COMMISSION

COMMISSION DECISION
of 11 December 2001
on the tax measures for banks and banking foundations implemented by Italy

(notified under document number C(2001) 3955)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2002/581/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 and having regard to their comments [1],

Whereas:

I. PROCEDURE

(1) By letter dated 24 March 1999, the Commission, after receiving a Parliamentary question on the subject, requested the Italian authorities to supply information in order to assess the scope and effects of Law No 461 of 23 December 1998 ('Law 461/98'). By letters dated 24 June and 2 July 1999, the Italian authorities provided the Commission with information on the Law and on the related Legislative Decree No 153 of 17 May 1999 ('Decree 153/99'). After examining the information received, the Commission advised the Italian authorities by letter dated 23 March 2000 that the aforementioned Law and Decree were likely to contain aid elements and requested them to halt any measures implementing them. By letter dated 12 April 2000, the Italian authorities informed the Commission that they had suspended the implementation of the two instruments. Further information was supplied to the Commission by letter of 14 June 2000.

(2) By letter dated 25 October 2000, the Commission informed the Italian Government that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received comments from interested parties. On 18 June 2001 it forwarded them to the Italian authorities, who were given the opportunity to react; their comments were received by letter dated 25 July 2001.

II. DETAILED DESCRIPTION OF THE AID

(5) Law 461/98 and Decree 153/99 introduce tax advantages for the consolidation of the banking sector:

1. the reduction to 12,5 % of the rate of income tax (IRPEG) for banks which merge or engage in similar restructuring, for five years after the operation, provided that the profits are placed in a special reserve which may not be distributed for a period of three years. The profits which may be placed in the special reserve may not exceed 1,2 % of the difference between the sum of credits and debits of the post-merger bank and the sum of credits and debits of the largest pre-merger bank (Article 22(1) and Article 23(1) of Decree 153/99);

[1] OJ C 44, 10.2.2001, p. 2.

[2] See footnote 1.

2. tax neutrality for transactions in which goods and holdings in ancillary activities transferred to banks pursuant to Law No 218 of 30 July 1990 are returned to the transferring institution (Article 16(3) of Decree 153/99);

3. the imposition of a fixed amount replacing the indirect taxes normally due in connection with the operations cited above in (1) and (2) (Article 24(1) and Article 16(5) of Decree 153/99);

4. tax neutrality with respect to the local tax due on the increase in the value of property at the time of change in ownership, in connection with the operations cited above in (1) and (2) (Article 24(1) and Article 16(5) of Decree 153/99);

5. exemption from tax for the transfer to banking foundations of banks' holdings in the capital of the Banca d'Italia (Article 27(2) of Decree 153/99).

(6) Law 461/98 and Decree 153/99 also introduce tax advantages for banking foundations. The measures concerning banking foundations will not be dealt with in the present decision.

(7) Decree 153/99 grants tax benefits in relation to merger operations carried out in the years 1998-2004. Since the implementation of the measures was suspended in 2000, the tax savings should concern only operations completed in 1998, 1999 and 2000. However, should it in fact transpire that operations carried out after the suspension also benefited from the measure, these should be treated in the same way as operations carried out before the suspension, particularly when this decision is executed.

(8) On the basis of the 76 operations carried out in 1998, 1999 and 2000, the Italian authorities put at ITL 5 358 billion (EUR 2 767 million) the maximum theoretical amount of tax benefits that beneficiaries of the measure referred to in paragraph 5(1) above might have claimed over the specified five-year period. This estimate does not include tax benefits granted through measures indicated in paragraph 5(2) to (5).

(9) Formerly State-owned banks in Italy, which did not take the form of public limited companies, were gradually converted, and finally obliged by law to convert in 1993, into public limited companies. Their shares were either placed on the market or held by non-profit institutions referred to as 'banking foundations'. Law No 218 of 30 July 1990 introduced special tax rules by which the banking foundations that owned or controlled the newly created banks could transfer certain assets to those banks. The measures indicated in paragraph 5(2) and (5) refer to those same assets and define the conditions under which they might be returned to the transferring institution (i.e. the banking foundation).

(10) The Commission provisionally considered that aid granted by Law 461/98 and Decree 153/99 in connection with bank mergers was likely to be incompatible with the common market in the light of Article 87, for the following reasons:

— Law 461/98 and Decree 153/99 grant tax advantages for bank mergers that favour certain undertakings, notably those carrying out merger operations, enabling them to grow in size and benefit from economies of scale at a lower cost. Being confined to the banking sector, this constitutes a sectoral scheme which falls within the scope of Article 87(1) of the Treaty;

— The advantage is granted by forgoing tax revenues, i.e. through State resources. The aid affects trade between Member States since it makes it easier for Italian banks to expand abroad and more difficult for foreign banks to enter Italy;

— The aid to banks is not within the *de minimis* limit. The Italian authorities state that the tax advantages for banks are justified by the fact that they are necessary for the consolidation and modernisation of the banking sector. The Commission had doubts as to whether or not this might make it possible to consider the aid to be compatible on the basis of Article 87(3)(c). The Treaty gives the Commission sole competence for checking that aid projects meet such a compatibility criterion and this is why it requires prior notification. In addition, the aid does not satisfy the conditions laid down by the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([3]). The measures in question are also likely to constitute operating aid in so far as they are not linked to the carrying-out of specific projects and reduce a firm's current expenditure; the Commission was unable to assess the precise volume involved when it carried out its *ex ante* examination.

On these grounds, the Commission initiated the procedure laid down in Article 88(2) of the EC Treaty.

III. COMMENTS FROM INTERESTED PARTIES

(11) The Commission has received a number of comments from beneficiaries of the aid, most of them being similar to those made by the Italian authorities.

(12) It was argued mainly that, even in the event that the Commission considered the measures as incompatible aid, there would be grounds for ruling out the recovery of the aid because of the legitimate expectations of the recipients.

([3]) OJ C 288, 9.10.1999, p. 2.

(13) These expectations would be justified by the fact that the Commission did not call into question Law No 218 of 30 July 1990, which granted similar benefits. In fact, in its notice pursuant to Article 88(3) in the case of aid granted by Italy to Banco di Napoli [4] the Commission took the view that: 'By allowing the assets to be revalued under a partial tax-exemption system and providing for the recapitalisation of certain public banks that have always been undercapitalised […] in order to comply with the minimum capital levels laid down in the new Community Directives on banking, the "Amato" Law made it possible to replace an unlimited State guarantee for public banks with limited capital injections. This was the first step towards treating public and private banks in the same way, thus limiting distortion of competition. […] Consequently, it must be concluded that the capital contributions to the bank provided for under the "Amato" Law do not constitute State aid within the meaning of Article 92(1) of the EC Treaty'.

(14) The operations had also been cleared by the Banca d'Italia, which is the relevant competition authority for the credit sector.

(15) The recovery of the aid would also run counter to the proportionality principle. Merger operations were carried out on the basis of the tax incentive; recovery could produce financial instability for the beneficiaries and would alter the conditions on which they had based their merger decisions.

IV. **COMMENTS FROM ITALY**

(16) In its response to the initiation of the procedure, the Italian Government stated that the banking system in Italy has been subject since 1936 to strict public control and direct Government intervention in the management of a large majority of banks. Banks had been divided into different institutional categories, with different operational limits ('specialisation principle'). This had adversely affected the efficiency and competitiveness of the system. For this reason the authorities took several steps from the early 1980s onwards to abandon the specialisation principle, privatise State-owned banks and encourage an increase in the average size of Italian banks. Law No 218 of 30 July 1990 had previously granted tax advantages to banks similar to those being considered in this decision. Law 461/98 and Decree 153/99 should be seen as part of the same process aimed at modernising the banking sector.

(17) While this process was taking place, the Italian Government also undertook a general reform of the taxation system. The general reform involved the introduction in 1997 of the 'Dual Income Tax' (DIT) [5] and of the 'Imposta Regionale sulle Attività Produttive' (IRAP) [6]. Those two taxes were applied to banks at less favourable conditions than to other economic sectors by way of compensation for the other more specific tax advantages envisaged for banks.

(18) Accordingly, the measures do not represent a derogation from the normal tax rules but, rather, special and temporary measures justified by the process of consolidation of the banking sector. The Italian authorities submit that the Court of First Instance has ruled that a special system of levies which does not constitute a derogation from the tax arrangements generally applied to other activities has to be evaluated solely in the context of the special tax arrangements applicable to the sector [7]. It is therefore legitimate for the Italian legislator to seek to adapt the tax system to the specific characteristics of the banking sector where this does not imply a decrease in the general tax burden, as in the present case, with respect to the rest of the economy.

(19) The Italian authorities also reckon that rules on State aid cannot hinder an improvement in the general fairness and consistency of the system where it could be demonstrated that the initial situation was penalising certain undertakings or sectors. They add figures showing that banks contribute 20 % of overall company tax revenues while accounting for only 5 % of the country's value added. Other figures support the claim that the banking sector is subject to a higher tax burden. While a reduction of the tax burden could have been achieved by granting banks the same taxation rules as other sectors, the Government decided instead to offer incentives for the consolidation of the sector.

(20) The measures should be considered to be of a general nature. All banks, including Italian branches of foreign banks, are eligible for the tax breaks. As for the difference in treatment with respect to other sectors, this is justified by the nature and general scheme of the system. The banking sector is subject to very specific regulation and, as a result, banks constitute a peculiar category of taxpayers. Banks are subject to many additional obligations with respect to other undertakings. As a result, a difference in tax treatment is objectively justified and is typical of this sector [8].

[4] Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid granted to Banco di Napoli (Case C 40/96; OJ C 328, 1.11.1996, p. 23).

[5] Legislative Decree No 466 of 18 December 1997.

[6] Legislative Decree No 446 of 15 December 1997.

[7] Case T-67/94 *Ladbroke Racing Ltd v Commission* [1998] ECR II-1.

[8] Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission* [2000] ECR II-3207.

(21) The measures in paragraph 5(2) and (5) and, to some extent, in paragraphs 5(3) and (4) concern goods and holdings in ancillary activities transferred to banks pursuant to Law No 218 of 30 July 1990. At the time of the conversion of the public banks into public limited companies owned by banking foundations, operators had to assign those assets to the banks instead of the foundations, in order to avoid taxation on revaluation of assets. In the case of the holdings in the capital of Banca d'Italia, the choice of placing them in the foundation was not even available. According to Law 141 of 7 March 1938, the newly created foundations were not among the institutions eligible to be shareholders of the Banca d'Italia. Decree 153/99 modified those rules and allowed foundations to hold shares in the Banca d'Italia. These assets, while increasing the capital of the banks, do not contribute to their activity and therefore lower their profitability indices. The measures in question merely provide for a tax-exempted transfer of these assets to the foundations in order not to penalise banks for the consequences of the privatisation process.

(22) The measures in question do not distort competition. There is no distortion of competition among banks operating in Italy, including those of other Member States. There is no distortion between banks operating in Italy and banks operating abroad since the initial situation is very unfavourable to those established in Italy.

(23) The measures do not affect trade between Member States. They would not make it easier for Italian banks to expand abroad and more difficult for foreign banks to enter Italy. On the contrary, foreign banks may participate in mergers in Italy and benefit from the tax breaks.

(24) The measures do not involve the use of State resources. The tax advantage is not automatic but conditional upon the implementation of specific operations. As for measures in paragraph 5(2), (3), (4) and (5), where those operations would have involved a tax burden, it is unlikely that they would have taken place in the absence of the tax benefit. As for measures in paragraph 5(1), the temporary reduction in company tax would be compensated in the long term by the likely increase in the profitability of the interested banks and by the taxation of that increase.

(25) In the rejected hypothesis that the measures constituted aid, it would be compatible under Article 87(3)(b). Consolidation of the banking system is part of the important Community project of introducing the euro and of creating a single internal market in banking services. It is also important to consolidate the banking sector in order to avoid a possible generalised crisis in the system, an initial symptom of which was evidenced by the financial difficulties of Banco di Sicilia and Banco di Napoli.

(26) The description of the measures as 'operating' aid is not correct. The tax advantages are granted only in relation to a specific and well-identified project, such as a merger. The amount of aid is determined on the basis of objective and transparent parameters. The measures do not reduce current expenditure but, rather, outlays related to operations of an exceptional nature.

(27) The tax measures would also qualify for compatibility under Article 87(3)(c) since they are intended to facilitate the development of banking activity without adversely affecting trade to an extent contrary to the common interest. The possibilities of resorting to Article 87(3)(c) are not exhausted by the circumstances indicated in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. The Commission has recognised on other occasions that consolidation of the banking sector is inevitable in the present circumstances.

(28) If the Commission does not accept the above general argument in favour of compatibility under Article 87(3)(c), it then has to verify case by case, i.e. by looking at each individual beneficiary of the measures, whether the conditions for applying Article 87(3)(c) are met.

V. **ASSESSMENT OF THE AID**

(29) The subject of the Commission's analysis is an aid scheme, i.e. an instrument by which a Member State offers tax advantages to any financial institution that fulfils the conditions laid down in the scheme. The Member State in question did not grant advantages on an individual basis and did not notify each individual case to the Commission. Consequently, given the very nature of the measure, the Commission has to undertake a general and abstract examination of the scheme, both as regards the question of aid and as regards the question of compatibility; it is competent to undertake such an examination pursuant to the Treaty, Regulation (EC) No 659/1999 and the case law of the Court [9]. It is not examining the scheme's application in each of the 76

[9] Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraphs 17-18; Case C-47/91 *Italy v Commission* [1994] ECR I-4635, paragraphs 20-21; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 48; Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, at paragraph 51.

merger operations referred to or in an unknown number of asset transfers between banks and banking foundations.

(30) The scheme itself was conceived and implemented by the Member State with a view to achieving a specific and clearly expressed effect: consolidation of the Italian banking sector. Thus, all of the elements necessary to assess whether the scheme involves State aid and whether it is compatible with the common market are to be found in the scheme itself. In addition, in view of the specific circumstances of the case, the assessment of aid granted under the scheme would probably not change in an individual case. Indeed, because of their nature, the beneficiaries will normally be considered to be undertakings within the meaning of Article 87(1) of the EC Treaty. As a consequence of the openness of the Community banking sector, the advantages given to a specific bank are bound to affect trade between Member States and to distort competition. In addition, in the light of the requirements laid down (notably, the prior existence of a restructuring plan), it is unlikely that any of the specific operations rank as restructuring of an undertaking in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([10]). It is even less likely that the advantages not related to new investments can exceptionally be considered as compatible under the Guidelines on national regional aid ([11]) In this respect, it could be added that consolidation operations are rarely confined to banks active only in areas eligible for regional aid. Finally, no other element suggests that individual aid might be considered to be compatible on any other ground.

(31) The Commission notes that Italy has asked it to analyse each individual case of aid. However, it does not consider that, for this reason alone, it is obliged to do that at this stage of these proceedings. In its view, any such request would have to be accompanied at least by all the information necessary for the Commission to conduct an assessment of each individual case, i.e. all the information that should normally be provided to the Commission in the context of a complete notification of an individual aid pursuant to Article 88(3). The Italian authorities were aware of the Commission's doubts concerning the scheme. If they considered that some particular cases, because of their specific features, should have been assessed on an individual basis, they were under a duty to inform the Commission of these features and to provide all the information needed for an individual assessment.

(32) The Commission acknowledges that the peculiar nature of banking could, in principle, justify the introduction of specific tax rules for the sector. However, the measures under examination do not represent an adaptation of the general system to the distinctive features of banking, but, rather, ad hoc aid having the effect of improving the competitiveness of certain undertakings, i.e. the merging banks, and only in relation to certain operations. The fact that the banking sector might be in need of restructuring at a particular time is an extrinsic factor bearing no relation to the normal operation of the tax system in the banking sector; therefore, it does not imply that it is in the nature or general scheme of the system that banking should benefit from more favourable rules on mergers. For these reasons, it cannot be accepted that the measures in question are justified by the nature or general scheme of the system. They represent a derogation from the normal tax rules. 'According to the case-law of the Court, aid in the form of an aid programme may concern a whole economic sector and still be covered by Article 92(1) of the Treaty (now Article 87(1)) and a measure designed to give the undertakings of a particular industrial sector a partial reduction of the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system, must be regarded as aid' ([12]). It is equally well established that the tax nature of the measure in question cannot suffice to shield it from application of Article 87(1) of the Treaty ([13]).

(33) The measures confer an advantage on banks, enabling them to grow in size and benefit from economies of scale at a lower cost. This advantage is selective in nature. It is also selective vis-à-vis banks within the sector since it is confined to those companies involved in merger or consolidation operations. Moreover, the aid measure described in paragraph 5(1) is not neutral with respect to the relative size of the companies involved. If, for simplicity's sake, we consider an acquisition involving two banks, the tax benefits will be directly proportional to the size (sum of credits and debts) of the smaller one. Accordingly, if the purchasing bank is smaller than the purchased bank, its tax advantage will be lower than the one accruing to a hypothetical larger buyer of the same bank. This might place smaller buyers at a disadvantage with respect to larger ones.

(34) In addition, to the extent that smaller buyers are placed at a disadvantage and since the tax benefit applies to Community banks only as regards the branches established in Italy, which tend to be rather limited in size, there may be an element of selectivity not only within the sector but also between foreign and Italian banks.

([10]) OJ C 288, 9.10.1999. Since some of the aid was granted after 9 October 1999, these guidelines apply by virtue of point 7.5, paragraph 101.
([11]) OJ C 74, 10.3.1998, p. 9.
([12]) Case C-75/97 *Kingdom of Belgium v Commission ('Maribel bis/ter' scheme)* [1999] ECR I-3671, paragraph 33.
([13]) Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13.

The fact that the aid is available also to branches of foreign banks does not seem sufficient to eliminate the bias in favour of mergers between Italian operators.

(35) Even if the aid covered all banking operators without differentiating between them, the measures would still constitute aid to the sector. Merger operations having the same expected profitability might not be carried out in other sectors that do not benefit from the aid. These selectivity elements do not disappear in cases where the banking sector is generally subject to a heavier tax burden. If the bias in the tax system is justified by the nature of the business, it does not call for compensation; otherwise, it is the bias itself that should be corrected. A selective measure might be justified by the specificity of the activity covered by it, but not by the presence of other selective measures.

(36) Moreover, the measures allow banks to acquire holdings in other undertakings more cheaply when these are owned by other banks involved in the operation. As indicated in the reply of the Italian authorities, the operations might also concern different companies, e.g. financial or insurance companies, although the tax breaks are granted only to the banks involved and in proportion to the size of banking business.

(37) The same considerations which apply to the measure in paragraph 5(1), with the exception of the non-neutrality with respect to the relative size of the participants, also apply *mutatis mutandis* to the other tax benefits described in paragraph 5(2), (3) and (4). In addition, they apply only to banks involved in merger or consolidation operations or in transfers of assets and also represent aid to the sector. Similar operations performed in other sectors do not benefit from the same tax rules. Accordingly, the measures are not of a general nature and confer a selective advantage upon the beneficiaries.

(38) Somewhat different considerations have to made with respect to the measure in paragraph 5(5) concerning the holdings in the capital of the Banca d'Italia. In this case, it might be argued that a tax exemption on the transfer of assets does not represent a derogation from the general taxation rules since the initial placement of the holdings with the bank was a temporary operation for which there was no alternative at the time and did not reflect a business choice of the operators.

(39) The reasoning in paragraph 38, however, would not apply if the holdings in Banca d'Italia were obtained free of charge and sold to the foundations or had been revalued. If the placement of the holdings in the bank has to be seen as a mere temporary operation, with the preferred solution of assigning the asset to the foundation not being available, then the bank should derive no benefit with respect to the hypothetical situation in which the holdings were originally placed in the foundation. In other words, the bank should not be penalised by taxes on an operation that offsets a non-voluntary transfer. Nor should it benefit from a tax exemption on an operation that allows the bank to convert into cash the value of those holdings or increases the bank's capital. It is therefore considered that a tax exemption on the transfer of shares of Banca d'Italia constitutes aid only to the extent that the joint operation of assigning the shares to the bank and transferring them to the foundations has no impact on the bank's balance sheet.

(40) The situation regarding the shares of Banca d'Italia is different from that of the other assets that could have been placed either in the bank or in the foundation. The choice was made at the time, taking into account the different implications of the two options in terms of the capital structure and tax liabilities of the two institutions. Further transfers are not aimed at correcting a previous non-voluntary transfer but are the result of a business decision: as such, they do not justify special tax treatment. Moreover, the tax exemption on the transfer of these assets from the bank to the foundations represents a selective advantage to those operators who originally opted in favour of placing assets in the bank in order to avoid the tax on capital gains.

(41) The line of reasoning in paragraph 34 suggests that there could be an effect on trade between Member States. Generally speaking, aid that benefits undertakings in a sector exposed to cross-border trade would be regarded as affecting such trade. As the Court of Justice has observed, 'when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ([14]). In this respect, there is no doubt that for many years financial services and providers or consumers of financial services have actually and potentially, directly and indirectly, crossed frontiers between Member States. The liberalisation of financial services and the integration of the financial market have had the effect of greatly increasing the sensitivity of intra-Community trade to distortions of competition. Aid granted to credit undertakings offering financial services in competition with other European credit establishments is certainly likely to distort intra-Community trade. This tendency is heightened by the introduction of the single currency and the complete opening-up of markets, which increase competitive pressures between Community countries. It should also be

([14]) Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671, paragraph 11.

borne in mind that, although banks can carry out their activities, which consist essentially in collecting deposits and granting loans, on a cross-border basis, they often encounter obstacles when expanding abroad. Such obstacles are frequently due to the fact that local banks are well established, which makes it more costly for foreign competitors to enter the market. As liberalisation will increasingly offer banks the opportunity to provide their services in other Member States, any aid granted to them, whether international or domestic, is likely to hamper them in so doing. Aid aimed at ensuring the survival of even local banks that would otherwise have been forced out of the market owing to their low profitability and competitiveness is thus liable to distort competition in the Community since it makes it more difficult for foreign banks to enter the Italian market. Even aid of a small amount and/or to small banking operators may affect trade between Member States. As stated by the Court of Justice, even aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in question ([15]).

(42) The advantage is granted by forgoing tax revenues, i.e. through State resources. The Court of Justice has consistently held that 'A measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of state resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty' ([16]). The argument that the operations would not have taken place in the absence of the measures, with the aid increasing state revenues, cannot be accepted. First of all, it cannot be ruled out that operations of the type covered by the scheme would have taken place anyway. Secondly, such an assertion would imply that the normal tax rules, applying to mergers in other sectors, are designed to discourage merger operations rather than raise revenues. The fact that, overall, an aid scheme increases the number or the amount of taxable operations and therefore creates additional revenue for the State is not relevant in this context.

(43) For the above reasons, the measures in question constitute State aid.

(44) The aid to banks is generally outside the *de minimis* limit. It cannot be ruled out, however, that in certain individual cases some of the measures, particularly those indicated at paragraph 5(2), (3), (4) and (5), might fall within the *de minimis* thresholds. In those cases, the measures would be deemed to fall outside the scope of Article 87(1) of the Treaty.

(45) The aid is not compatible under Article 87(2). It is not aid having a social character that is granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences or aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. Nor is the aid compatible under Article 87(3)(d) (aid to promote culture and heritage conservation) or (e) (such other categories of aid as may be specified by decision of the Council). Nor has the Member State invoked any of these derogations. Furthermore, the aid is not compatible under Article 87(3)(b). The strengthening of the Italian banking system cannot be considered a 'project of common European interest' since it will benefit mostly the economic operators of one Member State and not the Community as a whole and since it will not promote a concrete, precise and well-defined project; nor does it 'remedy a serious disturbance in the economy of a Member State' since there is no evidence that the Italian banking system was suffering from a systemic crisis.

(46) The aid extends across the whole territory of the Member State and cannot therefore be considered to be compatible under Article 87(3)(a) or (c) (as far as the development of certain regions is concerned). In addition, with respect to the ranking of the aid as 'operating' aid, this category, for the purposes of assessment under the relevant regional guidelines, embraces all types of expenditure not related to 'initial investment', i.e. investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment ([17]). Accordingly, even if the measure concerned expenditure linked to a specific merger or acquisition project in an assisted region, it would still be assessed as operating aid and normally prohibited.

(47) As for compatibility under Article 87(3)(c) (as far as the development of certain economic activities is concerned), the conditions for applying the Community guidelines on state aid for rescuing and restructuring firms in difficulty ([18]) are not met. The scheme is not limited to SMEs. The aid was not notified individually to the Commission

([15]) Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27.

([16]) Case C-6/97 *Italian Republic v Commission* [1999] ECR I-2981, paragraph 16.

([17]) See Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9) and in particular points 4.1, 4.4, 4.15.

([18]) OJ C 288 of 9.10.1999. Since some of the aid was granted after 9 October 1999, these guidelines apply by virtue of point 7.5, paragraph 101.

and no restructuring plan was submitted either. The banks that benefit from the aid are normally not in difficulty and the aid is not intended to restore their long-term viability. The guidelines require that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. In the present case the aid is intended instead to strengthen the position of the beneficiaries with regard to competitors which do not benefit from the measures. As far as aid to SMEs is concerned, the Commission notes that the scheme applies to undertakings other than SMEs and that the advantages do not qualify as investment aid or as aid to expenditure that can otherwise be considered to be compatible. No further feature of the scheme allows the Commission to consider it as compatible for other reasons under Article 87(3)(c). Moreover, this provision requires that the aid 'does not adversely affect trading conditions to an extent contrary to the common interest', a condition which, in the Commission's view, is not met in the present case. Indeed, with respect to previous measures ([19]) that may have made it easier for public banks to adopt the status of public limited companies, thereby placing them on a more even playing field with other banking institutions (see also the considerations in paragraphs 51 to 54), the present measures have mainly the effect of improving the competitiveness of the beneficiaries in a sector where international competition is strong.

(48) Apart from possible *de minimis* aid, there appear to be no other circumstances in which the measures in question would be deemed compatible in individual cases. In any event, those cases should have been notified individually to the Commission under Article 88(3). In addition, the Italian State has not provided sufficient information justifying compatibility in individual cases.

(49) In accordance with Article 14 of Regulation (EC) No 659/99 ([20]), where negative decisions are taken in respect of unlawful aid, the Commission must decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. The Commission need not require recovery of the aid if this would be contrary to a general principle of Community law.

(50) The Commission considers that no general principle of Community law stands in the way of recovery. In particular, as to legitimate expectations, the Court of Justice stated that: 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 87 of the Treaty, undertakings to which an aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent operator should normally be able to determine whether that procedure has been followed' ([21]). The aid in question was granted without prior notification.

(51) As regards the fact that the Commission did not call into question Law No 218 of 30 July 1990, it should be noted that the Law was not notified by the Italian Government. The Commission assessed only certain aspects of the Law in connection with individual cases ([22]): in particular, it was the capital injection that was the subject of the Commission's appraisal, an element not present in the measures at issue here. It was considered that the capital injection granted by Law 218/90 provided for the recapitalisation of certain public banks. This operation and the other advantages linked to it made it possible to replace an unlimited state guarantee for public banks with limited capital injections. It was in the interests of competition that public banks and bodies should be transformed into public limited companies and that there should be equal treatment of public and private banks.

(52) The above justification, however, would not apply in the present case. As pointed out in the reply of the Italian authorities, public banks, with very few exceptions, had already converted to public limited companies by the end of 1992. Such conversion was later made compulsory by Law No 489 of 26 November 1993.

(53) Moreover, the fact that the Commission did not at the time call into question the other measures, which are perhaps more similar to the ones implemented by Decree 153/99, does not mean that it should consider those latter measures favourably. A tax exemption on the transfer of assets from a banking foundation to the related banking institution does not necessarily have to be assessed in the same way as a similar transfer from the banking institution back to the foundation. Indeed, the one-off transfer of ancillary assets to the banking institution could have had the effect of facilitating the conversion of public banks into public limited companies; the return of those assets to the foundations, possibly revalued under tax exemption, has the purpose (and effect) of improving the profitability indicators of the bank.

([19]) In particular, Law No 218 of 30 July 1990.
([20]) OJ L 83, 27.3.1999, p. 1.
([21]) Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51.
([22]) Commission Decision of 20 May 1992 concerning the recapitalisation of two main Sicilian banks (OJ C 160, 26.6.1992, p. 8) and Commission notice pursuant to Article 93(2) of the EC Treaty concerning aid granted by Italy to Banco di Napoli (OJ C 328, 1.11.1996, p. 23). See also Commission Decisions of 29 July 1998 giving conditional approval to the aid granted by Italy to Banco di Napoli (OJ L 116, p. 36) and of 10 November 1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa (OJ L 256, 10.10.2000, p. 21).

(54) Lastly, even if Law 218/90 had the same mechanism and effects as the measures in question, something which the Commission does not accept, it would still remain an ad hoc measure. As such, it could be justified, in principle, by the specific circumstances relating to its introduction, but similar measures could not be considered compatible at all times with the common market.

(55) Regarding the fact that the operations had been cleared by the Banca d'Italia, which is the relevant competition authority for the credit sector in Italy, it should be noted that the Banca d'Italia has no competence over state aid aspects.

(56) For the above reasons, the beneficiaries of the aid could not entertain a legitimate expectation that the measures were compatible with the common market. In deciding to carry out an aided merger operation, a diligent operator should have taken into account the possibility that the aid might be declared incompatible. If the tax advantage represented a *sine qua non* for the profitability of the merger, a prudent operator would not have carried out the operation. For those reasons, it cannot be claimed that the recovery of the aid would run counter to the proportionality principle.

(57) The aid to be recovered must include interest which, in accordance with the Commission's practice, is to be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

VI. **CONCLUSION**

(58) The Commission finds that Italy has unlawfully implemented Law 461/98 and Decree 153/99 in breach of Article 88(3) of the Treaty. The legislative measures confer an advantage on banks, enabling them to grow in size and benefit from economies of scale at lower cost. Law 461/98 and Decree 153/99 also introduce tax advantages for banking foundations. The measures applicable to banking foundations are not the subject of the present decision and will be dealt with separately.

(59) The advantage is granted by forgoing tax revenues, i.e. through State resources. The aid granted to banks is selective. It discriminates within the sector and with respect to other sectors. The measures in question do not represent an adaptation of the general system to the distinctive features of the banking sector but, rather, ad hoc aid having the effect of improving the competitiveness of certain undertakings, i.e. the merging banks. The measure is not justified by the nature and general scheme of the system, with the sole exception of the tax exemption for the transfer to banking foundations of banks' holdings in the capital of the Banca d'Italia (Article 27(2) of Decree 153/99), to the extent that the joint operation of assigning the shares to the bank and transferring them to the foundations has no impact on the bank's balance sheet.

(60) The aid benefits undertakings that operate in a sector characterised by cross-border activity; the aid is, therefore, deemed to affect that trade.

(61) The aid to banks generally falls outside the *de minimis* limit and is not compatible under Article 87(3).

(62) The Commission finds that the State aid is incompatible with the common market and requires the Member State to recover it. It also considers that there are no grounds for the beneficiaries of the aid to entertain a legitimate expectation that the measures were compatible with the common market.

(63) This decision concerns the aid scheme and must be implemented immediately, including by recovering all individual aid granted under the scheme. The Commission also recalls that a decision on an aid scheme does not prejudice the possibility that individual aid may be considered, in whole or in part, compatible with the common market on its own merits in the context of a future Commission decision or by virtue of the exemption regulations. However, in the light of the foregoing considerations, possible compatibility of individual aid appears extremely unlikely in the circumstances of the present case,

HAS ADOPTED THIS DECISION:

Article 1

Without prejudice to Article 2, the State aid to banks which Italy has granted under Law No 461 of 23 December 1998 and Legislative Decree No 153 of 17 May 1999, and in particular on the basis of Articles 16(3) and (5), 22(1), 23(1), 24(1) and 27(2) of Legislative Decree No 153 of 17 May 1999, is incompatible with the common market.

Article 2

The advantages provided for in Article 27(2) of Legislative Decree No 153 of 17 May 1999 do not constitute state aid in so far as the joint operation of assigning the shares in the capital of the Banca d'Italia to the bank and transferring them to the foundation has no impact on the bank's balance sheet.

Article 3

Italy shall withdraw the scheme referred to in Article 1.

Article 4

1. Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the scheme referred to in Article 1 and unlawfully made available to the beneficiaries.

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

Article 5

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

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 11 December 2001.

For the Commission

Mario MONTI

Member of the Commission