COMMISSION

COMMISSION DECISION

of 16 May 2000

on the aid scheme implemented by Italy to assist large firms in difficulty (Law No 95/1979 converting Decree Law No 26/1979 on special measures for the extraordinary administration of large firms in crisis)

(notified under document number C(2000) 1403)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2001/212/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 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], and in particular Article 14 thereof,

Having regard to the decision of 28 July 1999 [2] in which the Commission invited the Italian authorities and other interested parties to submit their comments on its intention to withdraw its decisions of 13 December 1994 proposing appropriate measures to the Italian Republic regarding the extraordinary administration of large firms in crisis and of 22 January 1997 initiating the Article 88(2) procedure with regard to the Law on the extraordinary administration of large firms in a state of insolvency,

Having regard to the Commission Decision of 28 July 1999 in which it initiated the procedure under Article 88(2) in respect of aid C 68/99 (ex NN 96/99, ex C 7/97 and ex E 13/92),

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

Whereas:

I. PROCEDURE

(1) The Commission became aware in 1982 of Law No 95 of 3 April 1979 converting and amending Decree-Law No 26 of 30 January 1979 on special measures for the extraordinary administration of large firms in crisis (Law No 95/1979). However, no formal decision was taken under Article 88 (formerly Article 93) of the EC Treaty.

(2) In 1983, following discussions with the Italian authorities, the Commission accepted a verbal undertaking that Law No 95/1979 would no longer be applied.

[1] OJ L 83, 27.3.1999, p. 1.
[2] Letter to the Italian authorities of 12 August 1999 (OJ C 245, 28.8.1999, p. 27).

(3) In 1988 the Commission asked the Italian authorities for information, owing to the effect the measures provided for in the Law were having on the level of employment.

(4) By letter of 30 July 1992, the Commission informed the Italian Government of its decision to examine Law No 95/1979 under Article 88(1) (formerly Article 93(1)) of the EC Treaty in order to determine the appropriate measures required by the progressive development or the functioning of the common market.

(5) The Commission communicated the appropriate measures to the Italian authorities in 1995 ([3]).

(6) Among the appropriate measures proposed by the Commission as part of the constant review provided for in Article 88(1) was the requirement that all new plans to grant aid under the Law in question were to be notified under the Community guidelines on state aid for rescuing and restructuring firms in difficulty ([4]).

(7) In their reply of 9 March 1995, the Italian authorities agreed only to notify cases in which State guarantees were granted and refused to regard the other measures provided for in Law No 95/1979 as aid.

(8) By letter of 25 March 1997, the Commission informed Italy of its decision to initiate proceedings under Article 88(2) of the EC Treaty in respect of the scheme provided for in the abovementioned Law.

(9) The Commission decision to initiate proceedings was published in the *Official Journal of the European Communities* ([5]). The Commission invited interested third parties to submit their comments on the measures in question. No such comments were received.

(10) By letter of 28 April 1997 from the Minister for Industry, a complete version of which was received on 8 July 1997, the Italian authorities communicated their comments.

(11) In 'Rinaldo Piaggio-Ifitalia-Dornier', the Court of Justice of the European Communities considered the question 'whether a system such as that established by Law No 95/1979 must be classified as a new or as an existing aid' (...) in view of its relevance 'to the resolution of the dispute in the main proceedings, bearing in mind the inferences which the national court may have to draw (...) from the absence of any prior notification to the Commission of the aid system (...) in issue' ([6]).

(12) In paragraphs 45 et seq. of the same judgment, the Court rejected the position of the Commission, which, whilst recognising that Law No 95/1979:

(a) was promulgated after the entry into force of the Treaty, and

(b) was not notified to it in accordance with Article 88(3) of the Treaty;

had however classified the scheme as 'existing State aid'.

(13) The Court held that the Commission's position could not be accepted since the answer to the question to the Court 'cannot depend on a subjective assessment by the Commission' (paragraphs 46 and 47 of the grounds).

([3]) OJ C 395, 31.12.1994, p. 4; Commission letter SG(95)D/351, 13.1.1995.
([4]) OJ C 368, 23.12.1994, p. 12.
([5]) OJ C 192, 24.6.1997, p. 4.
([6]) Judgment in Case C-295/97 [1999] ECR I-3735, paragraph 25. The case concerned a reference for a preliminary ruling by the Tribunale di Genova (Italy) under Article 234 (formerly Article 177) of the EC Treaty.

(14) Following that judgment, the Commission, by letter of 12 August 1999 ([7]), announced its intention of withdrawing its two previous decisions proposing appropriate measures and initiating the Article 88(2) procedure, giving the Italian authorities and other interested parties the opportunity to present their comments, and initiated proceedings under Article 88(2) in respect of the aid provided for in Law No 95/1979, which would henceforth be entered in the register of non-notified aid.

(15) The Italian authorities sent their comments on the procedure by letter of 14 September 1999, registered as received on 20 September 1999, and their comments on the substance by letter of 2 November 1999, registered as received on 5 November 1999.

(16) Two interested parties, Ecotrade SpA and Cordifin SpA, sent their comments to the Commission by letter of 17 September 1999, registered as received on 21 September 1999.

(17) The comments were forwarded to the Italian authorities by letter of 7 October 1999.

II. **DESCRIPTION**

(18) The principal aim of extraordinary administration ('whilst avoiding bankruptcy') ([8]) is to ensure the continuation of productive activity and preserve the unity of the operational complex in order to maintain existing employment and production levels ('conservative' measures). The subsidiary aim is to satisfy creditors (protection of creditors' rights). The extraordinary administration procedure was established by Decree-Law No 26 of 30 January 1979, ([9]) as amended and converted into Law No 95/1979 ([10]) and subsequently amended on several occasions ([11]) Leaving aside the very large number of minor changes made, the essential elements of the procedure are described in recitals 19 to 27.

(19) Article 1 of the Law in question identifies firms subject to the extraordinary administration procedure on the basis of two factors:

1. the number of employees: not fewer than 300, employed for at least one year;

2. debt exposure: indebtedness towards credit institutions, special credit institutions, social welfare and social security institutions or bodies in which the State has a majority holding five times greater than the paid-up capital, currently equivalent to a minimum of ITL 85,277 billion (EUR 44 million) ([12]).

From 1993 onwards, Article 1A included other categories of firms in the list of those covered by extraordinary administration.

([7]) OJ C 245, 28.8.1999, p. 28.
([8]) Article 1 of Law No 95/1979.
([9]) Published in Italian Official Gazette No 36, 6.2.1979.
([10]) Published in Italian Official Gazette No 94, 4.4.1979.
([11]) In particular by the following acts: Law No 445 of 13.8.1980 (Official Gazette No 226, 19.8.1980); Law No 119 of 31.3.1982 (Official Gazette No 90, 1.4.1982); Law No 696 of 19.12.1983 (Official Gazette No 348, 21.12.1983); Decree-Law No 62 of 9.4.1984 (Official Gazette No 101, 11.4.1984), amended and converted into Law No 212 of 9.6.1984 (Official Gazette No 158, 9.6.1984); Decree-Law No 835 of 9.12.1986 (Official Gazette No 286, 10.12.1986), amended and converted into Law No 19 of 6.2.1987 (Official Gazette No 32, 9.2.1987); Decree-Law No 336 of 4.9.1987 (Official Gazette No 207, 5.9.1987), amended and converted into Law No 452 of 3.11.1987 (Official Gazette No 258, 4.11.1987); Decree-Law No 17 of 23.1.1993 (Official Gazette No 19, 25.1.1993), amended and converted into a No 80 of 25.3.1993 (Official Gazette No 71, 26.3.1993); Decree-Law No 532 of 23.12.1993 (Official Gazette No 300, 23.12.1993), amended and converted into Law No 111 of 17.2.1994 (Official Gazette No 42, 21.2.1994); Law No 128 of 24.4.1998 (published in Ordinary Supplement No 88 to Official Gazette No 104, 7.5.1998).
([12]) The debt limit is updated at 30 April each year, most recently on 30 April 1999 by decree of the Minister for Industry (Italian Official Gazette No 108, 11.5.1999).

(20) As regards the procedural aspect, Article 1 provides that, when a court finds that a firm is insolvent or has failed to pay the wages for at least three months, the Minister for Industry, Commerce and Craft Trades, in agreement with the Minister for the Treasury, adopts a decree imposing extraordinary administration ([13]).

(21) The procedure is carried out by one or three trustees appointed by the Minister for Industry, Commerce and Crafts and under the latter's supervision. A supervisory committee composed of three or five members is set up.

(22) Under Article 2 of the Law, the Minister may, pursuant to the Decree establishing the extraordinary administration procedure and taking account of the interests of creditors, authorise the firm to remain in business for an initial period of two years. Although optional, authorisation is the normal consequence of the procedure. The initial period may be extended for a further period not exceeding two years. Further extensions have been authorised for specific periods in special cases.

(23) The trustee draws up as part of a restructuring plan a management plan which the Interministerial Committee for Industrial Policy (CIPI) checks for compliance with national industrial policy ([14]). It should be noted that the plan is submitted not before but after the decision to initiate the extraordinary administration procedure.

(24) Under Article 2A, the Treasury may guarantee all or some of the debts which a firm in extraordinary administration contracts with credit institutions in order to finance day-to-day management and to bring back on stream or add to industrial plant, buildings and equipment.

(25) Article 3 of the Law provides that the same extraordinary administration procedure is applicable to groups, in particular the firms controlling or controlled by the firm in extraordinary administration or firms subject to the same management as the latter, even if their circumstances do not warrant an extraordinary administration procedure.

(26) The end of the procedure demonstrates its task of conservation ([15]), which takes precedence over the protection of creditors' rights, inasmuch as the proceeds of a bankrupt's assets will be allocated to creditors only after payment of the costs of extraordinary administration and day-to-day management, including debts incurred, within the meaning of Articles 111 and 212 of the Italian Bankruptcy Law.

(27) The extraordinary administration procedure ends if a composition is accepted, if total assets are distributed, if credit is exhausted, if there are insufficient assets or if the firm is once again able to fulfil its obligations and hence return to financial equilibrium.

III. **COMMISSION DECISION OF 28 JULY 1999**

(28) By decision of 28 July 1999, communicated to the Italian authorities by letter of 12 August 1999, the Commission:

— requested the Italian Government and other interested parties to submit their comments on the withdrawal of the Commission decisions of 13 December 1994 proposing appropriate measures under Article 88(1) to the Italian Republic and of 22 January 1997 initiating the Article 88(2) procedure in respect of the Law on the extraordinary administration of large firms in a state of insolvency,

([13]) The decree is similar to that which initiates the administrative compulsory winding-up procedure. It is defined in case-law as a mandatory act ('atto dovuto').
([14]) It is clear from this that the Law is strongly imbued with the interventionist spirit prevalent at the time it was adopted.
([15]) It is significant that Article 2(2) of Law No 95/1979 expressly states that, where possible, the unity of the operational complex, including the parts to be transferred, must be preserved.

— initiated the Article 88(2) procedure in respect of the scheme established by the abovementioned Law which would in future be registered as non-notified aid.

(29) The Commission based its reasons for the action referred to in the first indent of the preceding paragraph on the 'Piaggio' judgment (see recitals 11 to 13), from which it must draw the appropriate conclusions.

(30) In its reasons for the action referred to in the second indent of paragraph 28, the Commission expressed its doubts as to the compatibility of the scheme provided for in Law No 95/1979, pointing out in particular that it maintained the doubts referred to in its earlier Decision of 22 January 1997 initiating the procedure. In support of its analysis pointing to the existence of aid elements in the Law in question, it also referred to the case law in *Ecotrade Srl* v *AFS* (see recital 32), specifying that, in its opinion, the aid did not a priori qualify for any of the derogations provided for in the Treaty, notably those concerning aid for rescuing and restructuring firms in difficulty.

(31) The reasons for the decision of 22 January 1997 initiating the formal procedure under Article 88 may be summarised as follows:

— the Law concerns large firms in a state of insolvency,

— extraordinary administration is at the discretion of the administration, especially as regards the continuation of business,

— unlike bankruptcy, the aim is to protect the firm, on the basis of the public interest in safeguarding employment in particular, from the usual consequences of insolvency by allowing it to remain in operation,

— this is reflected in the system of judicial protection. Extraordinary administration is subject only to the control of the administrative court, which is empowered to deal solely with the legality of administrative acts and has no right to monitor the economic desirability of transactions,

— the legislative provisions in question clearly specify that extraordinary administration is an exception to bankruptcy procedures,

— aid to large firms in difficulty distorts in a particular manner trade and competition in the common market,

— extraordinary administration has a number of financial advantages involving the use of State resources (exemption from individual enforcement measures and suspension of interest payments on debts towards the tax authorities and social security bodies, exemption from the payment of fines and penalties for nonpayment of compulsory social security contributions, suspension of fines for delayed payment of income tax, symbolic registration charge on transfers of ownership of firms, freezing of amounts owed to other public bodies or companies, possible Treasury guarantee),

— the scheme does not provide for the notification of individual cases of aid, contrary to the Community guidelines for rescue and restructuring aid,

— extension of the Law to controlling and controlled firms (groups), which has a more serious impact on competition.

(32) In *Ecotrade* v *AFS*, ([16]) the Court of Justice concluded that 'application to an undertaking (...) of a system of the kind introduced by Law No 95/1979, and derogating from the rules of ordinary law relating to insolvency, is to be regarded as giving rise to the grant of State aid, where it is established that the undertaking:

— has been permitted to continue trading in circumstances in which it would not have been permitted to do so if the rules of ordinary law relating to insolvency had been applied, or

([16]) Judgment in Case C-200/97 [1998] ECR I-7907, paragraph 45.

— has enjoyed one or more advantages, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines and other pecuniary penalties or waiver in practice of public debts wholly or in part, which could not have been claimed by another insolvent undertaking in connection with the application of the rules of ordinary law relating to insolvency.'

IV. **COMMENTS BY ITALY**

(33) The Italian authorities sent their comments on the procedure and the substance by letter of 14 September 1999, registered as received on 20 September 1999, and on the substance alone by letter of 2 November 1999, registered as received on 5 November 1999.

Comments on the procedure

(34) In their first letter, the Italian authorities raised a question of procedure. They challenged the Commission's decision to withdraw all the acts relating to the rules on extraordinary administration on the ground that Law No 95/1979 constituted existing aid and to initiate at the same time the Article 88(2) procedure. According to the Italian authorities, withdrawal of the existing procedure should in any event take place before any new procedure is initiated and not at the same time.

(35) In addition, while the Commission may be required to withdraw its decisions of 13 December 1994 and 22 January 1997 in view of the 'Piaggio' judgment, it would have no real interest in seeking comments from the Member States and other interested parties in the absence of a margin of discretion.

Comments on the substance

(36) In the same letter the Italian authorities stressed that the concept of existing aid, which has evolved as Community law has been developed, must include a third category (*tertium genus*) consisting of schemes where a Commission assessment of compatibility changes over time in keeping with new case-law ([17]). Furthermore, the Commission was aware of Law No 95/1979, even though it was never notified, at least as early as 1982 but decided to examine it in detail only in 1992 in view of the development of the common market. At the same time, the position of the Italian Government developed along similar lines as of when it agreed to give prior notification of each case in which a public guarantee was granted for company debt.

(37) The reservations of the Italian authorities are, in their view, also justified by the fact that they claim to have informed the Commission that the aid scheme had been revoked at the same time as a new extraordinary administration procedure was introduced with the adoption of Decree-Law No 170 of 8 July 1999 ([18]) in response to the proceedings initiated (C 7/97).

(38) In their second letter, the Italian authorities gave an elastic interpretation of the Court's judgment in 'Rinaldo Piaggio', stating that the Court had concluded that the scheme introduced by Law No 95/1979 could, rather than necessarily must, give rise to the granting of aid in cases where certain conditions were fulfilled, and in particular if it were found that the firm had been to remain in operation in circumstances in which it would normally have been wound up, or where it enjoyed one or more of the following advantages:

— granting of a Treasury guarantee,

— exemption from payment of fines and pecuniary penalties in the event of non-payment of compulsory social security contributions,

([17]) The other two categories consist of aid existing before the EC Treaty (or the accession of the Member State in question) and aid declared compatible by a Commission decision and implemented lawfully.
([18]) Italian Official Gazette, 9.8.1999.

— suspension of enforcement measures in respect of company tax debts towards the tax authorities,

— payment of a symbolic registration charge of ITL 1 million (EUR 516) on transfers of ownership.

It would be for the national courts to verify that each case qualified as aid under the Court's guidelines.

(39) In view of that interpretation, it would be contrary to the ruling of the Court to initiate an Article 88(2) procedure in respect of the law in general and not its actual application, especially as the procedure would no longer serve any purpose as a result of the fact that Law No 95/1979 has in the meantime been revoked and could not therefore be notified in advance with a view to its future application.

(40) With regard to the substantive aspects of the scheme, the Italian authorities simply repeated the content of the letter of 28 April 1997 from the Minister for Industry, a full version of which was received on 8 July 1997 and in which they submitted their comments following the decision to initiate procedure C 7/97 (ex E 13/92), notified by letter SG(97) D/2286 of 25 March 1997.

The document contained the following comments:

— extraordinary administration is consistent with the traditional procedures provided for in the law on bankruptcy (which in Italy goes back to 1942), in particular as regards the temporary carrying-on of business ('esercizio provvisorio') ([19]) and the fact that debtors are dispossessed of their assets and no longer have the right to manage or dispose of them,

— it is limited to large firms and its extension to groups of firms is justified by the economic and social impact which, at least as regards SMEs, is easier to manage through the bankruptcy procedure,

— extraordinary administration differs from bankruptcy in that, in general, it is aimed at keeping the firm afloat with a view to restructuring and restoring viability so that it can be sold rather than broken up into separate entities. In their comments of 5 November 1999, the Italian authorities define insolvency as a neutral condition which is not inconsistent with such aims and indeed is specifically recognised as a typical indicator of a firm in difficulty ([20]). Furthermore, as the effect of the two procedures (extraordinary administration and bankruptcy) is the same, i.e. the continued presence of the insolvent firm on the market, it is irrelevant whether the aim is to protect creditors or workers, since aid must be assessed on the basis of its potential to distort competition and not on the basis of its stated aim.

(41) In its notice of 25 March 1997, the Commission challenged the claim that it was normal for a firm in difficulty and placed under extraordinary administration to continue its business, whereas the temporary carrying-on of business was an exception in bankruptcies. The Italian authorities replied as follows:

— the aim of preserving the status quo is inherently neutral and only the actual granting of public resources could give the firm in question an illegal advantage and hence distort the market,

— other European countries have procedures similar to extraordinary administration, notably the French system of 'compulsory administration' (redressement judiciaire), which is aimed at protecting the firm's assets and provides a significant margin of discretion,

([19]) Article 90 of the Italian Bankruptcy Law.
([20]) See in particular the definition of a firm in difficulty in paragraphs 5(c) and 6 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

— the procedure launched by the court with the adoption of the statement of insolvency is applied automatically and in general to all firms meeting the size requirements. Authorisation to continue business forms the essence of the procedure and the means for restoring the firm's viability, i.e. profitability. It is always subject to the legitimate interests of the creditors,

— while acknowledging that there was an element of discretion, the Italian authorities stated that it was exercised in the interests of the creditors and was therefore irrelevant to the question of whether the scheme was compatible with Articles 87 and 88 of the EC Treaty.

(42) With regard to the elements allegedly constituting State aid, Italy commented as follows:

— as regards the Treasury guarantee, originally the only quantifiable aid element recognised by them, the Italian authorities had already agreed, by letter of 9 March 1995 in reply to the Commission letter proposing appropriate measures under Article 88(1), to notify individual cases in which the guarantee was given. In the meantime, they had amended Law No 95/1979 in order to include a counterpart in the form of a market premium to be borne by the recipient firm,

— exemption from payment of fines and penalties in the event of non-payment of compulsory social security contributions relates only to fines imposed up to the entry into force of the Law in 1986 ([21]),

— suspension of enforcement measures in respect of company tax debts towards the tax authorities does not, according to the Italian authorities, prejudice the rights of the State as a preferential creditor as much as it would seem since its preferred status, which enables its claims to be met by means of an individual enforcement measure from the proceeds of the sale of the bankrupt's assets, is simply a procedural privilege deriving from the legal action since the State secures only its share of those proceeds,

— payment of a fixed registration charge of ITL 1 million (EUR 516) on transfers of ownership was, according to the Italian authorities, introduced only for any third parties acquiring a firm's assets and does not therefore benefit the insolvent firm ([22]),

— the suspension of interest payments on amounts owed to social security institutions forms part of standard bankruptcy procedure and is an automatic consequence of a declaration of insolvency.

V. **COMMENTS FROM THIRD PARTIES**

(43) Comments from two interested parties ([23]) were received by letter registered on 21 September 1999. Both parties agree with the position taken by the Commission in its letter of 12 August 1999 ([24]).

VI. **ASSESSMENT OF THE PROCEDURAL ISSUES**

(44) As regards the Italian comments on the procedure followed by it, the Commission points out that, as the Court of Justice ruling in 'Piaggio' had rejected its position that Law No 95/1979 constituted State aid, it was required to draw the appropriate conclusions regarding the acts adopted on 13 December 1994 and 22 January 1997. As the ruling was neither an action for annulment pursuant to Article 230 of the Treaty nor an action for assessment of validity pursuant to Article 234 of the

([21]) For a complete list of the amendments to Law No 95/1997, see footnote 11.
([22]) However, the tax on transfers of ownership in general amounts to 3 % of the value of the firm.
([23]) Ecotrade SpA and Cordifin SpA.
([24]) See footnote 7.

Treaty, it was required to allow the Italian Government and interested parties to submit their comments on the manner in which it planned to follow up the ruling, i.e. by withdrawing the acts adopted previously. The Italian authorities, through their comments on the lack of any real interest on the part of the Commission in seeking the comments of the Member State and interested parties in view of the absence of a margin of discretion, have failed to take that situation into account.

(45) The claim by the Italian authorities that the old procedure must be withdrawn before the new one is initiated rather than at the same time constitutes a form of inflexible formality whose sole practical effect is to lengthen the procedure. The approach taken by the Commission guarantees that, since the two decisions are successively covered by its decision of 28 July 1999, which in turn is covered by the present decision, it will examine the compatibility of the non-notified aid scheme established by Law No 95/1979 only once it has decided to withdraw its previous decisions of 1994 and 1997. This approach also ensures an economy of procedure that directly benefits the definitive clarification of the scheme in the light of the State aid rules. Indeed, it entails an economy of the procedure in Article 9 of Regulation (EC) No 659/1999, even if it is not directly applicable in the present case.

VII. **ASSESSMENT OF THE SUBSTANCE**

(46) The Italian authorities have not presented any arguments calling into question the conclusions the Commission intended to draw from the Court ruling that Law No 95/1979 was not existing aid, namely, that its decisions of 13 December 1994 (proposal for appropriate measures) and 22 January 1997 (first initiation of proceedings) should be withdrawn. For their part, the interested parties that submitted comments shared the view taken by the Commission in its Decision of 28 July 1999. The Commission therefore confirms its intention formally to withdraw its 1994 and 1997 Decisions.

(47) That said, it would point out that Law No 95/1979 has already been the subject of several Commission Decisions, including two concerning matters covered by the ECSC Treaty, which can usefully be examined in order to gain a better understanding of its operation.

— Decision 96/434/EC of 20 March 1996, ([25]) in which the Commission concluded that State aid was present in the provisions of Law No 80/93 ([26]) amending Law No 95/1979 and providing for the application of the extraordinary administration procedure to firms whose insolvency is caused by the obligation to repay to the State or to public bodies or companies in which the public authorities have a majority holding a sum of not less than 51 % of paid-up capital and, in any event, not less than ITL 50 billion (EUR 26 million), pursuant to Decisions taken by the Community institutions under Articles 87 and 88 of the EC Treaty. The measure in question was declared incompatible with the common market. By letter of 10 June 1998, registered as received on 12 June 1998, Italy stated that the provisions had been revoked,

— Decision 96/515/ECSC of 27 March 1996 ([27]) in which the Commission concluded that aid within the meaning of Article 4(c) of the ECSC Treaty had been granted to Acciaierie a Ferriere di Servola (AFS) in the form of a guarantee covering an amount of ITL 26,5 billion (EUR 14 million), without any premium being paid, under Article 2a (Treasury guarantee) of Law No 95/1979. In its decision, the Commission found that the aid was illegal and incompatible with the common market for coal and steel, and ordered the Italian authorities to recover it,

([25]) OJ L 180, 19.7.1996, p.31. It concerns Case C 59/94 (ex NN 125/94). According to the information provided by the Italian authorities, the only specific case in which Law No 80/93 was applied was in Nuova Cartiera di Arbatax.
([26]) Article 1 of Decree-Law 17 of 23 January 1993, converted into Law No 80 of 25 March 1993; See footnote 11.
([27]) OJ L 216, 27.8.1996, p. 11.

— Decision 97/754/ECSC of 30 April 1997, ([28]) in which the Commission concluded that a series of measures benefiting Ferdofin Siderurgica Srl, and in particular suspension of the payment of considerable debts towards certain public bodies, pursuant to Law No 95/1979 constituted aid within the meaning of Article 4(c) of the ECSC Treaty. In its Decision, the Commission stated that the aid was incompatible with the common market for coal and steel and ordered the Italian authorities to recover the aid already paid and to suspend Law No 95/1979 as regards the failure by Ferdofin Siderurgica Srl to pay debts contracted with public enterprises and bodies.

(48) The first task is to identify, within the legal framework of the extraordinary administration procedure, the measures that are not general measures and then to decide whether they are covered by Article 87(1) of the EC Treaty.

(49) Law No 95/1979 shares certain features with the bankruptcy procedure and contains a number of aid elements, ([29]) although it does derogate from the bankruptcy procedure, which, in principle, applies to most firms. The Law on extraordinary administration reflects the crisis that affected large industrial firms in Italy and Europe in the 1970s, its chief aim being to maintain employment levels through a restructuring plan intended to allow the firm to survive and to avoid being immediately wound up.

(50) Law No 95/1979 refers back in certain respects to the Italian Bankruptcy Law ([30]) and, where it provides for the application without derogation of the latter's mechanisms, the mechanisms and procedures constitute general measures and are not in any way selective. On the other hand, the Law contains specific provisions, including the granting to identifiable recipients of a number of special advantages involving public resources. Such cases would constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(51) In *Ecotrade* v *AFS* (see recital 32 of this decision), which concerned the application of Law No 95/1979, ([31]) the Court analysed the latter, identified the elements that did not constitute general measures and, by virtue of their characteristics, concluded that they constituted aid granted by the State.

(52) Before considering each of those elements, the Court found that the Law was intended to apply selectively to large industrial undertakings in difficulties which owed particularly large debts to certain, mainly public, classes of creditors (paragraph 38 of the grounds).

(53) The first element identified was the decision placing the firm in difficulties under extraordinary administration and permitting it to continue trading. The Court established that the decisions of the Minister for Industry in this respect were taken with regard as far as possible to the interests of the creditors and, in particular, to the prospects for increasing the value of the firm's assets. They were also influenced, as the Italian Government itself acknowledged, by the concern to maintain the firm's economic activity in the light of national industrial policy considerations. Hence, the legislation authorising the continuation of trading was liable to place the firms to which it applied in a more favourable situation than others, inasmuch as it enabled them to continue trading in circumstances in which that would not be allowed if the usual insolvency rules were applied, since those rules were decisive when it came to protecting creditors' interests. In view of the class of firms covered by the

([28]) OJ L 306, 11.11.1997, p. 25.
([29]) See footnote 16.
([30]) Royal Decree No 267 of 16 March 1942 (Bankruptcy Law). Article 1 of law No 95/1979 refers to Articles 5, 6, 195 et seq. and 237 of the Bankruptcy Law; Article 2 refers to Articles 35 and 212 of that Law and Article 3 to Articles 67, 198 and 206, etc.
([31]) In Piaggio (see footnote 6) the Court considered on its own initiative whether a system of the kind introduced by Law No 95/1979 and derogating from the rules of ordinary law relating to insolvency should be regarded as State aid within the meaning of Article 92 (now Article 87) of the Treaty. Its conclusions in this respect confirmed those reached in 'Ecotrade'

legislation and the scope of the discretion enjoyed by the Minister, the legislation meets the condition of specificity. Lastly, the Court pointed out that, in view of the priority accorded to debts connected with the pursuit of economic activity, authorisation to continue trading might, in those circumstances, involve an additional burden for the public authorities if it were in fact established that the State or public bodies were among the chief creditors of the firm in difficulties, all the more so because, by definition, that firm owed debts of considerable value (paragraphs 39 to 41 of the grounds).

(54) The Court also identified the following advantages:

— the grant of a guarantee under Article 2A of Law No 95/1979 ([32]),

— extension of the prohibition and suspension of all individual actions for enforcement to tax debts and penalties, interest and increases in cases of belated payment of company tax ([33]),

— exemption from the obligation to pay fines and pecuniary penalties in the case of failure to pay social security contributions ([34]),

— application of a preferential rate where all or part of the firm is transferred ([35]) (a flat-rate registration charge of ITL 1 million, whereas the normal rate of the registration charge is 3 % of the value of the property sold).

The Court emphasised that such advantages might also entail an additional burden for the public authorities and that this could be otherwise only if it were shown that placing a firm under special administration and allowing it to continue trading did not in actual fact entail an additional burden for the State, compared to the situation that would have arisen had the usual insolvency rules been applied (paragraphs 42 and 43 of the grounds).

(55) On the basis of that analysis, the Commission concludes that, as regards the first element ([36]), the reasoning of the Court (which stresses that authorisation to continue trading might involve an additional burden for the public authorities if it were in fact shown that the State or public bodies were among the chief creditors of the firm in difficulties) may be interpreted as meaning that it would be further necessary to prove in the case in question that public resources are involved as a result of the effective increase in the burden on the State. The Commission would point out in this respect that the Court itself ascertained the effective existence of such charges by virtue of the aim of Law No 95/1979, which applies selectively to large industrial firms in difficulties owing particularly large debts to certain, mainly public, classes of creditors.

(56) The Italian authorities do not challenge this analysis in their comments: their argument is that the analysis should not concern the Law in general but its specific application. Such an approach would be to ignore the fact that an aid scheme is involved and that, as a result, the analysis (as to whether it is State aid and, if necessary, whether it is compatible with the common market) concerns the scheme itself and its machinery in particular, without it being necessary or justified to analyse each individual case in order to reach a decision.

([32]) The Italian authorities, which had consistently maintained that the only State aid in the scheme was the guarantee and finally agreed in March 1995 to notify all cases in which a guarantee had been granted, introduced the payment of a premium.
([33]) Article 4 of Law No 544/1981 amending Law No 95/1979.
([34]) Second paragraph of Article 3 of Decree-Law No 835/1986, converted into Law No 19/1987 of 6 February 1987, further amending Law No 95/1979 (Italian Official Gazette No 32, 9.2.1987).
([35]) Article 5A of Law No 95/1979.
([36]) Authorisation to continue trading in circumstances in which that would not be allowed if the usual insolvency rules were applied.

(57) As regards the other 'advantages' identified by the Court, the Commission notes that, as regards the 'involvement of State resources', it is not disputed that the guarantee granted under Article 2A of Law No 95/1979 constitutes State aid; the Italian authorities have consistently regarded it as such ([37]). As for the other 'advantages', the Commission repeats, as stated above, that they are part of a scheme which must be analysed as such, without it being necessary or justified to analyse each individual case. In this respect it might be assumed from the Court's reasoning that an additional burden is placed on the public authorities, an assumption which can be ruled out only if it can be shown that the advantages should not entail an additional burden for the State, compared to the situation that would have arisen had the usual insolvency rules been applied. No such evidence was provided by the Italian authorities in their comments on the 'advantages' arising out of Law No 95/1979. They did not challenge that conclusion with regard to the suspension of individual enforcement actions and simply stated that the measure would not adversely affect the rights of the State, as a preferred creditor, to the extent it might appear to do. Nor did they challenge the conclusion with regard to the exemption from the payment of fines and pecuniary penalties, pointing out simply that the exemption related only to penalties imposed prior to the date of entry into force of the 1986 Law. Lastly, they did not challenge the view that the registration charge on transfers of ownership is an advantage.

(58) In short, it must be concluded that the various advantages arising out of Law No 95/1979 constitute State aid within the meaning of Article 87(1) of the EC Treaty ([38]).

(59) Once it has been ascertained that State aid is involved, it is necessary to consider whether the aid scheme qualifies for a derogation under Article 87(2) and (3), thereby averting the ban in Article 87(1).

(60) Article 87(2) defines the forms of aid that are compatible with the Treaty. In view of the nature and purpose of the scheme in question and its geographical coverage, it is clear that the derogations in Article 87(2)(a), (b) and (c) are not applicable in the present case.

(61) Article 87(3) lists the categories of aid that may be regarded as being compatible with the common market. Compatibility with the Treaty must be assessed from the standpoint of the Community as a whole and not in a purely domestic context. In order to safeguard the proper functioning of the common market and having regard to the principle in Article 3(g) of the Treaty, the exceptions in Article 87(3) must be construed narrowly.

(62) With regard to the derogations in Article 87(3)(b) and (d), it is clear that the scheme in question is not intended to promote an important project of common European interest, to remedy a serious disturbance in the Italian economy or to promote culture and heritage conservation. As regards the regional development derogations in Article 87(3)(a) and (c), it is clear that the scheme applies without distinction to all Italian regions.

(63) As regards the derogation in Article 87(3)(c) for aid to facilitate the development of certain activities, it is clear that the aid scheme is not intended to facilitate the development of a particular economic area or promote initiatives to assist small and medium-sized businesses, research and development, environmental protection, job creation or training, in accordance with the Community guidelines on State aid for small and medium-sized enterprises, research and development, environmental protection, employment and training.

([37]) They subsequently imposed the payment of a premium for the guarantee before agreeing in March 1995 to notify the Commission of all cases in which the guarantee is granted.

([38]) The *de minimis* rules (OJ C 68, 6.3.1996, p. 9) clearly do not apply in the present case.

(64) The purpose of the scheme is to adopt extraordinary administration measures to assist large firms in difficulties. The Commission has defined its policy on rescue and restructuring aid and specified the conditions in which it considers that such aid can contribute to the development of economic activities without affecting trade to an extent contrary to the general interest. The relevant guidelines in force when the Commission took its decision on 28 July 1999 to initiate proceedings under Article 88(3) of the Treaty provided (as specifically stated in the decision) for the possibility of authorising rescue or restructuring aid only for small and medium-sized firms, since for large firms individual notification of all aid was mandatory and approval of a scheme was ruled out ([39]). This is why the Commission stressed when initiating the proceedings that it believed that the scheme was incompatible. The new guidelines also rule out the possibility of a scheme being authorised for large firms ([40]). They do, however, provide that the Commission will examine all rescue and restructuring aid granted without its approval and hence in breach of Article 88(3) of the Treaty in order to determine its compatibility with the common market under the guidelines in force when the aid was granted ([41]).

(65) The first time the Commission set out its policy on aid for rescuing and restructuring firms in difficulty was in 1978 in the Eighth Report on Competition Policy (point 228). The policy ([42]) concerned the aid arrangements introduced by Member States in order to provide credit required by certain firms which they could not otherwise obtain either for a limited period to provide for a study of restructuring/conversion opportunities (rescue aid) or to keep them in business until the restructuring/conversion can take effect (restructuring aid).

— Rescue aid granted simply to keep firms in business while the causes of their difficulties are identified and a remedy worked out must observe the following conditions:

  — they must consist of cash aid in the form of loan guarantees or loans bearing normal commercial interest rates.

  — they must be restricted to the amount needed to keep a firm in business (for example, covering wage costs and routine supplies),

  — they must be paid only for the time needed (generally six months) to devise the necessary and feasible recovery measures,

  — they must be warranted on the grounds of serious social difficulties and keeping the firm in operation must not have any adverse effects on the industrial situation in other Member States.

— As regards restructuring aid, the Commission stated that it must be strictly conditional on the implementation of a sound restructuring or conversion programme which effectively restores the viability of the production concerned in the long term and that its intensity and amount must be restricted to the strict amount needed for supporting the firm during the transitional period before such a programme takes effect. The period involved must therefore be limited and the assistance gradually reduced.

Lastly, in the case of both rescue and restructuring aid, the Commission required that the industrial programmes drawn up for their application or individual significant cases of application be notified in advance.

(66) In view of the various arrangements of the scheme provided for in Law No 95/1979, it is clear that the conditions set out above have not been satisfied:

([39]) See footnote 4, paragraphs 4.1 and 4.2.
([40]) See footnote 20, paragraph 4.1 of the guidelines.
([41]) See footnote 20, paragraph 7.5 of the guidelines.
([42]) As confirmed and expanded in the subsequent guidelines of 1994 and 1999.

— either as regards rescue aid: the guarantee provided for in Article 2A applies to debts arising out of the continued operation of the firm and is not limited to a loan guarantee. The other measures cannot in any way be regarded as loans bearing a normal commercial interest rate. There is no machinery to guarantee that the aid granted under the scheme is restricted to the strict minimum needed by the firm to remain in business. The period in which the scheme is applicable to a given firm is initially two years, renewable for another two years. While the scheme is designed to safeguard the firms in question in view of their social importance, it has no mechanism providing or guaranteeing that any imbalances caused in other Member States will be taken into account,

— or as regards restructuring aid: while the application of the criteria in force in 1979 required firms receiving aid to carry out reorganisation measures including in some cases the closure of industrial plants in sectors suffering from structural overcapacity, the specific aim of the scheme is to preserve the firm's entire production complex. In the case of extraordinary administration, no reference is made when the management plan is approved (Article 2 of the Law) to financial restructuring, which is a strategic element as important as the reorganisation and rationalisation of the industrial activities. Nor does any element of the scheme or, for the rest, any of the comments from the Italian authorities point to the conclusion that the scheme guarantees that the firm will regain economic and financial viability (e.g. by ensuring that cover for amortisation costs and financial charges as well as a minimum return on the capital invested are obtained), that it avoids undue distortions of competition (e.g. by selling production capacity) or that it ensures proportionality between the aid granted and the benefits obtained from restructuring (e.g. by avoiding excessive reductions in the firm's financial charges).

(67) Lastly, the Italian authorities have not requested the benefit of any derogation under Article 87 of the Treaty.

(68) In view of the foregoing, it must be concluded that the scheme does not qualify for a derogation under Article 87 and cannot therefore be regarded as being compatible with the common market. Accordingly, the prohibition provided for in Article 87(1) is applicable.

(69) By letter of 24 July 1998, registered as received on 28 July 1998, the Italian authorities provided the Commission with the first elements of a new draft reform, the Italian Parliament having instructed the Government on 8 July 1998 to revoke the existing scheme and, at the same time, to adopt new rules for the extraordinary administration procedure. Law No 95/1979 was eventually revoked on 30 June 1999.

VIII. **RECOVERY OF THE AID**

(70) Since, in cases of unlawful aid incompatible with the market, undistorted competition should be restored, Article 14(1) of Regulation (EC) No 659/1999 provides that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. The same provision also states, however, that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

(71) In the present case, the Commission considers that the general principle of law applicable is that of the protection of legitimate expectation. This should be examined in relation to the Member State which applied the scheme and to which this Decision is addressed as well as, in view of the particular features of the case, to the firms that benefited from the scheme.

(72) The Commission had specifically informed the Italian authorities, first by letter of 30 July 1992 (see recital 4), that the measures in question would be treated as 'existing aid', an approach it subsequently confirmed when it proposed appropriate measures to those authorities under Article 88(1). Thus, from the moment it notified its official position in 1992, the Commission fostered the legitimate expectation on the part of the Italian authorities that the aid in question would henceforth be regarded and treated by the Commission as existing aid. After the entry into force of the scheme, the Italian authorities could not have had any legitimate expectation that it was lawful and compatible with the common market (they were fully aware of not having notified it under Article 88(3)), therefore they were justified from that date onwards in regarding new applications of the Law as lawful and compatible. On account of the legitimate expectation thus created in the Member State, the Commission cannot order it to recover the aid granted under the scheme after notification of its Decision of 30 July 1992.

(73) As regards the interested parties in general and the firms that received aid in particular, the Commission decision ([43]) to propose appropriate measures in respect of the scheme provided for in Law No 95/79 gave them the legitimate expectation that the aid was 'existing aid'. The consequences were twofold:

— All those who benefited from the scheme after the date of publication of the decision were entitled, by virtue of that decision, to have a legitimate expectation concerning the 'lawful' and 'compatible' benefits of the scheme, thereby preventing the Commission from requiring the Member State to recover the aid granted to them.

— All those who benefited from the scheme before the Decision was published were entitled to have a legitimate expectation that the closing of the procedures provided for by the Treaty in respect of the aid scheme from which they benefited meant that the aid would never have to be repaid. In cases of 'existing aid', the Commission can, under Article 88(1) and (2), only propose to the Member State concerned the appropriate measures required by the progressive development or by the functioning of the common market and, if the Member State rejects them, initiate the formal procedure at the end of which the Commission may decide to impose the appropriate measures, but only as regards the future. The recipients, in whom the Commission had not, until that date, created a legitimate expectation as to the 'lawfulness' and 'compatibility' of the scheme, could legitimately expect that Commission Decisions on the scheme would relate only to the future and would not call into question earlier applications. The recipients were justified in this respect in entering into the accounts any reserves constituted to repay aid granted. In view of the legitimate expectation thus created, the Commission cannot require the Member State to recover the aid already granted.

IX. **CONCLUSIONS**

(74) The Commission finds therefore that:

(a) the decision of 13 December 1994 proposing appropriate measures to Italy and the decision of 22 January 1997 initiating the Article 88(2) procedure in respect of the Law on the administration of large firms in crisis should be withdrawn;

(b) Law No 95/1979 establishing urgent measures for the extraordinary administration of large firms in crisis introduced a State aid scheme for the firms in question which was unlawfully implemented by Italy in breach of its obligations under Article 88(3) of the Treaty;

(c) on the basis of the finding in (b), the scheme in question is incompatible with the common market pursuant to Article 87(1) of the EC Treaty as it does not qualify for any of the derogations in Article 87(2) and (3);

([43]) See footnote 3.

(d) the aid scheme provided for in Law No 95/1979 was revoked by Decree-Law No 270/1999;

(e) there are no grounds for requiring Italy to recover from the recipient firms the aid already granted,

HAS ADOPTED THIS DECISION:

Article 1

The Commission decisions of 13 December 1994 proposing appropriate measures to the Italian Republic and of 22 January 1997 initiating the procedure provided for in Article 88(2) of the Law on the administration of large firms in crisis are hereby withdrawn.

Article 2

The scheme provided for in Law No 95/1979 converting Decree-Law No 26/1979 on urgent measures for the extraordinary administration of large firms in crisis, which was introduced in Italy for large firms in crisis, is unlawful and incompatible with the common market.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 May 2000.

For the Commission

Mario MONTI

Member of the Commission