession in the proper sense could justify the position suggested by the Italian authorities. On the basis of the information provided by the Italian authorities, however, Sadam, with the composition procedure, did not take over all of the rights and obligations of Nusam relating to the production activity of the Celano factory.

(112) Moreover, Nusam continued its own business after the sale of the Celano factory to Sadam in its Strongoli factory (the company was declared bankrupt on 29 December 1997).

(113) Contrary to what the Italian authorities affirm, it is the Commission's view therefore that the aid granted by RIBS for the Celano factory must be assessed by distinguishing between aid in favour of Nusam and aid in favour of Sadam Abruzzo.

(114) It remains to be seen if this aid can be considered as a restructuring plan under the Community guidelines as the Italian authorities maintain.

Aid to Nusam

(115) With regard to the aid in favour of Nusam, not covered by the national plans for the sector for the reasons given in points 88, 89 and 90 (the aid referred to in point 15.1, ITL 5 billion stake, and the aid referred to in point 15.4, ITL 2,5 billion stake), there can be no doubt that it is aid in favour of an undertaking in difficulty. In reality, these stakes constitute increases in the capital following reductions in the capital aimed at covering the undertaking's operating losses. They do not respect the principle of the private investor because, as they were intended to cover operating losses, the possibility of obtaining an acceptable income was minimal. They do however constitute intervention by RIBS in the capital of Nusam, decided case by case following the ascertainment of the existence of financial difficulties in the undertaking, and not on the basis of a document which could be defined as a restructuring plan.

(116) The measures referred to in point 15.5, (a) and (b) (waiver of the mortgage, and deferment of the credit which became unsecured) were formally taken in favour of Nusam. However, as they were part of a more complex operation included among the intervention measures in the CIPE decision of 26 July 1990 (relating to the purchase of the Celano factory by Sadam Abruzzo) their effects will be analysed in the framework of the assessment of the measures implemented by RIBS in applying the decision.

(117) These measures do not meet the requirements enabling them to be considered rescue aid under the relevant Community guidelines (points 96 to 98).

(118) These Community guidelines require that aid for restructuring be granted under a restructuring plan which permits the restoration of the undertaking's long-term economic-financial efficiency within a reasonable time span, on the basis of realistic hypotheses regarding the future operating conditions. The aid must be linked to a restructuring plan to be submitted to the Commission, complete with all the relevant particulars.

(119) The information available clearly shows that the aid granted to Nusam was not part of any restructuring plan aimed at restoring the economic-financial efficiency of the undertaking. The aim of the aid, and the effect achieved, was to guarantee the survival of the undertaking which was in serious financial difficulty, so as to be able to adopt suitable reorganisation measures in Nusam to eliminate the causes.

(120) The aid under examination cannot therefore be considered as aid for restructuring as envisaged in the relevant Community guidelines.

(121) The Italian authorities' second argument was the affirmation that the aid made it possible to make investments in the Celano factory.

(122) However, the Commission did not receive any piece of information which made it possible to verify the existence of an investment plan and the indispensable link between the granting of the aid and the realisation of investments by Nusam. The Italian authorities did not demonstrate that the aid was granted to Nusam to allow it to make investments or, in other words, that these investments (which were not identified, moreover) could not have been made without the aid under examination.

(123) Therefore, the aid consisting of stakes in the capital of Nusam for a sum of ITL 5 billion and one of ITL 2,5 billion took the form of operating aid in favour of the recipient undertaking.

(124) Taking the above, and the financial situation of Nusam in particular, into account, the value of the aid to take into consideration is that of a non-recoverable grant for an amount corresponding to the two consecutive stakes mentioned above (ITL 2,5 billion and ITL 5 billion), which were never repaid to RIBS. On the other hand, it is necessary to note that the RIBS stakes in the Nusam capital were lost definitively following the bankruptcy of the latter on 29 December 1997. This aid must be considered operating aid which is contrary to the constant general practice of the Commission as regards the implementation of Articles 87, 88 and 89 of the Treaty (judgment of the Court of First Instance, 8 June 1995, Case T-459/93- *Siemens/Commission* [19].

(125) In light of the above, the aid in question cannot benefit from any of the derogations provided for in Article 87(2) and (3) of the Treaty.

Aid to Sadam Abruzzo as lessee of the Celano factory

The sureties

(126) Two sureties were provided for Sadam Abruzzo during the period in which this company was lessee of the Celano factory (aid referred to in points 15.2 and 15.3).

(127) For the reasons given in point 95 this aid was not covered by the national plans for the sector.

(128) As the Commission stated when initiating the procedure, this aid must be assessed in light of the criteria applicable to State guarantees [20]. In reply to the Commission's objection, the Italian authorities provided no elements to demonstrate that these criteria were respected in the case in question.

(129) The statement by the Italian authorities that the two sureties were never made use of is not relevant either, as the advantage is created by the public guarantee at the moment when it is provided and not exclusively when it is effectively availed of. In accordance with point 38 of the Commission communication concerning the application of Articles 87 and 88 of the Treaty and of Article 5 of Commission Directive 80/273/EEC to public undertakings in the manufacturing sector [21], which, in the case of guarantees, are applicable indifferently to public and private undertakings, the conformity of measures of this type must therefore be examined at the moment in which they are granted. The assessment of the element of aid contained in the guarantees also depends on the financial situation of the recipient undertakings.

(130) As the sureties in this case were granted to an undertaking which was not in financial difficulty, their value does not correspond to the guaranteed sums ITL 2 billion + ITL 11 billion), but to the market price which Sadam would have had to pay for guarantees provided by financial institutes in similar conditions of risk.

(131) The Commission therefore confirms the reasoning made at the time the procedure was initiated. It confirms that the aid granted by RIBS to Sadam in the form of sureties cannot benefit from any of the derogations provided for in Article 87(2) and (3) of the Treaty, as its form was that of operating aid, which does not meet the requirements laid down in the Community rules applicable to aid granted in guarantee form or the criteria laid down in the Community guidelines for State aid in favour of undertakings in difficulty.

Aid associated with the transfer of the Celano factory from Nusam to Sadam

(132) The CIPE decision of 26 July 1990 envisaged a series of intervention and aid measures aimed at preventing the bankruptcy of Nusam and to permit the sale of the factory at Celano by Nusam to Sadam Abruzzo (1990 specific intervention plan).

The measures implemented involved:

(a) waiving the mortgage on the Celano factory as a guarantee for Nusam's residual debt of ITL 17,504 billion to RIBS;

[19] ECR [1995] II-1675.

[20] Commission letter to the Member States dated 5 April 1989 and 12 October 1989.

[21] OJ C 307, 13.11.1993, p. 3.

(b) deferring the credit, which in this way became unsecured, until after the other unsecured credits. Following the bankruptcy of Nusam on 29 December 1997, this credit was definitively lost;

(c) selling the Celano factory by Nusam to Sadam Abruzzo, which shouldered the responsibility for the reimbursement of the residual debt of ITL 15 billion to RIBS (on the same reimbursement conditions);

(d) the concession of new pre-amortisation period of five years (exemption from the payment of interest) for the reimbursement of the aforesaid debt of ITL 15 billion;

(e) aid in the form of a stake in the capital of Sadam Abruzzo for a sum of ITL 8 billion;

(f) loan at a subsidised rate for a sum of ITL 11 billion granted by RIBS to Sadam Abruzzo.

(133) This aid comes within a specific intervention plan under the national plans for the sector. It is the Commission's view, however, that not all the aid conforms with the plans for the sector because, as has already been said, some of the measures implemented by RIBS, in applying the aforesaid CIPE decision, do not respect the type of instrument (stake in capital, participatory loan, subsidised loan) made available to RIBS to facilitate the restructuring of the sugar sector in Italy.

(134) The initial intervention of RIBS under the CIPE decision of 26 July 1990 (referred to in point 15.5, (a) and (b)) was aimed at preventing the bankruptcy of Nusam and allowed it to sell the Celano factory to Sadam Abruzzo, which was its lessee. To achieve this objective, RIBS waived the mortgage on the credit of ITL 17,504 billion with respect to Nusam, and this allowed it to apply for a judicial arrangement with creditors. It is important to note that, without the deferment of the RIBS mortgage credit, the conditions laid down in Italian law for an undertaking in difficulty to avail of the arrangement with creditors procedure would not have been met. In order to avail of this procedure, debtors must in fact be able to pay all the preferential credits (such as the RIBS mortgage credit) and 40 % of the unsecured credits. In this case, the initiation of the bankruptcy procedure would have impeded the conclusion of the contract for the sale of the factory to Sadam, as all the assets of Nusam would have been put under judicial control in the framework of the procedure for the liquidation of the company itself, and this could have led to the closure of the factory (see the Italian authorities' comments, point 54).

(135) Such operations could have been considered to be intervention measures which did not involve State aid under Article 87(1) of the Treaty if their aim was to permit the sale of the factory in conditions compatible with the principle of the private investor in a market economy. In reality, things do not seem to have gone like that. The only benefit which RIBS could obtain from the set of operations provided for in the CIPE decision of 26 July 1990 was that Sadam shouldered a further debt (subsidised loan) of ITL 15 billion from Nusam. However, a new pre-amortisation period of 5 years was granted for the reimbursement of the subsidised loan. It should also be remembered that as the assets of Nusam, including the Celano factory (which had a value of 31,8 billion on the basis of an evaluation by independent consultants) exceeded the mortgage value of ITL 17,504 billion. RIBS should have benefited from the partial reimbursement of the second debt of ITL 15 billion.

(136) Now, as it has not been shown that the other private creditors of Nusam would have behaved in the same way by waiving their credits, the Commission feels that such behaviour cannot be considered comparable to that of the private investor in a market economy. The CIPE decision of 26 July 1990, which envisaged the waiver of the RIBS credits and their deferment, was accompanied by a decision to sell the factory to Sadam Abruzzo and by other State aid measures in favour of the company itself. Furthermore, the waiver of the RIBS credits was not accompanied by the waiver of their credits by the other Nusam creditors. By analogy with the Commission communication on the participation of the public authorities in the capital of undertaking [22], the waiver of credits by the public authorities must be proportional to the waiver of credits by the private creditors if the operation is not to be seen as State aid.

(137) This operation must therefore be considered as State aid, as a private investor in the normal conditions of a market economy could not be expected to behave in this way.

(138) Given the above, the true recipient of the aid must be identified. Formally, the recipient was Nusam. It is the Commission's view, however, that this company did not gain any financial advantage from the aid. In this regard, it should be remembered that at the time of the deferment of the debt, Nusam was in a precarious financial position and subsequently went bankrupt. On the other hand, the deferment of the credit did not reduce Nusam's overall indebtedness. The economic effects of this operation were to modify the structure of the order of precedence of the company's creditors. In waiving the mortgage, RIBS waived the precedence

[22] Bulletin 9-1984.

accorded to its credit and passed to the last place after all the other Nusam creditors. The operation did not create any advantage for Nusam which was obliged to reimburse all its creditors in any case, within the limits of its resources.

(139) The deferment and waiver of this credit come within the framework of a set of financial intervention measures, decided on the same date, the only aim of which was to permit the transfer of the Celano factory from Nusam to Sadam. In normal market conditions, in the absence of intervention by RIBS, such a transfer would have been made at market prices so as to optimise the reimbursement of Nusam's creditors. For the reasons given above, it is the Commission's view that the price paid by Sadam for the transfer of the Celano factory was below the market price (see points from 141 to 148). Thus, it is the Commission's view that the sole objective of the operation was the transfer of the Celano sugar factory from Nusam to Sadam in favourable conditions. This is confirmed by the Italian authorities' observations (point 54) in which it is stated that the Ministry of Agriculture had taken the decision to prevent the probable bankruptcy of Nusam leading to the closure of the Celano factory and to hand over its management to Sadam. The Ministry decision was taken before the CIPE decision. The Commission has therefore come to the conclusion that a part of the aid formally granted to Nusam in reality constitutes aid to Sadam for the purchase of the Celano factory. The value of the aid corresponds to the difference between the market price of the factory and the price really paid by Sadam.

(140) This conclusion however does not allow it to be said that the sole economic effect of the deferment of the mortgage debt of ITL 17,504 billion into an unsecured credit was to Sadam's advantage. Bearing in mind the information provided by the Italian authorities, the Commission felt that this measure also constituted aid in favour of Nusam's other creditors. For these reasons, the main effect of the deferment of the credit was to modify the order of precedence of the creditors in the framework of the procedure for the arrangement with creditors. As undertakings must be able to settle all the preferential credits and 40 % of the unsecured credits in order to avail of this procedure, the Commission deemed that the deferment of the credit allowed Nusam's creditors to recover a greater part of their credits than would have been possible without this operation. Following the waiver by RIBS of its 17,504 billion credit, all the creditors would in fact have been able to recover at least 40 % of their credits. If Nusam had been wound up, on the other hand, it would not have been possible to guarantee the liquidation of all the preferential credits and 40 % of the unsecured ones.

(141) As far as the price paid by Sadam for the purchase of the factory is concerned, in initiating the procedure, the Commission maintained that it did not correspond to the effective value of the Celano factory, as resulted from the evaluation made by an expert appointed by RIBS in agreement with Nusam. The estimate of the value of the property to be transferred was in fact ITL 31,8 billion.

(142) The Italian authorities did not dispute either the existence of the evaluation or the estimated sum. They argued that it was merely an estimate of the worth of the property which did not take into account the negative profitability (bad will) in Nusam's balance sheet.

(143) The Commission does not understand, and the Italian authorities have not explained, how Nusam's 'bad will' could have influenced the evaluation of the Celano factory because, with the purchase of the works, Sadam did not take over the obligations connected with the economic activities of the previous proprietor. In other words, the Italian authorities do not explain how the price estimated by the expert was reduced from ITL 31,8 billion to the price offered by Sadam.

(144) Only a sale by public auction would have made it possible to learn the market value of the transferred factory. In the absence of such a sales procedure, the Commission can only conclude that the market price of the Celano factory was higher than the price paid by Sadam.

(145) Compared with the expert's estimate of ITL 31,8 billion, Sadam's offer as the price of the Celano factory was:

(a) the waiver of its credit with Nusam for a sum corresponding to the investments made in the Celano factory during the period of the lease (ITL 11 billion) and

(b) shouldering Nusam's debt (loan at a subsidised rate) of ITL 15 billion to RIBS. RIBS granted Sadam a new pre-amortisation period of five years for the reimbursement of this debt.

(146) The nominal value of the offer (ITL 26 billion) is already lower than the value indicated in the aforesaid estimate (–ITL 5,8 billion).

(147) It is also necessary to consider that:

(a) the economic value of the waiver by Sadam of the debt owed to it by Nusam does not correspond to the amount of the debt itself. On the basis of the available information that the credit was unsecured, the prospects of its reimbursement at the time of the waiver appeared reduced, in the most pessimistic hypothesis, to 40 % of the amount of the debt (i.e., ITL 4,4 billion);

(b) the value of shouldering the subsidised loan which was accorded to Nusam by RIBS must therefore be adjusted in consideration of the reimbursement facilities for this loan (the reduced interest and the pre-amortisation period for the reimbursement of the capital).

(148) In light of the above, it is the Commission's view that the sale of the Celano factory to Sadam Abruzzo was not made at market conditions and that the difference between the price fixed in the CIPE decision of 26 July 1990 and the price established by the expert (ITL 31,8 billion) constitutes state aid in favour of Sadam Abruzzo.

Assessment of the aid in favour of Sadam Abruzzo

Restructuring aid

(149) First of all it is appropriate to see if, as the Italian authorities maintain, this aid can be considered aid for restructuring an undertaking in difficulty in accordance with the Community guidelines for rescuing and restructuring firms in difficulty and, above all, if Sadam Abruzzo could benefit from aid of this type.

(150) In the relevant Community guidelines, a firm permitted to benefit from rescue and restructuring aid is defined as being 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing'.

Elsewhere it is noted that the 'financial weakness of firms that are rescued by their governments is generally due to poor past performance and dim future prospects'.

The guidelines describe the typical symptoms of firms which can benefit from the aid (deteriorating profitability, increasing size of losses, increasing debt and rising interest charges), and it is evident that these symptoms cannot be characteristic of a newly created firm. This also applies to new firms created to take over the activities of a firm in difficulty during a procedure for an arrangement with creditors (in the present case, Nusam was on the verge of bankruptcy which could have been delayed, but not avoided, thanks to the aid granted by RIBS). Point 2.3 of the Community guidelines specifies in fact that the assessment of aid is not influenced by changes in the ownership structure of the recipient business.

(151) The guidelines on national regional aid ([23]) state that aid for taking over a factory which has closed or would close if not purchased can give rise to an advantage for the undertaking in difficulty and that this must be examined in the light of the Community guidelines. In the case in question, the Commission considers that the aid to Nusam does not satisfy the conditions envisaged by the Community guidelines (see points 116, 117 and 118).

(152) Sadam Abruzzo is legally and financially independent of Nusam. The aid granted by RIBS is not therefore for liquidating past debts or improving a situation caused by previous poor management. It was not therefore aimed in reality at restructuring an undertaking in difficulty. On the other hand, the Italian authorities have not provided any elements for concluding that Sadam Abruzzo was an undertaking in difficulty.

(153) It must therefore be concluded that the aid under examination cannot be assessed in light of the Community guidelines.

(154) With respect to the second argument made by the Italian authorities, i.e., that the aid permitted investments to be made in the factories concerned, it is therefore necessary to assess this aid in light of the criteria applicable to investments in the agricultural products processing and marketing sector.

Conformity with the plan for the sector

(155) A preliminary observation must be made: the constant general practice followed by the Commission in assessing aid that States propose to grant is to apply the sectoral restrictions decided for the examination of admissibility to Community co-funding under the various successive Community regulations on the improvement of the conditions for processing and marketing agricultural products (Regulations (EEC) No 355/75 ([24]), (EEC) No 866/90 ([25]) and (EC) No 95/97 ([26]). This procedure was 'codified' with the adoption of the guidelines for State aid in connection with investments in the processing and marketing of agricultural products ([27]).

(156) Among the abovementioned sectoral restrictions is the prohibition on granting aid to the sugar sector.

(157) However, on the basis of Article 46 of Regulation (EEC) No 1785/81 and on the occasion of approving the national plans for restructuring the sugar sector in Italy, the Commission allowed a derogation from this restriction for aid associated with the exceptional needs in these plans (as was the case with the aid for investments in the Celano, Strongoli and Castiglion Fiorentino factories envisaged in the first specific intervention plans in favour of Nusam and Castiglionese, approved by the Commission in 1984 and 1985). These waivers were assessed case by case by the Commission following notification of each of the specific plans.

([23]) OJ C 74, 10.3.1998, p. 9.
([24]) OJ L 51, 23.2.1977, p. 1.
([25]) OJ L 91, 6.4.1990, p. 1.
([26]) OJ L 142, 2.6.1997, p. 22.
([27]) OJ C 29, 2.2.1996, p. 4.

(158) It is the Commission's view for the reasons given above that this aid is not in accordance with the national plans for the sector as it is not among the instruments provided therein to restructure the sugar sector in Italy. The aid cannot therefore benefit from the derogation provision in Article 46 of Regulation (EEC) No 1785/81 for aid motivated by exceptional needs linked with the current plans for restructuring the sugar sector in Italy.

(159) It emerges from this analysis, based on the general criteria regarding State aid, that the type of aid under examination is similar to aid in favour of the purchase of an existing factory, and that this, according to the Italian authorities' claims, should be considered an investment aid.

Investment Aid

(160) The specific intervention plan approved in the CIPE decision of 26 July 1990 provided for a series of aid measures in favour of Sadam Abruzzo as compensation for the following 'investments':

(a) ITL 15 billion used for purchasing the Celano factory;

(b) ITL 11 billion for investments made by Sadam Abruzzo during the period in which it leased this same factory (which explains the existence of a credit of corresponding value of Sadam Abruzzo with respect to Nusam);

(c) ITL 20 billion of new investments (described in detail in the specific intervention plan).

(161) It is the Commission's view that all three of these cost categories cannot be considered as admissible investments under Community rules regarding State aid.

(162) With regard to the sum of ITL 15 billion (price 'paid' by Sadam Abruzzo for purchasing the Celano factory) and without prejudice to what has been set out above with regard to the type and assessment of the aid granted for purchasing this factory, the Commission reiterates its position regarding aid granted to facilitate the simple change of ownership of an existing asset. As it does not imply a sectoral advantage, but constitutes an advantage exclusively for the interested party or parties, such an operation cannot be considered to be aimed at making an initial investment in the Community's sense of the term. According to the guidelines on national regional aid ([28]) in which the constant general practice relating to the specific sector of regional aid is set out, 'initial investment means an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)'. These conditions do not exist in the case under examination.

(163) In any case, this sum regards expenses already borne at the moment in which the aid was provided.

Therefore, with regard to the investments made by Sadam Abruzzo before granting the aid referred to in the CIPE decision of 26 July 1990 (for a sum of ITL 11 billion) it cannot be admitted as aid to investment, by virtue of the fundamental principle governing State aid according to which aid granted to an undertaking must be necessary to achieve the desired result. This principle therefore excludes the admissibility of aid which, given its retroactivity with respect to the effect hoped for (the realisation of investments in this case), is no longer capable of producing the necessary incentive effect (judgment of the Court of Justice of 17 September 1980-Case 730/79-Philip Morris/Commission ([29])).

(164) Therefore, the expenses for investments effectively provided for in the specific intervention plan of 1990 for the Celano factory are exclusively those relating to new investments planned, that is, the investments not yet made on the date the CIPE decision in question was made.

(165) These expenses, which amount to ITL 20 billion, are the only ones which meet the requirements for benefiting from State aid under Article 46 of Regulation (EEC) Nos 1785/81 and the Commission decisions approving the national plans for the sector: this is because they are expenses envisaged in the framework of a specific intervention plan and motivated by exceptional needs connected with the abovementioned national plans (in fact the specific intervention plan considers them necessary for implementing the restructuring of the undertaking). Any aid granted to pay these expenses could therefore have been assessed favourably in the framework of Articles 87 and 88 of the Treaty, taking account of the derogation provided for in Article 46 of Regulation (EEC) No 1785/81.

([28]) See footnote 24.
([29]) ECR [1980] 2671.

(166) As the Celano factory is located in what was an Objective 1 area at the time the aid was granted, the overall amount of the aid that Sadam could have benefited from for making the new investments contemplated in the specific intervention plan should have been limited to 75 % of the admissible expenses (intensity applicable to investments in the processing and marketing sectors for agricultural products in Objective 1 areas). The value of the corresponding aid amounts to ITL 15 billion in gross grant-equivalent.

(167) The aid received by Sadam Abruzzo under the CIPE decision of 26 July 1990 can be assessed as follows.

(168.1) Reduction of the purchase price of the Celano factory.

This aid is equivalent to the difference between the ascertained value of the factory (ITL 31,8 billion) and the price actually paid by Sadam. The effective sum of this price is given by the sum of the real value of shouldering theITL 15 billion loan transferred to Sadam (that is, the face value of the loan less the aid represented by the reduction in the interest rate applied to the loan with respect to the market interest rate, and the concession of a pre-amortisation period for the reimbursement of the loan), plus the waiver of a credit which, for the reasons we have set out, must be calculated as ITL 4,4 billion. This aid is completely incompatible with the common market.

(168.2) New RIBS stake in the capital of Sadam Abruzzo for a sum of ITL 8 billion.

As this is a stake in the capital to be redeemed at face value, the value of the stake must be calculated considering this sum as a loan with an interest rate of 0 %, with a duration equal to that of the stake itself, and with a period of exemption for the reimbursement of the capital with the same duration as the loan. The interest rate which must be used as a basis for calculating the gross grant-equivalent of this aid is the Community reference rate applicable to Italy on the date of the operation (14,66 %).

(168.3) Loan at a subsidised rate for the sum of ITL 11 billion.

The gross grant-equivalent of this aid (which takes into account the reduction of the interest rate and the agreed reimbursement exemption) is calculated using the Community interest rate applicable to Italy on the date the loan was given (14.66 %) as the reference rate.

(169) The aid referred to in points 168.2 and 168.3 is incompatible with the common market as its value expressed as gross grant-equivalent exceeds the sum of ITL 15 billion (20 billion x 75 %), which Sadam Abruzzo could lawfully have received as investment aid.

Assessment of the aid in favour of the other Nusam creditors

(170) The deferment and waiver by RIBS of the mortgage credit of ITL 17,504 billion, converted into an unsecured credit, not only constitutes State aid in favour of Sadam Abruzzo, but also aid in favour of the other Nusam creditors (see point 139).

(171) In light of the Community guidelines, this is not aid in favour of investments nor aid for restructuring undertakings in difficulty. In the absence of other juridical bases, suggested by the Italian authorities or found by the Commission, the aid under examination must be considered operating aid which is contrary to the Commission's constant practice with regard to the application of Articles 87, 88 and 89 of the Treaty (see point 124). This aid must therefore be considered incompatible with the common market.

Aid to Castiglionese relating to the Castiglion Fiorentino factory

Guarantee

(172) The opening of a line of credit of 41 billion lire in favour of Castiglionese for the expenses connected with the 1991 financial year (see the aid referred to in point 16.1) was backed by a State guarantee.

(173) The arguments made in points 126 to 131 are valid for this aid in guarantee form inasmuch as they are compatible. This is operating aid which does not comply with Community rules governing aid in the form of guarantees, not aid in favour of undertakings in difficulty.

Specific intervention plan (decision of 16 April 1992)

(174) With regard to the aid granted to Castiglionese in application of the specific intervention plan approved in the CIPE decision of 16 April 1992, the Italian authorities also put forward two arguments for its conformity with the guidelines on aid to firms in difficulty, that it is restructuring aid and that it is compatible as it is investment aid.

Conformity with the Community guidelines on State aid for restructuring firms in difficulty

(175) It is the Commission's view that the aid in favour of Castiglionese does not comply with the Community guidelines on aid for restructuring firms in difficulty.

1. *It does not concern a restructuring plan within the meaning of the Community guidelines*

(176) To overcome the difficulties of Castiglionese, the 1992 specific intervention plan envisaged granting a series of aid measures for reducing the financial costs of indebtedness to RIBS (extension of the stake taken by RIBS in 1984, conversion of a part of the credit into capital — ITL 20 billion out of a total of ITL 24 billion due to RIBS, spreading the residual debt over 15 years) on one hand, and, on the other hand, provided the company with fresh resources (a new stake for a given period for ITL 10 billion and a new subsidised loan of ITL 20 billion).

(177) On the basis of the Community guidelines, a restructuring plan for firms in difficulty must allow the long-term 'economic-financial efficiency of 'the undertaking to be restored within a reasonable time span, on the basis of realistic hypotheses regarding the future operating conditions. The specific intervention plan approved by the CIPE decision of 26 April 1992 cannot be considered to be in accordance with this definition of a restructuring plan.

(178) Aid for restructuring must in fact be linked to a programme for the reorganisation of the undertaking, presented to the Commission with all the necessary details. Furthermore, the restoration of the undertaking's profitability must be obtained principally by means of internal measures envisaged in the restructuring plan.

(179) The 1992 specific intervention plan, on the other hand, limits itself to listing the financial needs of Castiglionese without seeking and analysing the causes of its difficulties which dated back to the firm's previous management: it refers exclusively to factors outside the undertaking itself, such as the changes made to the Community rules in the sugar sector and the negative impact on the sector of the GATT negotiations, in particular in terms of the reduction of Community aid.

(180) As a consequence, no measure for the internal reorganisation of the undertaking is envisaged. The only obligations for the recipient of the aid in the 1992 specific intervention plan are, in fact, the obligation to guarantee the continuity of the beet supply basin and to complete the restructuring of the plant. These measures cannot be considered reorganisation measures within the meaning of the Community rules.

(181) The plan transmitted to the Commission after the procedure was initiated does not even make reference to the future management conditions of the undertaking, except in such vague terms that it is impossible to trace the presence in them of realistic hypotheses regarding the future conditions of long-term profitability.

(182) The Commission therefore considers that the 1992 specific intervention plan does not constitute a restructuring plan under the relevant Community guidelines, as it contains no precise indications to permit the verification, on one hand, of reasons for the undertaking's difficulties and the existence of internal reorganisation measures and, on the other hand, the effectiveness of the solutions proposed and adopted.

2. *Prevention of undue distortion of competition*

(183) In any restructuring plan it is necessary to adopt measures to attenuate the unfavourable repercussions of the aid on competitors as much as possible.

(184) When, as in the case under examination, there is overcapacity in the market in which the recipient operates, the restructuring plan must contribute, in proportion to the aid received, to the restructuring of the sector which serves this market in the Community through an irreversible reduction of the production capacity or closure of plants.

(185) There has been structural over-capacity in the sugar sector for years. This is why a system of national production quotas was established in the framework of Regulation (EEC) No 1785/81, forbidding the granting of any new aid for investments in the sector. The latter prohibition expresses the constant preoccupation with the prevention of increases in production capacity in a particularly sensitive sector.

(186) The 1992 specific intervention plan does not envisage any reduction in the production capacity of the recipient undertaking.

(187) The rule, laid down in the Community guidelines, according to which the recipient of aid for restructuring must proceed with an irreversible reduction in production capacity and the closure of plants can be tempered if it is shown that a reduction in capacity would risk creating a clear deterioration in the structure of the market, giving rise, for example, to monopoly or oligopoly situations in the strict sense. This was not demonstrated in the case in question.

(188) In this regard, the Italian authorities state that they respected the condition imposed by the Commission, when approving the national plans for the sector, and that in no case must the aid for restructuring lead to the national sugar quota assigned to Italy being exceeded.

(189) This last condition, however, is different from the one laid down in point 3.2.2.(ii) of the Community guidelines which aims at safeguarding the free play of competition in a given market, whether or not it is subject to quantity limits fixed globally at the level of each Member State.

(190) The Italian authorities also state that the increase in production capacity in the Castiglion Fiorentino factory (from 3 700 to 7 500 tonnes of beet processed per day) would have permitted the collection and processing of all the beet produced in the beet basin which the factory previously shared with another sugar factory located at Cecina, after the closure of the latter. The conditions for this closure and any link between it and the restructuring plan for Castiglionese were not specified.

(191) The existence of factual elements which would permit exemption from the rule according to which, in cases of this kind, the restructuring must be accompanied by a reduction in production capacity must be considered not to have been demonstrated.

3. *Proportionality of the aid to the costs and benefits of the restructuring*

(192) According to this third criterion, restructuring aid must be limited to the minimum strictly necessary to permit restructuring. This criterion is respected when several conditions are present. On one hand, the recipient of the aid must contribute in a significant manner to the restructuring programme, both using funds of its own and with recourse to borrowing at market conditions. On the other hand, the aid must not unduly reduce the undertaking's financial costs, allowing the recipients to avail of supplementary liquidity which could be used for aggressive and perturbing initiatives on the market, without any relationship to the restructuring process. In any case, the aid must not be used to finance new investments which are not necessary for the restructuring operation.

(193) These conditions have not been respected in the case of the aid in question.

(194) The information available-shows, in fact, that the restructuring was financed with resources provided exclusively by RIBS. In the CIPE decision of 26 April 1992 and in the specific intervention plan approved as a result of it, no reference is made to costs of the restructuring process to be borne by the recipient. The only obligation the Castiglionese sugar factory had to respect in order to benefit from a financial shareholding (not quantified, moreover) was to complete the restructuring of the plant. This is a case of the recipient participating in the investment costs (most of which were not indispensable for restoring profitability within a reasonable time) and not of its participation ('in a significant manner' as requested by the guidelines) in the global costs of restructuring the undertaking.

(195) On the other hand, it is necessary to note that, on the basis of the information available, the aid paid to Castiglionese in implementing the 1992 specific intervention plan not only allowed a part of the company's overall debt to RIBS, amounting to ITL 32 billion, to be converted into share capital, with the obligation of redemption of the shares at face value - after ten or fifteen years, depending on the case - and the spreading of the residual debt in favourable conditions, but also allowed investments for an overall sum of ITL 47,5 billion (envisaged in the specific intervention plan) to be made.

(196) These investments, however, were not all necessary for the purposes of restructuring. On the basis of what was envisaged in the 1992 specific intervention plan, overall investments of 10 billion lire were considered to be required immediately to permit the continuance of the activities in the Castiglion Fiorentino factory. However, the 1992 specific intervention plan envisaged investments amounting to ITL 2,5 billion for the 15 years of RIBS intervention (amounting to ITL 37,5 billion overall) for the 'normal technological upgrading' of the machinery: such investments cannot be considered necessary under the guidelines for restructuring aid.

(197) In light of the above, the Commission considers that the aid under examination excessively alleviated the financial burden of the Castiglionese sugar factory and this allowed the company, among other things, to fund an investment plan which was not strictly limited to what was required for restructuring purposes.

(198) It must therefore be concluded that this aid does not comply with the relevant Community guidelines.

(199) Similarly to what was said regarding the aid granted to Nusam and to Sadam Abruzzo, the Italian authorities' second argument, according to which the aid granted to Castiglionese could be approved as it is investment aid, remains to be verified. To be considered compatible with the common market, it must first be seen to be necessary for restructuring the sugar sector in Italy and, secondly, it must respect the maximum intensity applicable to aid of this kind in the region involved at the moment the aid was granted.

(200) With regard to the first of these two conditions, it is only necessary to recall the terms used in the 1992 specific intervention plan according to which a part ITL 37,5 billion of the investments envisaged was destined for the normal technological upgrading of the machinery. Given this, the Commission has no grounds for concluding that these investments were necessary for restructuring the company or for restructuring the sugar sector in Italy.

(201) The situation is different, on the other hand, for the investments the specific intervention plan considers indispensable if the activity of the sugar factory is to continue. This expenditure, which amounts to ITL 10 billion is the only item which meets the requirements for benefiting from State aid under Article 46 of Regulation (EEC) No 1785/81 and the Commission decisions which approved the national plans for the sector: it does, in fact, come within a specific intervention plan and is motivated by exceptional needs linked with the plans for the sector (in fact the specific intervention plan considers it necessary for implementing the restructuring). Any aid granted to make these investments could therefore have been favourably assessed under Articles 87 and 88 of the Treaty, taking account of the derogation provided for in Article 46 of Regulation (EEC) No 1785/81.

(202) As the Castiglion Fiorentino factory is located in a region which is not in an Objective 1 area (nor was it in one when the aid was provided), the overall amount of the aid which Castiglionese could have received to cant' out the new investments envisaged in the specific investment plan should have been limited to 55 % of the permitted expenses (intensity applicable to aid for investments in the agricultural products processing and marketing sector in areas other than Objective 1 regions).

(203) The value of the corresponding aid therefore amounts to ITL 5,5 billion in gross grant-equivalent (10 billion x 55 %).

(204) To calculate the value of the aid, the Commission believes that even if Castiglionese could have been considered a firm in difficulty, this value cannot correspond to the total of the sums of the loans and RIBS stakes. The Commission does not in fact have any elements which allow it to conclude that, at the time the loans and stakes were provided, Castiglionese would not have been able to reimburse them. Furthermore, according to the Italian authorities, the dates for the reimbursement were rigorously respected. The value of the aid Castiglionese received in implementation of the CIPE decision of 16 April 1992 must be calculated as set out in points 204.1, 204.2 and 204.3:

(204.1) Extension for an additional period of ten years of the 12 billion lire stake taken in 1984.

The value of this stake corresponds to that of a loan at a rate of 0 % for a period of 10 years, with the exemption of the reimbursement of the capital for a period of the same length (10 years). The interest rate to take into consideration for calculating the grant-equivalent of this aid is the Community reference rate on the date the aid was provided (14,4 %);

(204.2) The value of the conversion into capital of a ITL 20 billion debt and of the stakes in the capital of the company for ITL 10 billion.

This is calculated taking into account the fact that each stake is the equivalent of a loan at zero interest for a period equal to that during which the stake is held, with a pre-amortisation period equal to the life of the loan. The interest rate to take into consideration for calculating grant-equivalent of this aid is the Community reference rate on the date the aid was provided (14,4 %). Any other financial advantage which accompanied the conversion of the ITL 20 billion debt into capital must also be included in the calculation (for example, writing off the interest due on the date of conversion of the debt).

(204.3) Spreading of the residual debt of 4 billion lire and the subsidised loan of ITL 20 billion over fifteen years.

The gross grant-equivalent of this aid (which takes into account the reduction in the interest rate and the pre-amortisation period accorded) is calculated using the Community reference rate on the date the aid was provided (14,4 %).

(205) Therefore, the part of the aid referred to in point 204 which exceeds the sum of ITL 5,5 billion in gross grant-equivalent which Castiglionese could lawfully receive as investment aid is not compatible with the common market.

Aid for purchasing Castiglionese

(206) The intervention approved in the CIPE decision of 16 April 1992 cannot be considered as aid for purchasing the controlling share package of Castiglionese.

(207) This is because this intervention did not have a precise recipient but was directed towards the potential awardees of the public sales procedure, provided that they met the requirements laid down in the decision. A public sales procedure was carried out under the control of the Bankruptcy Court of Rome in the framework of the arrangement with the Federconsorzi creditors, and all the operators were invited to participate in the auction.

VII. **CONCLUSIONS**

(208) As it was not notified to the Commission under Article 88(3) of the Treaty, the aid which is the subject of this Decision was paid unlawfully, that is, without waiting for the Commission to decide on its compatibility with the common market.

(209) Furthermore, for the reasons already set out, it is incompatible with the common market as it comes under the prohibition referred to in Article 87(1) of the Treaty and cannot benefit from any of the derogations specified in paragraphs 2 and 3 of the same.

(210) In the event of incompatibility of aid with the common market, the Commission must exercise its power recognised by the judgment of the Court of Justice of 12 July 1973 in Case 70/72-Commission/Germany ([30]) confirmed by the judgments of 24 February 1987 in Case 310/85-Deufil/Commission ([31]) and of 20 September 1990 in Case C-5/89-Commission/Germany ([32]), and order the Member State to recover any unlawfully paid aid from the recipients. Recovery is necessary to restore the previously existing situation, and to eliminate the financial advantages the recipients of the unlawfully paid aid were able to enjoy unduly from the date on which the aid itself was paid.

(211) The aid must be repaid in accordance with the procedures of Italian law. It must be quantified by the Italian authorities in accordance with the criteria set out in this Decision. The sum obtained from the application of these criteria shall bear interest from the date on which the aid was granted to the moment of its effective recovery. It shall be calculated on the basis of the market rate, with reference to the rate used for calculating the grant-equivalent in the framework of regional aid.

(212) This decision is without prejudice to the measures which the Commission may decide to implement for the funding of the common agricultural policy in the framework of the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

1. The following aid which the Italian authorities granted through the public company, RIBS SpA, is incompatible with the common market:

(a) aid to Nusam SpA in the form of stakes in its capital of ITL 5 billlion (12 April 1988) and ITL 2,5 billion (2 February 1990);

(b) aid to Sadam Abruzzo SpA in the form of public sureties for guaranteed sums of ITL 2 billion (12 September 1989) and ITL 11 billion (2 February 1990);

(c) aid provided for in the CIPE decision of 26 July 1990: downgrading and deferment of a credit of ITL 17,504 billion, to the advantage of Sadam Abruzzo S.p.A. and of the other creditors of Nusam S.p.A., as well as the reduction of the purchase price of the Celano factory, along with the advantages associated with shouldering ITL 15 billion in favour of Sadam Abruzzo SpA;

(d) aid to Zuccherificio Castiglionese S.p.A. in the form of a public surety for a guaranteed sum of ITL 41 billion (2 August 1991).

2. The following aid granted by the Italian authorities through the public company RIBS SpA, on 26 July 1990, to Sadam Abruzzo SpA is incompatible with the common market to the extent to which its value, expressed in gross grant-equivalent, exceeds the sum of ITL 15 billion:

(a) aid in the form of a stake in the capital for a sum of ITL 8 billion tile and

(b) aid in the form of a loan at a subsidised rate for a sum of ITL 11 billion lire.

3. The following aid granted by the Italian authorities through the public company, RIBS SpA on 16 April 1992 to Zuccherificio Castiglionese SpA is incompatible with the common market to the extent to which its value, expressed in gross grant-equivalent, exceeds the sum of ITL 5,5 billion:

(a) aid in the form of an extension of the redemption term for a stake of ITL 12 billion for an additional period of ten years;

(b) aid in the form of the conversion of a credit of ITL 20 billion lire into capital stock;

(c) aid in the form of the renegotiation of a debt of ITL 4 billion;

(d) aid in the form of a stake in capital for a sum of ITL 10 billion;

(e) aid in the form of a loan at a subsidised rate for a sum of ITL 20 billion.

Article 2

1. The Italian authorities shall take all the measures necessary to recover from the recipients the aid referred to in Article 1 and unlawfully made available to them, within two months of notification of this Decision.

2. Recovery shall be effected in accordance with the procedures of Italian law. The sums to be recovered shall bear interest from the date on which they were made available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

([30]) ECR [1973] 813.
([31]) ECR [1987] 901.
([32]) ECR [1990] I-3437.

Article 3

1. The Italian authorities shall inform the Commission, within two months following notification of this Decision, of the procedures used to calculate the grant-equivalent of aid to be recovered.

2. The Italian authorities shall inform the Commission, within two months following notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 11 May 1999.

For the Commission

Franz FISCHLER

Member of the Commission