COMMISSION DECISION

of 21 June 2000

on State aid which Italy is planning to implement for Siciliana Acque Minerali Srl

(notified under document number C(2000) 1730)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2000/648/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 10, and the first subparagraph of Article 88(2) thereof,

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

Having regard to Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1],

Having regard to the Commission communication to the Member States on the transfer of funds to public undertakings [2],

Having regard to the Community guidelines on State aid for rescuing and restructuring firms in difficulty [3],

Having regard to the Commission Decision of 3 June 1999 [4] to initiate the procedure laid down in Article 88(2) in respect of aid C 34/99 and to invite the Italian authorities to provide all the necessary information within one month,

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

Whereas:

I. PROCEDURE

(1) By letter dated 19 August 1997 from its Permanent Representation, Italy notified the Commission pursuant to Article 88(3) of the EC Treaty of aid that the Region of Sicily planned to grant to the company Siciliana Acque Minerali Srl (hereafter 'SAM') to cover its balance-sheet losses, the legal basis for the operation being Article 19 of Regional Law No 46 of 24 December 1997 concerning provisions governing the carrying on of professional activities by travel and tourism agencies in Sicily. On the sole ground that, under Article 22 of Law No 46/97, Article 19 is subject to prior approval by the Commission within the meaning of Articles 87 et seq. of the Treaty, the measure in question was entered in the register of notified aid under N 576/97.

(2) By letter dated 3 June 1999 (SG (99) D/4000), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid, since the recapitalisation of SAM could involve elements of State aid within the meaning of Article 87 of the Treaty and since the extremely small amount of information received obliged the Commission to request that the Italian authorities provide, within one month, all the documents and information required to assess the compatibility of the measure, including a restructuring plan and a note setting out in detail the procedure regarding any future sale of SAM.

(3) In the same decision, the Commission also informed the Italian authorities that, in the absence of such documentation, it would take a decision on the basis of the information available to it.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [5]. The Commission invited interested parties to submit their comments on the measure within one month of the date of publication.

(5) No comments on the matter have been received by the Commission either from interested parties or from the Italian authorities.

II. DETAILED DESCRIPTION

(6) Article 19 of Regional Law No 46/97 authorises the member of the Sicilian Regional Executive responsible for tourism, communications and transport to make an outright grant to the Acireale Springs Agency (a public institution set up by Sicilian Presidential Decree No 12 of 30 December 1954) for the recapitalisation of Siciliana Acque Minerali Srl, which is controlled by the above agency.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 307, 13.11.1993, p. 3.
[3] See point 98 of the new guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2), which provides that aid for SMEs individually notified before 30 April 2000 will be assessed in the light of the guidelines previously in force (OJ C 368, 23.12.1994, p. 12).
[4] OJ C 365, 18.12.1999, p. 3.
[5] See footnote 4.

(7) The amount of the planned grant is ITL 3 000 million (EUR 1,5 million).

(8) The final beneficiary of the aid is SAM, a company specialising in managing industrial plants for bottling and distributing mineral water and beverages. SAM was set up in 1993, with 95 % of its capital coming from the Acireale Springs Agency and 5 % from private partners. It initially had a workforce of 30. On 31 December 1996 it employed 26 people. Its turnover was some ITL 3 859 million in 1996 (about EUR 2 million), representing a loss of ITL 710 million (EUR 362 000), of which ITL 500 million was attributable to the day-to-day management of the business and ITL 210 million to its financial management. This loss, equivalent to 18 % of turnover, which followed substantial losses in previous years (ITL 1 922 million in 1995, ITL 1 075 million in 1994 and ITL 376 million in 1993), brought the company's difficulties to such a critical point that its capital base became negative to the extent of ITL 2 584 million (EUR 1,3 million) as at 31 December 1996.

(9) Article 19 of Regional Law No 46/97 provides that the aid in question is intended to cover SAM's losses and to reconstitute its capital with a view to privatisation.

(10) The market in bottling and distributing mineral water and beverages, SAM's main activity, is one in which companies throughout the European Union are in competition. Available information [6] shows that the main producers are in France, the United Kingdom, Italy and Spain. More specifically in 1998, intra-Community exports of beverages totalled some EUR 13 billion, of which EUR 4 485 957 000 is accounted for by France, EUR 1 983 600 000 by the United Kingdom, EUR 1 699 926 000 by Italy and EUR 1 159 648 000 by Spain [7].

III. **COMMENTS FROM INTERESTED PARTIES**

(11) No comments from interested parties were received following publication in the *Official Journal of the European Communities* of the Commission decision to initiate the procedure [5].

IV. **COMMENTS FROM ITALY**

(12) No comments were received from the Italian authorities, nor was a reply received to the Commission's request for information in its decision to initiate the procedure.

V. **ASSESSMENT OF THE AID**

(13) As to the existence of the aid, since a capital injection was provided by a public authority to a State-owned firm, the measure must be assessed according to the 'market economy investor principle' set out in the Commission communication to the Member States on the transfer of funds to public undertakings [8].

(14) SAM is a public undertaking within the meaning of Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [9], as amended by Directive 85/413/EEC [10] and by Directive 93/84/EEC [11]. This Article provides that a public undertaking is considered to be any undertaking over which the public authorities may exercise directly or indirectly a dominant influence. According to the second paragraph of this Article, a dominant influence on the part of the public authorities is presumed when these authorities, directly or indirectly in relation to an undertaking, hold the major part of its subscribed capital. This is undoubtedly the case of SAM, 95 % of whose capital is held by the Acireale Springs Agency, a public institution set up by the Region of Sicily.

(15) It is clear that in certain circumstances public enterprises can derive an advantage from the nature of their relationship with public authorities. Consequently, 'to ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise and the terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions' (market economy investor principle — point 11 of the Commission communication to the Member States on the transfer of funds to public undertakings).

(16) The information in the Commission's possession shows that in 1996, the year when the decision on recapitalisation was taken, SAM was in a particularly weakened financial situation as a result of the losses and the erosion of the firm's capital base described at recital 8. Furthermore, no particulars have been submitted to the Commission to suggest that there was some prospect of the recapitalisation of the firm, at a cost of ITL 3 000 million, being profitable enough to cover the cost of capital which a private investor might be willing to advance and to provide a satisfactory return on the capital investment. Therefore, since it is not in line with the market economy investor principle, the capital injection for SAM constitutes State aid.

[5] See footnote 4.
[6] See European Commission, *Panorama of EU industry* 1997, 3-146, 1994 data.
[7] See Comext2, Eurostat 1999 figures.
[8] See footnote 2.
[9] OJ L 195, 29.7.1980.
[10] OJ L 229, 28.8.1985, p. 20.
[11] OJ L 254, 12.10.1993, p. 16.

(17) This aid could distort or threaten to distort competition in that it allows SAM to strengthen its market position at the expense of its competitors. It could also affect trade within the Community since, according to the information available (see recital 10), the Community market in bottling and distributing mineral water is a very competitive one. Moreover, during the formal investigation procedure, the Italian authorities did not dispute the Commission's affirmation that, if recapitalisation had not taken place, the company would have had to be put into liquidation, releasing market shares or enabling some of its competitors in the Community to bid for its assets.

(18) As to whether the aid is lawful, it should be noted that the measure was kept in the register of notified aid solely because, under Article 22 of Regional Law No 46/1997, Article 19 is subject to prior approval by the Commission within the meaning of Articles 87 et seq. of the Treaty. The Commission did not receive any specific information that the aid had not been granted. It must therefore conclude that the provisions of the Treaty were respected but it cannot rule out the possibility that the aid may none the less have been unlawfully implemented. Indeed, on the basis of the information available, SAM is still in business on the date of this Decision.

(19) As regards the compatibility of the aid, the Commission considers that, since it does not rank as aid having a social character granted to individual consumers or as aid to make good the damage caused by natural disasters or exceptional occurrences, the exemptions in Article 87(2)(a) and (b) are not applicable. Since, furthermore, it is not aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, the exemption in Article 87(3)(b) cannot be applied. The exemption in Article 87(3)(d) is not relevant given the nature of this case. Finally, since the aid is not intended to encourage economic development in Sicily, which would have been considered admissible under the exemption in Article 87(3)(a), the only exemption that could possibly be considered, as indicated by the decision to initiate the formal investigation procedure, is the one provided for in Article 87(3)(c) for the non-regional aspect; in particular, in view of the nature of the aid, the compatibility of the measure should be examined in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([12]), which in any event take account of development needs in the regions assisted.

([12]) See footnote 3.

(20) SAM could be defined as a 'firm in difficulty' unable to recover through its own resources within the meaning of point 2.1 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. However, the scant information which the Commission has at its disposal does not allow it to establish whether the planned capital injection by the Region of Sicily for SAM could be classified as rescue or restructuring aid compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

(21) To be authorised as rescue aid intended temporarily to sustain a firm in difficulty, the recapitalisation of SAM would have had:

(a) to consist of liquidity help in the form of loan guarantees or loans at market interest rates;

(b) to be restricted to the amount needed to keep the firm in business;

(c) to be paid only for the time needed (generally not exceeding six months) to identify the necessary and feasible recovery plan;

(d) to be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial situation in other Member States (see point 3.1 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty) ([12]).

Since the capital injection for SAM was planned in the form of an outright grant, in breach of condition (a), and since there is no evidence that the other conditions were satisfied, the Commission is unable to conclude that the aid in question is compatible with the common market as rescue aid.

(22) To be authorised by the Commission as restructuring aid intended to restore the long-term viability of the firm through reorganisation, rationalisation or diversification of its activities, the recapitalisation of SAM and its subsequent privatisation, as provided for in Regional Law No 46/97, would have had:

(a) to be linked to a restructuring plan intended to restore the long-term viability of the firm within a reasonable timescale;

(b) to be associated with measures aimed at offsetting as far as possible any adverse effects on competitors;

(c) to be limited, as regards the amount and intensity of the aid, to the strict minimum needed to enable restructuring to be undertaken;

(d) to be accompanied by full implementation of the restructuring plan and observance of the conditions laid down in the Commission Decision;

(e) to include an undertaking from the Member State concerned to submit an annual report to the Commission to enable it to monitor the implementation, progress and success of the restructuring plan (see point 3.2 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty) ([12]).

It should be noted that, despite the Commission's request for information in the decision of 3 June 1999 initiating the procedure, no restructuring plan or any other documentation to justify the recapitalisation has been received from SAM. Accordingly, given the lack of information regarding the observance of the other conditions, the Commission cannot conclude that the aid in question is compatible with the common market as restructuring aid.

(23) As regards the procedure for any future sale of SAM, referred to in the Commission decision of 3 June 1999, following the privatisation of the company provided for by Article 19 of Regional Law No 46/97, the Commission has no information at its disposal which would allow it to establish whether or not this took place. As a result, the Commission is not in a position to judge whether the general conditions for the sale of public undertakings were respected; these would form the basis for a decision on the existence or otherwise of State aid ([13]). This Decision does not, therefore, prejudge any position the Commission might take on the matter should privatisation take place in the future.

(24) In conclusion, the Commission considers that the Italian authorities, by neglecting to provide the information needed to assess the case in question, have failed to fulfil their obligation to cooperate in good faith as laid down in Article 10 of the EC Treaty.

VI. **CONCLUSION**

(25) The Commission:

— notes that the Italian authorities have failed to comply with its request for information and that, as a consequence, this Decision must be adopted on the basis of the information available, in accordance with Article 7 of Regulation (EC) No 659/1999,

— concludes on that basis that, since none of the exemptions in Article 87(2) and (3) are applicable, the aid in question is incompatible with the common market and cannot therefore be implemented,

— concludes that any aid implemented in spite of the condition laid down in Article 22 of Regional Law No 46/97 must be recovered. This is necessary to restore the previous situation by removing the financial advantages from which the recipient has benefited unlawfully from the date on which the aid was improperly granted. Recovery of incompatible and unlawful aid is provided for in Regulation (EC) No 659/1999. The aid must be recovered without delay and in accordance with the procedures of national law, provided that these allow effective and immediate execution of the Commission Decision. Interest is payable from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. Interest is calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Italy is planning to implement for Siciliana Acque Minerali Srl, amounting to ITL 3 000 million is incompatible with the common market.

2. The aid may accordingly not be implemented.

Article 2

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

Article 3

1. Italy shall take all necessary measures to recover from the recipients any aid which may have been unlawfully granted.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipients until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

([12]) See footnote 3.

([13]) The Commission Decision of 3 June 1999 (see footnote 4) implicitly refers to the letter of 14 July 1993 to the Director-General of the French competition authority; these criteria were reaffirmed by the Commission in its XXIIIrd Report on competition policy.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 June 2000.

For the Commission
Mario MONTI
Member of the Commission