II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 2 June 1999
concerning State aid granted by Italy to Seleco SpA

(notified under document number C(1999) 1524)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2000/536/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

I. PROCEDURE

(1) By letter registered as received on 30 March 1994, the autonomous region of Friuli-Venezia Giulia, acting in accordance with Article 88(3) of the Treaty, notified the Commission of Regional Law No 47/94 on special assistance for Seleco SpA, Pordenone (hereinafter referred to as 'Seleco').

(2) By letters of 12 April and 26 July 1994, the Commission asked the Italian authorities for further information. No reply was received to those letters. The Commission learned from press reports that the notified transaction had been carried out on 6 August 1994 before it had expressed its views. Accordingly, on 18 August 1994, the aid measure was deleted from the register of notified aid and entered in the register of non-notified aid under number NN 92/94. The Commission also learned that Ristrutturazione Elettronica SpA (hereinafter referred to as 'REL') had partially written off loans made to Seleco under an agreement concluded in 1994 to cover losses for the financial year 1993.

(3) In the absence of further information from the Italian authorities and in view of its doubts concerning the compatibility of the aid with the common market, the Commission decided on 27 September 1994 to initiate the Article 88(2) procedure.

(4) The Italian authorities were informed of the initiation of the procedure by letter of 10 October 1994. They presented their observations by letter of 27 March 1995. The Commission invited comments from other interested parties by publishing a copy of its letter in the *Official Journal of the European Communities* [1]. No comments were received from third parties.

(5) By letters dated 26 October 1994, 30 January 1995, 19 April 1995, 7 July 1995, 25 August 1995 and 19 November 1996, the Commission asked the Italian authorities for more detailed information, which it received on 10 November 1994, 31 March 1995, 27 June 1995, 19 December 1995, 22 January 1996, 5 December 1996 and 11 February 1997 respectively. Further details were provided at a meeting held on 22 November 1995 between representatives of the Commission and the Italian Government.

[1] OJ C 373, 29.12.1994, p. 5.

(6) As the Commission was about to terminate the procedure, it learned, once again from press reports, that further State aid may have been granted to Seleco. By letter of 19 November 1996, it asked the Italian authorities for details. Replies from the Italian authorities were received by the Commission on 5 December 1996 and 11 February 1997. In view of the information contained in the letters, the Commission decided on 3 February 1998 to extend the Article 88(2) procedure to the new measures.

(7) The letter informing the Italian authorities of the extension of the procedure was sent on 18 February 1998. Italy did not comment on the extension by the deadline set. The Commission invited interested parties to comment on the aid in question by publishing its letter in the *Official Journal of the European Communities* ([2]). No replies were received.

(8) Failing any reply from the Italian authorities, a reminder was sent on 15 July 1998 stating that, in the event of continued failure to reply, Italy might be ordered to reply. On 30 July 1998 the Italian authorities requested an extension of the deadline to 4 September 1998.

(9) Following various formal and informal requests, the Italian authorities notified the Commission by letter of 21 September 1998 that Seleco had been declared bankrupt on 17 April 1997, i.e. 10 months before notification of extension of the procedure was given. The Commission responded by letter of 29 September 1998 asking the Italian authorities for further information on the winding up of Seleco. Having received only partial information on 17 November 1998, the Commission adopted a decision ([3]) on 2 December 1998 ordering Italy to provide the information required. A reply was received by the Commission by letter dated 18 January 1999. Further clarification was requested by letter of 28 April 1999. The Italian authorities replied on 21 May 1999.

II. **DESCRIPTION OF THE AID**

II.1. **The recipient**

(10) Seleco, a company located in Pordenone (Friuli-Venezia Giulia), is engaged in the consumer electronics business, more specifically in three sectors: colour televisions, decoders for encrypted programmes (pay-TV sector) and professional television equipment (video projectors and monitors). Like other firms in this industry in Italy, Seleco has regularly received State aid over the last 10 years through REL ([4]).

(11) The Seleco group (hereinafter referred to as 'the group') operated chiefly in Italy, with subsidiaries in Malta, Spain (until the end of 1993), Germany and the Netherlands. The group's sales covered the entire European Union and the EEA countries.

(12) The group's turnover, profits and equity (as from 1993) are set out in the following table:

(billion ITL)

	Turnover	Profits (losses)	Equity capital
1989	334	(25,3)	—
1990	384	(11,4)	—
1991	351	2,4	—
1992	323	0,5	—
1993	374	(77,5)	54,5
1994	266	(41,6)	45
1995	254	(64,2)	32,7

(13) The results for 1996 were not provided. In 1993 75 % of turnover was accounted for by colour televisions, 6 % by decoders and 4 % by video projectors.

(14) On 17 April 1997 an Italian court declared Seleco bankrupt. The firm had liabilities of some ITL 154 billion, of which only 43 % was covered by preferential rights. The Commission was notified only on 21 September 1998, following a number of reminders requesting information in connection with the extension of the procedure.

II.1.1. **The 1994 recapitalisation**

(15) On 31 December 1993 Seleco's equity capital totalled ITL 54,48 billion and was held by Sofin, REL and Friulia SpA (hereinafter referred to as 'Friulia'), as follows:

	Capital (in ITL million)	% of total shares
Sofin SpA	20 157	37
Friulia SpA	2 000	3,7
REL SpA	32 320	59,3
Total	54 477	100

([2]) OJ C 155, 20.5.1998, p. 10.
([3]) Not yet published in the Official Journal.
([4]) Public agency for the reconstruction of the consumer electronics industry in Italy, whose activities were the subject of the Decisions of 17 January 1984 and 17 September 1985. By Decision of 20 May 1992 (OJ C 166, 3.7.1992, p. 6), the Commission approved aid granted by REL to a dozen firms in the consumer electronics industry, the largest of which was Seleco SpA.

(16) Sofin SpA was a private company and Friulia is a finance company that is wholly controlled by the region of Friuli-Venezia Giulia and is responsible for promoting the region's economic development, while REL was set up in 1982 and is controlled by the Ministry of Industry, Trade and Craft Trades. REL's purpose was to reorganise the consumer electronics industry by setting up firms, taking shareholdings and financing firms in which it had shares.

(17) The Commission has already examined REL's activities in the past; in a decision of 17 January 1984, it had asked the Italian Government to end the restructuring of the electronics industry being carried out through REL.

(18) In a Decision of 20 May 1992 ([5]) terminating the procedure initiated on 16 July 1991, the Commission required the Italian authorities to wind up REL and took note of the Italian Government's undertaking to transfer REL's holdings in electronics firms to private shareholders.

(19) The financial year 1993 was even more difficult for the group than the preceding years. Its net result was ITL 77,5 billion in losses, exceeding significantly its equity capital (ITL 60,6 billion). Under Italian law, shareholders in such situations must wind up the firm or reduce its capital, covering its losses and recapitalising the firm if liquidation does not take place. According to the 1993 annual report, the shareholders opted for the first alternative, i.e. to wind up Seleco (decision of the administrative board of 1 February 1994).

(20) However, the announcement of this measure prompted a strong reaction on the part of the workforce, which endeavoured to prevent liquidation. The ensuing demonstrations resulted in the national and local authorities intervening to urge the shareholders to change their decision. The 1993 annual report, which also covers events in the first few months of 1994, shows that, following the intervention of the public authorities, the shareholders reached an agreement on the basis of which, after covering losses, they would recapitalise the company. The agreement was formalised by a directive adopted by the Italian Government and was subsequently notified to the company.

(21) Under that agreement, REL was required to cover all losses exceeding the equity capital, including those which should have been covered by the other shareholders, and partially to write off loans to Seleco (ITL 16,8 billion out of a total of ITL 82 billion). In exchange for the write-off, the other shareholders would reconstitute Seleco's capital to the tune of ITL 45 billion. Thus Friulia contributed ITL 13 billion and Sofin ITL 19 billion. The balance, i.e. ITL 10,5 billion, was provided by a consortium of banks, for the most part private-sector banks, in proportion to their loans to Seleco (ITL 162 billion, or 40 % of the total debt).

([5]) See footnote 4.

(22) The new capital was distributed as follows:

	Capital (in ITL million)	% of total shares
Sofin SpA	19 190	42,64
Friulia SpA	13 000	28,89
Banks	10 500	23,33
Group employees	2 310	5,13
Total	45 000	100

II.1.2. **The 1996 recapitalisation**

(23) The year 1994 proved as difficult for the company as the previous year. Because of the delay in recapitalisation (end of August), production was interrupted for eight weeks, the workforce was cut by 336 persons (from 1 424 to 1 088) and five subsidiaries filed for bankruptcy. The company incurred losses of ITL 39,2 billion.

(24) By the end of 1995 Seleco showed fresh losses amounting to ITL 64,2 billion; this further reduced its equity capital (ITL 3,9 billion) to below the statutory level. The disappointing results were due to a renewed interruption in production lasting 50 days and the definitive closure of three subsidiaries that had filed for bankruptcy. The workforce was reduced to 821.

(25) The shareholders were thus faced with the same situation as in 1994. Compelled once again to choose between winding up the company and recapitalising it, they decided to inject fresh capital amounting to ITL 32,7 billion, while a new shareholder, the private-sector Sorec, contributed the other ITL 28,8 billion required.

(26) In February 1996 Seleco's capital was distributed as follows:

	Capital (in ITL million)	% of total shares
Sorec	28 800	87,91
Sofin	1 710	5,22
Friulia SpA	1 144	3,49
Banks	924	2,82
Employees	181	0,56
Total	32 759	100

(27) The transaction involving the new shareholder was tied to additional intervention by REL in June of that year. This consisted in the repurchase by Seleco of its outstanding debt of ITL 65,2 billion from REL for ITL 20 billion, the value of this transaction to Seleco amounting to ITL 48,5 billion. Despite the two transactions, however, its capital still fell below the statutory level owing to the accumulated losses.

(28) As these measures were not sufficient to guarantee the continuation of the business from a legal standpoint, other measures were essential: (i) a debenture loan of ITL 12 billion issued by Seleco and subscribed to by a consortium of chiefly private-sector banks; (ii) a convertible loan of ITL 12 billion granted by Friulia; (iii) the sale of the holdings in Seleco Multimedia srl (hereinafter referred to as 'Multimedia') for ITL 20 billion.

(29) According to the 1995 annual report, which covers a large part of 1996, Seleco continued to experience serious difficulties, despite the February 1996 recapitalisation and the extraordinary transactions described above. The net result for 1996, which remained negative, was not notified to the Commission. Then, on 17 April 1997, the Italian courts declared Seleco bankrupt.

II.1.3. **The setting up of Multimedia**

(30) Multimedia was set up with a capital of ITL 20 million in 1995 by the only private shareholder of Seleco, Mr Rossignolo. In March 1996 Seleco, whose majority shareholder (87,9 %) was Sorec, a private company whose sole administrator was the same Mr Rossignolo, hived off its most profitable assets (video projectors and monitors) to Multimedia, providing ITL 29 billion in capital and becoming sole owner. Multimedia thus became Seleco Multimedia srl. In July 1996, months before it entered into liquidation, Seleco sold a 33,33 % stake in Multimedia to Italtel (a partly public (50 %) and partly private (50 %) company which was the only other Italian producer of the same type of products) and a 33,33 % stake to Friulia. Each package of shares was sold for ITL 10 billion. The remaining 33,33 % was transferred by Seleco to Finanziaria Elettronica srl, a shell company of which it owned 99 %. The 33,33 % stake in Multimedia held by Seleco through Finanziaria Elettronica was sold to the private company Formenti SpA at the Seleco bankruptcy sale on 20 December 1997.

II.2. **Matters covered by this procedure**

(31) The following are covered by this procedure:

— the partial write-off in 1994 of the amount owed to REL by Seleco (ITL 16,8 billion out of a total ITL 82 billion),

— the conversion into Seleco shares of the ITL 6 billion loan and the capital contribution of ITL 7 billion (public funds) from Friulia as part of the 1994 recapitalisation,

— the injection of ITL 10,5 billion by a consortium of banks, chiefly private-sector, as part of the recapitalisation of Seleco; in 1994,

— the repurchase by Seleco in July 1996 of its outstanding ITL 66 billion debt from REL for ITL 20 billion,

— the convertible loan of ITL 12 billion granted in April 1996 by Friulia for five years at 7 % against a guarantee consisting of Seleco's four industrial brands (Seleco, Brionvea, Elbe and Tandberg),

— the debenture loan of ITL 12 billion granted in 1996 by a consortium of banks, chiefly in the private sector, for four years and ten months at 5 %,

— the acquisition by Friulia and Italtel of a third each of the shares in Multimedia at a price of ITL 10 billion each.

III.1. **Doubts expressed by the Commission when initiating and extending the Article 88(2) procedure**

(32) In its Decision of 27 September 1994 initiating the procedure, the Commission expressed doubts concerning the applicability of the private-investor principle to the public measures taken and the compatibility of the aid with the common market. The reasons why the Commission initiated the procedure are summarised below.

(33) With regard to the 1994 measures, the Commission noted that the Italian Government had undertaken to ensure that REL sold its shareholding in Seleco to the private sector by 20 December 1995, in accordance with the Decision of 20 May 1992. It noted that the recapitalisation had had the effect of replacing a public shareholder (REL) with another public shareholder, Friulia. On the basis of the information in its possession, the Commission was unable to conclude that Friulia and the public-sector banks concerned would withdraw from Seleco by 20 December 1995. It also pointed to the statement in its Decision of 20 May 1992 to the effect 'that it will, as a matter of principle, adopt a negative position on any other future assistance [..] for an industry that has received aid over such a long period.' But the partial write-off of REL's loans to Seleco was tantamount to granting fresh aid since, in practice, it allowed Seleco to be recapitalised by Friulia, Sofin and the banks.

(34) In view of the temporary nature of the shareholdings acquired by Friulia and the banks, the Commission had doubts concerning both the profitability of the investment and the question of compliance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty [6].

(35) When extending the procedure on 3 February 1998, the Commission questioned the rates applied to the repurchase by Seleco of its outstanding debt from REL, on the one hand, and the convertible loan granted by Friulia, on the other. In the case of the repurchase transaction, the Italian authorities considered that the rate of 19 % accurately reflected the considerable economic risks associated with the economic position of the company (namely Seleco); however, in the case of the loan, they claimed that a rate of 7 % corresponded to the market rate applicable to a firm in a similar position to that of Seleco.

(36) At the same time, the Commission also doubted whether the private-investor principle was applicable to the acquisition by Friulia and Italtel of the two packages of shares in Multimedia.

III.2. **The position of the Italian authorities**

(37) As regards the debt waiver by REL of ITL 16 billion (out of a total of ITL 82 billion), the Italian authorities consider that the transaction complies with the principle of a private investor operating under normal market conditions.

(38) Under the Commission Decision of 20 May 1992, REL was required to withdraw from Seleco. In addition, REL, which was put into liquidation on 9 December 1992, was required under Italian law only to pay its debts and endeavour to recover as much as possible of its lending to other electronics companies. However, following the very poor results in 1993, the choice facing REL and all the other shareholders was either to wind up Seleco or to make provision for its survival. In view of the Commission Decision, REL could not participate in the recapitalisation but only in covering Seleco's losses in 1993 by writing off part of the amount owed to it. This solution allowed it to try and recover as much as possible of its lending.

(39) Furthermore, according to the Italian authorities, REL did not write off its debts without a reciprocal contribution from the other shareholders, who had agreed to underwrite ITL 45 billion of the recapitalisation and subsequently to repay REL the amount outstanding (ITL 65,2 billion).

(40) The contribution from Friulia to the 1994 recapitalisation of Seleco amounted to ITL 13 billion, of which ITL 6 billion consisted in the conversion into shares of a loan for the same amount and ITL 7 billion represented new capital. The Italian authorities stated that the transaction was justified by the risk of failure to recover the entire loan if Seleco was wound up. In order to assess the profitability of the investment and the economic position of Seleco over the period 1994 to 98, Friulia had commissioned a study from an outside consultant (Peat Marwick). On the basis of the information in its possession, it concluded that the firm's position would gradually improve under the restructuring plan drawn up by the private-sector shareholder for the period 1993 to 96. The Italian authorities therefore took the view that Friulia acted like a private investor; they also pointed out that Sofin, Seleco's private-sector shareholder, was prepared to reinvest in the company since it was convinced of the latter's economic and financial viability.

(41) A consortium of banks, mostly in the private sector, also contributed ITL 10,5 billion to the recapitalisation of Seleco since, according to the Italian authorities, the banks were convinced that Seleco would soon be economically and financially viable.

(42) The convertible loan of ITL 12 billion at 7 % per annum granted by Friulia on 19 April 1996 is guaranteed by a lien on all the brands owned by Seleco SpA (Seleco, Brionvega, Elbe and Tandberg). The Italian authorities consider that the loan is fully justified in view of the fact that a consortium of banks, mainly private-sector banks, had subscribed to a 5 % debenture loan to Seleco for the same amount.

(43) The ITL 20 billion paid by Seleco in June 1996 to redeem its ITL 66 billion debt to REL is, according to the Italian authorities, justified by the application of a discount rate of 19 %. The rate is obtained by adding together a basic rate of 13 % to 14 %, corresponding to the rate applied by banks at the time to mortgage loans and medium-term secured loans, and a 'spread' of 5 % to 7 % reflecting the difficulties of the Seleco group and the difficulties on the market on which it operates.

(44) As regards the decision taken by Italtel to acquire a 33,33 % stake in Multimedia, the Italian authorities stated that it could not have been taken without the explicit approval of the private-sector shareholder (Siemens AG).

(45) The Italian authorities have stated that Sorec, with an 87 % stake in Seleco following the recapitalisation in 1996, is a private company. It is worth noting that it has been in voluntary liquidation since 28 July 1997.

(46) The failure of the 1993 to 96 restructuring plan was said to be due to, among other things, the poor prospects on the consumer electronics market, on which the company operated.

[6] OJ C 368, 23.12.1994, p. 12.

(47) Seleco allegedly set up Multimedia above all in order to merge with the only other Italian producer of the same type of products (video projectors, monitors and decoders), Italtel, and to benefit from the pooling of technical know-how and the customers Seleco had on this market. The sale of the Multimedia shares also provided Seleco with some of the liquidity it needed in order to cover its 1995 losses.

(48) Seleco was declared bankrupt at the beginning of 1997. Its debts amount to some ITL 154 billion, of which 43 % is preferential debt. The creditors who benefited from an initial partial allocation of assets totalling ITL 40 billion before the end of 1998 were the employees, who received ITL 28,2 billion, Medio Credito (a public-sector bank), which received ITL 8,5 billion plus ITL 1 billion in interest, and Banca Antoniana (a private-sector bank), which received ITL 1.1 billion, all of them being preferential creditors.

(49) Lastly, the receiver brought an action to revoke the repurchase by Seleco of its ITL 65,2 billion debt from REL for ITL 20 billion. The court abolished the preferential nature of Seleco's debt of ITL 13 billion to Friulia, which received ITL 1 billion as compensation for the loss of its lien on four industrial brands offered by Seleco as a guarantee.

IV. **ASSESSMENT OF THE AID**

(50) Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement state that, save as otherwise provided for in the Treaty, any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

(51) For the reasons set out below, the Commission considers that some of the measures covered by this procedure constitute State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement. They are measures financed through State resources which distort or threaten to distort competition since they constitute an economic advantage from which other producers have been unable to benefit. Such advantage allowed the recipient to survive artificially on the market and to avoid a large proportion of the costs of such survival. The measures also affected trade between Member States as the recipient had subsidiaries in many Member States and its products were also exported to other EEA countries.

(52) In 1992, after years of growth, the European consumer electronics industry started to decline; consumption fell by ECU 4 billion and production by ECU 2,5 billion. There were significantly more redundancies than in manufacturing, while labour costs rose more than proportionally to the growth in productivity (44 % extra per unit against a 33 % growth in productivity) [7].

(53) The economic recession caused a slowdown in growth, stronger competition and a sharp fall in prices. This resulted in a surplus market, the fall in prices having stimulated the sale of electronic goods. According to the Panorama of EU industry, demand in 1994 could be divided into two segments: top-of-the-range and bottom-of-the-range. Success was dependent in the first segment on price, after-sales service and distribution quality and in the second segment on an improved brand image and expansion of the distribution networks to include supermarkets.

(54) In 1993, for the second year running, there was a downturn in the Italian consumer electronics market [8] (– 11,6 % of sales in terms of value). The reasons were the same as for the rest of Europe, but price erosion was more rapid than in the other Member States. On the Italian market Seleco's competitors were investing far more in advertising and R & D, with some of them (Thomson, Grundig and Blaupunkt) even launching new products. Distribution was chiefly through small retailers but, as elsewhere in Europe, supermarkets were becoming the main sales outlets.

(55) According to the Panorama of EU industry for 1994, the prospects for the following years (1994 to 97) were still very poor. In the short term, companies were endeavouring to reduce costs, rationalise production, improve the quality of existing products and launch new ones. In the long term, the winning strategy consisted in concentrating on R & D.

(56) The forecasts for the Italian market were similar. According to the February 1994 issue of Euromonitor, the Italian economy would continue to decline and the economic recession would affect the whole of 1994. According to the same issue, growth forecasts for the Italian television industry in terms of volume and price were as follows:

[7] *Source:* 'Panorama of EU industry, 1994' Eurostat.
[8] *Source:* 'Euromonitor', February 1994, 'Television and video products in Italy'.

Colour televisions	1993	1994	1995	1996	1997	1998
Volume	2 900	2 800 (– 3,45 %)	2 850 (+ 1,8 %)	2 900 (+ 1,7 %)	2 950 (+ 1,7 %)	3 000 (+ 1,7 %)
Price	1 723	1 505 (– 12,5 %)	1 522 (+ 1,2 %)	1 542 (+ 1,3 %)	1 542 (+ 1,3 %)	1 640 (+ 4 %)

(57) The aid in question was not granted under a scheme approved by the Commission and, contrary to Article 88(3), it was granted without having been notified in advance. It is therefore unlawful. This is also true of the injection of ITL 13 billion by Friulia into Seleco in 1994, which, although notified, was carried out before the Commission had taken a decision.

(58) Because a transfer of public resources is involved, the Commission must determine whether the public authorities acted like a private investor operating under normal market economy conditions.

(59) Under the guidelines on government capital injections [9], State aid is not involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions (point 3.2). According to that principle, analysis of the financial position of the firm and its long-term viability can establish whether the public resources constitute State aid or not.

IV.1. **Partial write-off in 1994 of loans granted by REL**

(60) In 1994 REL wrote off in part the amounts owed to it by Seleco (ITL 16,8 billion out of a total of ITL 82 billion) to allow the latter to remain in business. According to the Italian authorities, REL was thus safeguarding the bulk of its claims, which it would recover later once Seleco's financial position had improved.

(61) However, the Commission notes that, as stated in Seleco's annual report for 1993, its shareholders, the largest being REL, had decided at the beginning of 1994 to wind up the company in view of the year's poor financial results, the losses being one and a half times greater than its equity capital. The report also stated that the decision to wind up Seleco was not implemented owing to action by the workforce and the subsequent intervention of the public authorities, notably the Prime Minister's Office, aimed at securing a reversal of the shareholders' decision. Following that intervention, and contrary to their first decision, the shareholders decided to recapitalise Seleco and REL covered the company's losses by waiving some of the money owed to it (ITL 16,8 billion out of ITL 82 billion).

(62) Consequently, the argument put forward by the Italian authorities, namely that REL intervened, as any private creditor would have, to prevent the liquidation of Seleco in order to safeguard the bulk of its loans to Seleco, cannot be accepted by the Commission. Even if Italian law enabled shareholders to avoid liquidation and to recapitalise a company by covering its losses, it is clear that, without the political intervention of the Italian authorities and the consequent action forced on REL, the other shareholders would not have reinvested in a company which, despite having received State aid for more than 10 years, had failed to make a profit during that period (apart, that is, from a very small one in the financial years 1991 and 1992). The decision to wind up the company, which was taken by all the shareholders in 1994, including REL, the leading shareholder at the time (59 %), can be explained only by the fact that the shareholders, who were best placed to assess the true position of the company, considered that the survival of Seleco would be much more costly for them than its liquidation and that, in any event, the company was not viable in the long term. In particular, as REL had to withdraw from Seleco as from 1994 and as it was Seleco's largest creditor at the time, the liquidation of Seleco would have ensured that it recovered most of its loans.

[9] Bulletin EC 9-1984

(63) In view of the foregoing, the Commission must conclude that the measures taken by REL, i.e. its decision in 1994, contradicting its original intentions, to write off some of its loans (ITL 16,8 billion out of a total of ITL 82 billion) and its decision in 1996 to allow the outstanding debt of ITL 65,2 billion to be repurchased for ITL 20 billion, are the direct result of the intervention of the public authorities in 1994 aimed at preventing the winding up of Seleco at all cost. Accordingly, the fact that REL agreed in 1994 to waive debt totalling ITL 16,8 billion and to await the end of 2015 to recover the balance is tantamount to writing off the entire debt (ITL 82 billion) and therefore constitutes aid. The behaviour of REL not only does not conform to the private-investor principle but must a priori be regarded as State aid in accordance with the Community guidelines on government capital injections (point 3.3) since the financial position of the company and the volume of the debt were such that the other investors in Seleco (public and private) were not prepared to reinvest in the latter. The decision of the other investors (37 % private-sector) to recapitalise the company once REL had covered the losses, even though they too were subject to that obligation, does not alter the conclusions reached above ([10]). The Commission considers that Seleco would not have been recapitalised in 1994 without REL's prior undertaking to cover all losses through a partial write-off, which in practice amounted to a complete write-off of the loans given the strong possibility of the imminent winding up of the company, which indeed occurred three years later. The fact that REL endeavoured in 1996 to recover part of the amount still owed to it (ITL 20 billion out of a total of ITL 65,2 billion), a transaction against which the receiver initiated proceedings under Article 67 of Decree No 267 of 16 March 1942 ([11]) (bankruptcy law) on the ground that REL must necessarily have been aware of Seleco's insolvency at the time of the agreement, simply confirms the merits of the Commission's position on this matter.

IV.2. **Conversion of a loan into shares in Seleco and injection of capital by Friulia in 1994**

(64) As part of the recapitalisation of Seleco in 1994, Friulia converted into shares its loan of ITL 6 billion granted in 1992 for five years at 9,55 % and injected additional funds totalling ITL 7 billion. Through these measures it became a shareholder of Seleco with a stake of 28,8 % against the 3,7 % held previously. The Italian authorities justified this transaction on the ground that it complied with the private-investor principle. It was claimed, on the one hand, that Friulia acted to protect the repayment of its loan, which, unlike REL's loan, was guaranteed to the amount of ITL 3 billion by the private-sector bank Friuladria, which was itself guaranteed to the amount of ITL 2 billion by Seleco, and, on the other hand, that Friulia was convinced on the basis of the 1993 to 96 restructuring plan drawn up by an outside expert that its investment would be profitable. Thus, according to the Italian authorities, Friulia's behaviour was consistent since a private shareholder was again prepared to invest ITL 19 billion in Seleco.

(65) The Commission considers that its conclusion that the partial write-off by REL of its loans to Seleco constitutes State aid is also applicable to the intervention by Friulia. The latter was one of the Seleco shareholders which, according to the 1993 annual report, had decided to wind up the company. Furthermore, it was a Seleco creditor but, unlike REL, a large part of its claims, which amounted to one tenth of those of REL, was guaranteed. In the event of liquidation, Friulia would have recovered a proportionally higher share of its loans than REL. The argument that it was safeguarding an existing claim cannot therefore be accepted by the Commission.

(66) As stated when the procedure was initiated, the stake taken by Friulia was temporary. Furthermore, the repurchase price of Friulia's shares was agreed with Sofin and, according to the Italian authorities, was not related to the variation in the value or number of the shares acquired by Friulia. The price paid was equal to the purchase price paid by Friulia, discounted at 75 % of the average Treasury reference rates, plus 1 %. According to Section 3.3 of the Community guidelines on government capital injections, however, there is State aid where the holding is a short-term one, with duration

([10]) It might be concluded that the behaviour of REL amounted to granting aid to the other Seleco shareholders, in proportion to their individual liability for loss. But the Commission considers that such an effect is indirect, marginal and, in any event, peripheral to the direct and selective effect on Seleco.

([11]) Official Gazette of the Italian Republic No 81, 6.4.1942.

and selling price fixed in advance, so that the return to the provider of capital is considerably less than he could have expected from a capital market investment for a similar period. The Italian authorities have not at any time during this procedure claimed or demonstrated that the return on the Friulia shareholding was greater than or equal to the return it could have expected from a capital market investment for a similar period. It follows that the holding constitutes State aid.

IV.2.1. **Commission assessment of the study commissioned by Friulia and of the Seleco restructuring plan for the period 1993 to 1996**

(67) The Commission considers that it has already provided sufficient evidence that the contribution by Friulia to the recapitalisation of Seleco in 1994 does not conform to the private-investor principle. However, it must also examine the argument put forward by the Italian authorities that Friulia, like any private investor, was convinced of the profitability of its investment since it had commissioned a study on the Seleco restructuring plan and had decided to take part in the recapitalisation on the basis of its assessment of the company's viability.

(68) The 1993 to 96 restructuring plan is the second to be drawn up since the beginning of the 1990s. The first plan, covering the period 1990 to 93, forecast a return to significant profits in 1993. Based on a hypothetical recapitalisation of ITL 45 billion, the second plan forecast a return to profitability in 1995, i.e. after absorption of the residual restructuring costs during 1994. The main points of the plan can be summarised as follows: concentration of production, reduction of costs, reorganisation and reduction of the workforce, and investment in R & D. Overall, the plan provided for a 20 % cut in the production of colour televisions, a 75 % increase in the production of decoders (for sale on other European markets) and a 33 % increase in the production of video projectors and monitors (to be sold on non-European markets, including the US and China). It also provided for 267 redundancies at the Pordenone plant.

(69) At the request of Friulia, the plan was studied by an outside expert (KPMG Peat Marwick Corporate Finance) who came to the conclusion that the restructuring plan for Seleco was too ambitious because of both the firm's position and the assumptions underlying the plan.

(70) The study also pointed out that the commercial, economic and financial structure of Seleco presented considerable structural weaknesses. First, in a highly labour-intensive sector, the job structure was inappropriate since there were too many management staff in relation to workers, chiefly because of the complex structure of the group (10 operational subsidiaries and six in liquidation).

(71) The company was also unable to bring its R & D to the marketplace, in a sector where this is an essential factor in guaranteeing the continuation of business. For example, Seleco had not succeeded in producing new chassis for television sets for more than two years, although it is essential to renew this part of the product regularly. The study emphasised that Seleco had not developed any strategy for designing and marketing new products. There was also the fact that it was totally dependent on other major producers in the sector for the basic components of its products, and this exposed it both to variations in production and to financial fluctuations.

(72) The study revealed the strong influence of REL in the financing of the group, especially between 1991 (52 % of its financial position was dependent on REL loans) and 1993 (42 %). The REL funding was characterised by extremely low costs, well below market rates. It is worth considering the possible consequences of the foreseeable withdrawal of REL from Seleco and the extent to which the latter would have been able to obtain financing on the capital market.

(73) The assumptions underlying the plan did not take account of the group's weaknesses. First, the plan forecast a fall in production costs based on a reduction in labour costs. The study notes that, at the end of 1993, Seleco had reduced labour costs through early-retirement measures (*cassa integrazione*). The plan proposed the same strategy (solidarity contracts) for the future. These forecasts were not realistic since Seleco had assumed that the contracts would be concluded at national level, something which, according to the study, was highly unlikely.

(74) The strategy of the group was focused on improving the company's image, which had deteriorated following its poor results in previous years. The investments were strategic as the move towards using supermarkets as distributors was not improving consumers' image of its products. Consumers had always appreciated the high-quality after-sales service they received when the products were distributed through specialised shops. The study stressed that considerable investment in advertising was needed although immediate results should not be expected.

(75) The success of the plan was thus dependent on the amount of the funding committed and on external factors over which the firm had no control, such as the strong bargaining power of supermarkets and the use of solidarity contracts.

(76) In conclusion, the study indicated that:

— the forecast of a significant contraction in sales, counterbalanced by an 8 % increase in prices as of the second half of 1994, was unfounded,

— Seleco did not have the means to launch its product as an advanced, quality product,

— the assumption that prices would rise did not take account of the bargaining power of the supermarkets and hence of the subsequent narrowing in Seleco's profit margins, which had always been its weak point. Seleco's positioning on a range of average prices had never allowed it to establish itself, either in terms of margins (high prices) or in terms of quantity (insufficient market share),

— the development of the only really profitable sector of Seleco (professional products), predicted to expand by 21 % in 1995, risked being hampered by the group's financial crisis.

(77) The Commission concludes that the strategy adopted by Seleco was not appropriate to the situation. In 1994 the firm should have positioned itself at either the top end or the bottom end of the product range and should have chosen the most appropriate distribution network for each product. However, while manufacturing bottom- and medium-range products, Seleco sought to compete against top-range products through supermarkets. There was no commercial logic to this as its products did not stand out from those of its competitors and would have had difficulty in attracting consumers without the advantages provided by specialised stores.

(78) The strategy was based on incorrect pricing assumptions. All the studies, including the one commissioned by Friulia, agree that such growth was impossible and that, on the contrary, prices would have continued to fall until the end of the year before recovering to a level slightly below that predicted in the plan (2 %). In order to absorb the residual restructuring costs in 1994, as provided for in the plan, a spectacular increase in turnover would have been necessary, an unlikely development in view of Seleco's past, its future prospects and the market on which it operated.

(79) It is clear therefore that, even if Seleco had had the means to achieve the objectives of the plan, this would have taken much longer than predicted. In view of the forecasts of its results, the shareholders would also have had to inject further capital. There is nothing to indicate (nor have the Italian authorities made any such claims) that Seleco had the necessary resources to ensure its survival during the implementation of the plan. The Friulia study does not comment on this aspect.

(80) The same is also true of the budget forecasts provided, given that the 'business plan' was based on unrealistic assumptions and inadequate strategies.

(81) The Commission considers that the study commissioned by Friulia was appropriate and reasonable and that the expert, on the basis of the restructuring plan and market conditions and prospects, drew the proper conclusions as to the viability of Seleco. It notes that the accuracy of the study is confirmed by its own assessment.

(82) The company's performance over the subsequent two years confirms that assessment. Over half its output of colour televisions and decoders remained unsold, the only growth sector being that of video projectors and monitors.

(83) The Commission therefore concludes that Friulia could not expect its investment to produce a return that would be acceptable to a private investor operating under normal market economy conditions. Consequently, Friulia's entire contribution of ITL 13 billion to Seleco's capital constitutes State aid within the meaning of Article 87(1) of the Treaty.

IV.3. **Capital contributions by the public-sector banks in 1994**

(84) A consortium of banks, for the most part private-sector banks, contributed ITL 10,5 billion to the recapitalisation of Seleco. The protocol of agreement between those banks and the former Seleco shareholders shows clearly that the funding provided by the banks was purely supplementary, the banks having agreed to inject capital into Seleco after obtaining a firm assurance from its former shareholders (REL, Sofin and Friulia) that the losses of the preceding financial year would be covered by REL and that the other shareholders would contribute ITL 35 billion. They also agreed to renegotiate, in proportion to the amounts owed, the repayment of Seleco's debts.

(85) As both the public- and private-sector banks subscribed to the capital increase in proportion to the amounts owed to them by Seleco (ITL 162 billion in loans, or about 40 % of the firm's total indebtedness as at 31 December 1993), the Commission concludes that their intervention was inevitable and was designed chiefly to safeguard their loans. The measures taken by the banks are not therefore caught by Article 87(1) of the Treaty.

IV.4. **Repurchase of the outstanding debt to REL in 1996**

(86) In 1996 Seleco paid REL ITL 20 billion to redeem its outstanding debt of ITL 65,2 billion.

(87) It might be concluded from an analysis of the intrinsic aspects of the transaction that the benefit to Seleco is the difference between the discount rate applied to the debt (19 %), which, as stated when the procedure was extended, takes account of the risk twice, and the rate which would have been applied by a private investor, i.e. the real market rate plus a reasonable risk premium. However, for the reasons explained in point IV.1, the Commission considers that this second transaction is simply a continuation over time of the first and is equally incompatible with the private-investor principle.

(88) In any event, the Commission notes that the date (2015) on which the outstanding debt (ITL 65,2 billion) was payable and the period in which the repurchase took place, i.e. some ten months before the bankruptcy of Seleco, prompted the receiver to initiate proceedings to revoke the transaction (under Article 67 of the Bankruptcy Law) on the ground that REL, a Seleco shareholder until 1994, could not have been unaware in 1996 that the firm was insolvent.

(89) Accordingly, and on the basis of the considerations set out in point IV.1, all the loans (not recovered or sub judice) granted by REL to Seleco must be regarded as state aid under Article 87(1) of the EC Treaty.

IV.5. **The convertible loan granted by Friulia in 1996**

(90) The loan in question was for ITL 12 billion and was granted for five years at 7 %. Friulia received four industrial brands owned by Seleco as a guarantee. The Italian authorities claim that Friulia acted like a private investor since a consortium of banks, mostly in the private sector, had granted Seleco a debenture loan of ITL 12 billion at 5 %, probably in the same year (the authorities have never specified the date of the intervention by the banks).

(91) The Commission does not believe that the comparison between the behaviour of Friulia and that of the banks is relevant. First, unlike Friulia, the banks which acquired the Seleco shares were owed ITL 20,5 billion by the company, of which only a small proportion was guaranteed. Friulia, in fact, was not owed anything by Seleco. Second, the types of loan concerned are different (this has never been denied by the Italian authorities): the transaction with the banks involved a debenture loan, whereas the loan granted by Friulia was a convertible loan. The Commission notes that, under Italian law, where a bankrupt company is being wound up, the debts arising out of a debenture loan are repaid before the other unsecured claims. In addition, although Friulia obtained guarantees on its loan, these were annulled by the court since, as laid down in Article 67 of the Bankruptcy Law, it could be shown that Friulia was aware of Seleco's insolvency one year before it went bankrupt. Unlike Friulia, the banks intervened both to protect their claims and because public resources (REL and Friulia) had been injected on a much larger scale (ITL 60,5 billion against ITL 12 billion).

(92) The Commission also doubts that the guarantees were appropriate. As the 1994 study commissioned by Friulia indicates (point IV.2.1), Seleco's image had deteriorated to such a point that only a considerable investment in advertising could have improved it in the long term. The low market value of the industrial brands owned by Seleco is confirmed by the price at which three of them (excluding Elbe) were sold when the assets were liquidated: a little over ITL 1 billion. Thus, even if the Commission cannot base its conclusions on a posteriori analyses, it notes that, although the book value of the brands is much higher, their real value appears to be well below the ITL 12 billion lent. As a result, the interest rate should have taken account both of Seleco's precarious position (risk premium) and the inadequacy of the guarantees offered by it.

(93) The Commission also notes, on the basis of the information supplied by the Italian authorities, that the market rate applied at the time to loans such as that granted to Friulia varied from 13 % to 14 %. In their justification of the discount rate used for the repurchase by Seleco in 1996 of its debt to REL, the Italian authorities stated that the rate of 19 % was obtained by adding together the basic rate of 13 % to 14 %, which in 1996 was applied to medium-term financing covered by the appropriate guarantees, and a risk premium of 5 % to 7 % reflecting the company's position. The Commission concludes that the rate applied by Friulia does not therefore correspond to the market rate.

(94) The Commission also notes that Friulia did not act like a private investor. As the annulment by the court of the guarantee clearly shows, Friulia was fully aware when it granted the loan, account being taken of Seleco's financial position, that its investment would never produce a return. The Commission would point out that, when the loan was granted, Friulia, a Seleco shareholder, could not have been unaware that the latter's only profitable assets had already been transferred to Multimedia one month previously. Moreover, three months after granting the loan, Friulia purchased a one-third stake in Seleco.

(95) Since it follows that no private investor would have granted the loan in question, the entire amount of ITL 12 billion constitutes State aid under Article 87(1) of the Treaty.

IV.6. **The debenture loan granted by a consortium of banks in 1996**

(96) In 1996 a consortium of banks, for the most part private-sector banks (71 %), granted a debenture loan at 5 %. Since a majority of the banks are private-sector banks whose conduct falls outside the scope of Article 87(1) of the EC Treaty and since the public-sector banks, which constituted a minority, applied the same conditions as the private-sector banks, it must be concluded that their intervention is not covered by Article 87(1). The Commission also notes that the banks participating in the consortium were, at the time of the bankruptcy, owed some ITL 20,5 billion by Seleco. It must therefore be assumed that their intervention was aimed primarily at safeguarding their loans.

IV.7. **The Friuli and Italtel investments in Multimedia**

(97) In view of the conditions under which Multimedia was set up, the investments by Italtel (which had to seek the approval of its private shareholder, Siemens, in order to acquire the shareholding in Multimedia) and by Friulia do not in themselves contain any elements of State aid within the meaning of Article 87(1) of the Treaty as they constituted an investment in a firm which would be operating in a particularly dynamic and promising sector, as stated in point II.1.3.

V. **COMPATIBILITY OF THE AID WITH THE COMMON MARKET**

(98) The aid granted in 1994 and 1996 by REL and Friulia cannot be regarded as being compatible with the common market by virtue of the exemptions provided for in Article 87(2) of the Treaty as it does not constitute aid having a social character granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences. Nor can it be exempted under Article 87(2)(c) or (3)(a),(b) and (d). The recipient is not located in an assisted region under Article 87(3)(a) or (c) since the aid is not intended to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, or to promote culture and heritage conservation.

(99) The Commission's analysis is therefore limited to determining whether the abovementioned aid qualifies for exemption under Article 87(3)(c) and, in particular, whether it can be regarded as rescue and restructuring aid to firms in difficulty since, in view of its financial position, Seleco must be regarded as a firm in difficulty.

(100) For the Commission to approve restructuring aid, it must be shown that the recipient is a firm in difficulty in accordance with the criteria set out in the relevant Community guidelines (see recital 34 of this Decision). It is also essential to have a restructuring plan that complies with the general conditions laid down in point 3.2.2 of the guidelines. Firstly, the Commission would have to be convinced that there was a real probability of regaining economic and financial viability in 1994 and that the restructuring plan was based on realistic assumptions. Secondly, it would have to establish that the aid did not distort competition and was proportionate to the costs and advantages of the restructuring.

(101) According to the Community guidelines, a firm in difficulty is a firm unable to recover through its own resources or by raising the funds it needs from shareholders. Its financial weakness is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover and increasing debt. As stated in Section II of this decision, Seleco is to be regarded as a firm in difficulty within the meaning of the relevant Community guidelines.

(102) For the reasons given in point IV.2.1, the Commission considers that Seleco's restructuring plan was based on unrealistic assumptions and an inappropriate and inconsistent strategy regarding its positioning on the market. The forecasts concerning its future operation were, to a large extent, based on external factors over which it had no control. Even though it operated in certain growth segments (professional products and video recorders), it nevertheless concentrated its efforts on a sector that had reached saturation, i.e. colour televisions.

(103) As the criterion of a restoration of viability laid down in the guidelines has not been met by Seleco, it serves no purpose to examine compliance with the other criteria. The Commission nevertheless would like to comment on several points in this connection.

(104) If restructuring aid is to be compatible with the common market, measures must be taken to offset, as far as possible, adverse effects on competitors. Seleco received aid for some 10 years without any significant improvement in its situation. This dependence on State aid had, in fact, prompted the Commission to warn the Italian authorities not to grant any further aid to the company. In its Decision of 20 May 1992 the Commission notified the authorities that it would take a negative decision on any fresh aid. Accordingly, it must be concluded that that criterion has not been met.

(105) The amount and intensity of the aid must, under the relevant Community guidelines, be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid recipients will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. In the present case, the public-sector contribution during the 1994 recapitalisation was 49 % compared with a private-sector contribution of 51 %. Without the public-sector contribution, the private shareholder would not have agreed to recapitalise the firm in view of the fact that the shareholders had already decided that the best solution was to wind up Seleco.

(106) Following the failure of the restructuring plan, which was predictable for the reasons given in point IV.2, only new injections of capital could keep the firm in business. This was done in 1996 during the second recapitalisation and financial restructuring of the firm. On that occasion the private sector contributed ITL 30,8 billion and the public sector ITL 60,5 billion. Thus, following the two recapitalisations in 1994 and 1996, public-sector contributions to Seleco totalled 55,4 % and private-sector contributions 44,6 %.

(107) The Commission has to bear in mind that, even if the first transaction involved a majority of funds from private investors, that was only in theory. For the reasons given in points IV.1 and IV.4, the manner in which REL managed the recovery of its claim of ITL 82 billion on Seleco resulted in a write-off of virtually the entire amount as early as 1994. The de facto nature of the majority public holding in 1994 is confirmed by the fact that, as stated in point II.1.1, all of Seleco's shareholders, both public and private, were prepared at that time to wind up the firm and were only prevented from doing so by the Italian authorities. Furthermore, the firm's results in 1994 (losses totalling ITL 41.6 billion) and in 1995 (losses totalling ITL 64.2 billion) confirmed that the only viable option in 1994 was to wind up the firm. During the second recapitalisation/financing, public resources accounted for 60 % of the total funds invested. The Commission therefore concludes that the principle of proportionality was not complied with in either the first or the second recapitalisation.

(108) The 1993 to 96 restructuring plan was unable, for the reasons given in point IV.2.1, to restore the firm's competitiveness within a reasonable time on the basis of realistic assumptions regarding future operating conditions. The Commission notes as regards the 1996 recapitalisation/refinancing that the Italian authorities failed to submit any other restructuring plan enabling it to approve the second transaction.

(109) In view of the foregoing, the Commission concludes that the criteria provided for in the Community guidelines on State aid for rescuing and restructuring firms in difficulty have not been complied with. Accordingly, the aid must be deemed incompatible with the common market as it does not qualify for exemption under Article 87(3)(c) of the Treaty.

VI. **CONCLUSIONS**

(110) Italy agreed to the conversion of a loan of ITL 6 billion into shares and the injection by Friulia of ITL 7 billion of fresh capital into Seleco, both operations being notified to the Commission on 30 March 1994, i.e. before the Commission had taken a decision. The Commission also notes that the other forms of aid were granted in breach of Article 88(3) of the Treaty.

The following aid measures in particular are concerned:

— the partial write-off in 1994 by REL of ITL 16,8 billion on a loan of ITL 82 billion and the repurchase of the outstanding debt of ITL 65,2 billion for ITL 20 billion in 1996,

— the convertible loan of ITL 12 billion granted in 1996 by Friulia at 7 % per annum and guaranteed by a lien on four industrial brands owned by Seleco.

(111) The aid, however, is unlawful. For the reasons already given, it is incompatible with the common market as it does not qualify for exemption under Article 87(2) and (3) of the Treaty.

(112) When the Commission finds that unlawful aid is incompatible with the common market under Article 88(2) of the EC Treaty, it orders the Member State to recover the aid from the recipient, a principle upheld by the Court of Justice in Case 70/72 *Commission* v *Germany* 12 July 1973 ([12]), 310/85 *Deufil* v *Commission* of 24 February 1987 ([13]), and Case C-5/87 *Commission* v *Germany* 20 September 1990 ([14]).

(113) Accordingly, the Italian authorities must take all the necessary steps to restore the financial position in which the firm would have been without the incompatible aid. They must therefore recover the unlawful and incompatible aid, plus interest running from the date on which it was granted to the date it was recovered from the recipient, Seleco, currently being wound up. To ensure that the Commission decision is implemented correctly, the Member State is required to act like a private creditor (and to act with at least the same diligence as it would to recover its own debts, such as tax or social security debts) and to recover the aid without delay using all the legal means at its disposal, including seizure of the firm's assets and, where necessary, its liquidation if it is unable to repay the amounts in question. The proceeds of the sale of the assets allow the creditors, including the Member State, to be repaid even if they are not sufficient to cover all the debts of the firm and even if, consequently, the aid is not recovered in full. In such circumstances, the liquidation of the firm is still important from a competition standpoint as it frees the market segment previously held by the firm and makes it available to creditors, while giving them the opportunity to acquire the assets and reallocate them more effectively.

(114) There are, however, circumstances which can hamper that process, jeopardise the effectiveness of the recovery decision and frustrate the rules on State aid. Such is the case when, following a Commission investigation or decision, the assets and liabilities of the firm as an ongoing concern are transferred to another firm controlled by the same persons at below-market prices or by way of procedures that lack transparency. The purpose of such a transaction can be to place the assets out of reach of the Commission decision and to continue the economic activity in question indefinitely.

(115) As in any other recovery procedure, the Member State must, like any other diligent creditor, exhaust all the legal instruments available under its own legal system, such as those used to combat fraud against creditors in the form of acts carried out by the firm in liquidation during the suspect period prior to the bankruptcy, which would allow such acts to be declared invalid.

([12]) [1973] ECR 813.
([13]) [1987] ECR I-901.
([14]) [1990] ECR I-3437.

(116) Furthermore, in order to prevent the effectiveness of the decision from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms.

(117) The elements examined by the Commission include the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets, etc.), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction.

(118) In the case under examination, Seleco hived off in March 1996 its most profitable assets (video projectors and monitors) to Multimedia (set up the preceding year by its only private shareholder, Mr Rossignolo); it injected ITL 29 billion into Multimedia and became its sole owner. This transaction, which thus helped to deprive Seleco doubly of its substance (assets and capital), occurred after the Commission decision of 10 October 1994 to initiate the Article 88(2) procedure. Multimedia is fully controlled by Seleco, which became its sole owner. It is also likely that the transaction was not limited to a transfer of assets and that the transfer of Seleco's main assets was accompanied by the transfer to Multimedia of the corresponding workforce (or part of it) and hence of its social security debts at the very least.

(119) Four months after that transaction (and nine months before its bankruptcy), Seleco sold two thirds of its shares in Multimedia, of which Italtel, Friulia and Seleco owned one third each at the time. Multimedia remained under the control of Seleco (which transferred its share to a shell company, Finanziaria Elettronica srl, of which it held 99 %) and/or its shareholder Friulia (Seleco's third shareholder with 3,49 % in February 1996 and with capital of ITL 32,759 billion, which granted it a convertible loan of ITL 12 billion).

(120) As a result, if the decision to recover the unlawful and incompatible aid is to be implemented correctly, the Italian authorities must take action not only against Seleco but also against Multimedia and any other firm which may have benefited from a transfer of the assets in question, thereby helping to frustrate the effectiveness of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The following aid granted by Italy to Seleco SpA is hereby declared incompatible with the common market:

(a) the partial write-off in 1994 by Ristrutturazione Elettronica SpA of ITL 16,8 billion on a loan of ITL 82 billion;

(b) the repurchase in 1996 by Seleco SpA of its outstanding debt to Ristrutturazione Elettronica SpA of ITL 65,2 billion for ITL 20 billion;

(c) the conversion into shares by Friulia SpA of an ITL 6 billion loan granted by it in 1992;

(d) a capital injection of ITL 7 billion by Friulia SpA in 1994;

(e) a convertible loan of ITL 12 billion at 7 % granted by Friulia in 1996 and guaranteed by a lien on four industrial brands owned by Seleco.

Article 2

1. Italy shall take all the necessary measures to recover the aid referred to in Article 1, which has already been granted unlawfully, from Seleco SpA and, additionally, with regard to the part not recoverable from Seleco, from Seleco Multimedia srl and any other firm which benefited from asset transfers designed to frustrate the effects of this decision.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was made available to the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the net grant equivalent of regional aid applicable at the time the aid was granted.

Article 3

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

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 June 1999.

For the Commission

Karel VAN MIERT

Member of the Commission