II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 May 2004

on State aid No C 4/2003 (ex NN 102/2002) implemented by Italy for WAM SpA

(notified under document number C(2004) 1812)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2006/177/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 regard to the decision [1] by which the Commission initiated the procedure laid down in Article 88(2) of the Treaty in respect of aid No C 4/2003 (ex NN 102/2002),

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

Whereas:

I. PROCEDURE

(1) By letter dated 26 July 1999, the Commission received a complaint from a competitor against WAM Engineering Ltd. It was alleged in the complaint that WAM SpA had been granted illegal public subsidies by Italy.

(2) Requests for information were addressed to the Italian authorities by letters of 5 August 1999 and 10 September 1999. The complainant submitted additional information by letter A/36636 of 2 September 1999. By letter dated 13 December 1999 (D/65224), the Commission communicated to the complainant the reply of the Italian authorities submitted by letter A/37761 of 11 October 1999, and announced that it intended to carry out a formal investigation.

(3) At the same time, a survey on national support schemes for foreign direct investment outside the EU (FDI) was being carried out by the Commission and was expected to result in a Commission communication on the matter.

(4) By letter dated 18 December 2001 (D/55270), the Commission asked Italy for further information following renewed action by the complainant (two reminders were addressed to the Commission by letters A/32799 of 31 March 2000 and A/38320 of 11 October 2000), given that the FDI survey had been postponed by the Commission.

(5) In the light of the information provided by the letters of 20 February 2002 (A/31323) and 27 March 2002 (A/32370), further questions were put to the Italian authorities by letter of 12 April 2002 (D/51694).

(6) The Italian authorities replied by letter of 21 May 2002 (A/33699). By letter of 5 June 2002 (D/52840), the Commission informed the Italian authorities that it considered the information submitted to be incomplete and asked for the missing information and further clarification to be provided within 20 working days of receipt of the letter.

[1] C(2003) 35 fin (published in OJ C 142, 18.6.2003, p. 2).

(7) As no reply was received, and in spite of a request from the Italian authorities by letter A/34670 of 25 June 2002 for an extension of the deadline until 31 July, an information injunction within the meaning of Article 10(3) of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2] was adopted by the Commission on 26 September 2002. Meanwhile, the case had been transferred to the non-notified aid register and had been given the number NN 102/2002.

(8) By letters D/53325 of 26 June 2002 and D/55544 of 4 October 2002, the complainant was kept informed of the progress of the dossier. By letter A/37992 of 31 October 2002, it asked to know the outcome of the injunction.

(9) The Italian authorities submitted the requested information by letter A/37537 of 16 October 2002 and supplied additional elements by letter A/37783 of 24 October 2002.

(10) The Commission informed Italy by letter SG(2003) D/228223 of 24 January 2003 that, by decision C(2003) 35 fin, it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid in question.

(11) By letter D/50629 of 29 January 2003, the complainant was informed accordingly.

(12) Having not yet received the above mentioned letter, the complainant sent the Commission a reminder by letter A/31086 of 10 February 2003.

(13) Further to the communication to the Italian authorities concerning the opening of the procedure, WAM SpA immediately sent a letter to the Commission (A/31070 of 10 February 2003).

(14) By letter A/31552 of 27 February 2003, Italy asked for an extension, until 7 March, of the fifteen-day deadline for presentation of observations on confidentiality, as laid down in the Commission's decision.

(15) By letter A/31812 of 10 March 2003, Italy asked the Commission not to publish the decision, given the willingness of the recipient to repay the aid, as also stated by WAM SpA itself in letter A/31907 of 13 March 2003 sent direct to the Commission.

(16) By letter D/51799 of 18 March 2003, the Commission pointed out that, in order to avoid publication, a final decision closing the case was necessary, this being conditional on proof being submitted that the two aid tranches plus interest, calculated in a way acceptable to the Commission, had actually been recovered.

(17) As the amount proposed by the Italian Government by letter A/33347 of 13 May 2003 was significantly lower than the first estimate of the grant equivalent of the aid calculated by the Commission on the basis of the elements available at the time of the opening of the procedure, the Commission informed Italy, by letter D/53393 of 22 May 2003, that, since the proposed amount to 19 be repaid was considered not to satisfy its criteria, the publication would take place shortly.

(18) By letter A/34156 of 13 June 2003, the complainant asked for information about the publication of the decision. The Commission replied by letter D/53949 of 18 June 2003. A further communication was sent the same day, via e-mail to the complainant informing it promptly that publication had just taken place.

(19) By letter of 1 July 2003, preceded by a fax (A/34620 of the same date), a request for access to the whole file was submitted by WAM SpA The request was rejected by DG COMP by letter D/54522 of 14 July 2003.

(20) By letter A/34306 of 20 June 2003, WAM SpA reacted directly to the Commission's communication to Italy to the effect that it had published the decision. The Commission replied by letter D/54497 of 11 July 2003.

[2] OJ L 83, 27.3.1999, p. 1.

(21) By letter A/34527 of 27 June 2003, the complainant expressed the intention to claim compensation from WAM SpA in view of the losses it had incurred, if the Commission's final decision was negative. It asked to be informed of the procedure to be followed.

(22) By letter A/34750 of 4 July 2003, Morton Machine Company Limited, which is the complainant, announced that it had been summoned to appear before an Italian court by WAM SpA, which in its turn claimed compensation, and asked the Commission whether it could have the summons withdrawn.

(23) By letter D/54481 of 10 July 2003, the Commission replied to the two above mentioned letters from Morton Machines Company.

(24) By letter A/35044 of 16 July 2003, interested third parties submitted comments, with the request that they be dealt with confidentially.

(25) On 23 July 2003 a meeting took place between the Commission departments and the Italian authorities. Ahead of the meeting, the Italian Government had provided some information by letter No 9601 of 22 July 2003, registered as received on 25 July 2003 (A/35269). Additional information was sent direct to the Commission by letter A/35577 of 8 August 2003 from the Prime Minister's Office (Department for the Coordination of Community Policies).

(26) By letter A/35785 of 21 August 2003, Morton Machines Company asked whether a final decision had already been taken and asked to be kept informed of the situation. The Commission replied by letter D/55473 of 28 August 2003.

(27) By letter A/36444 of 19 September 2003, Italy submitted to the Commission its observations on the opening of the procedure.

(28) By letter A/37525 of 3 November 2003, Italy submitted its observations on the comments notified by third parties and transmitted to it by Commission letter D/56068 of 25 September 2003.

(29) Further to the request for compensation submitted by WAM SpA (2003/A/35486 of 30 July 2003), the refusal of access to the documents was confirmed by the Secretariat-General by letter SG/B/2/IS/D(2003) 330353 of 16 September 2003.

(30) The folders missing from the reply of 19 September 2003 (A/36444) were provided by Italy by letter A/30263 of 14 January 2004.

II. DESCRIPTION OF THE AID

(31) The complainant, referring to the pricing policy of WAM Engineering Ltd in the United Kingdom, claimed that the latter was able to offer the same products (industrial mixing machinery) that it itself manufactured and marketed for about one third of its prices — a level at which, in its view, it would be different to purchase the necessary raw materials — and this thanks to Italian Government funding, in particular under Law No 394/81.

(32) WAM Engineering Ltd is the subsidiary for the United Kingdom and Ireland of WAM SpA. The relevant market segment is the design, manufacture and sale of industrial mixing machinery used mainly in the food, chemical, pharmaceutical and environmental industries.

(33) According to the complainant, WAM Engineering Ltd benefited from Italian Law No 394/81, which seems to provide financial support for trade penetration programmes in non-EU countries. In particular, Law No 394/81 allegedly supports Italian companies wishing to establish a subsidiary abroad, in the form of representative offices, shops and warehouses.

(34) The Italian authorities confirmed the granting in 1995 of aid in the form of a subsidised loan amounting to ITL 2 281 450 000 (some EUR 1,18 million) for WAM SpA for projects in Japan, South Korea and Taiwan. According to the Italian authorities, the recipient was actually granted an amount of ITL 1 358 505 421 (some EUR 0,7 million) as the planned projects in Korea and Taiwan were not implemented on account of the economic crisis in those countries.

(35) The subsidised loan covers 85 % of the eligible expenditure. The interest-rate subsidy may amount to 60 % of the reference rate. The loan is to be repaid over five years on a straight-line basis and in equal half yearly portions, interest being due on the balance outstanding. A grace period of two years is envisaged.

(36) The subsidised interest rate on the specific loan (equal to 4,4 %) was calculated with reference to a market rate of 11 %. In the light of the above and on the basis of the information available at the time of the opening of the procedure, the aid intensity seemed to be equivalent to 16,38 % gross grant equivalent (gge), which would have resulted in presumed aid of ITL 222,523 million (some EUR 115 000).

(37) The eligible costs of this aid have been divided into two categories: costs relating to permanent structures abroad and trade promotion costs. The following costs, expressed in ITL million, were taken into account:

Eligible costs	Loan granted (ITL million)
PERMANENT STRUCTURES	
Rent, insurance, miscellaneous facilities	122,56
Operating costs (in particular, personnel, fittings, equipment for permanent structures)	556,94
Display models	38,23
Consultancy	29,43
Subtotal 1	**747,18**
TRADE PROMOTION	
Storage of goods	456,28
Market surveys	40,95
Fairs and exhibitions	12,19
Advertising	94,39
Business trips	7,52
Subtotal 2	**611,33**
Grand total	**1 358,51**

(38) Moreover, by letter A/33699 of 21 May 2002, the Italian authorities, in reply to a precise question from the Commission, stated that WAM SpA was granted another subsidised loan of ITL 1 940 579 808 (some EUR 1 million) under the same scheme on 9 November 2000.

(39) The Commission was not aware, at the time of the opening of the procedure, of any other details concerning this additional aid.

III. GROUNDS FOR INITIATING THE PROCEDURE

Aid granted to WAM SpA in 1995

(40) The Italian authorities maintained in their letter A/33699 of 21 May 2002 that the aid granted to WAM SpA in 1995 under Law No 394/81 was significantly below the *de minimis* threshold and that no other *de minimis* aid had been granted to the same recipient over the same three-year period. Furthermore, they stressed that the aid could not in any way be considered as being directly linked to the quantities exported.

(41) The Commission pointed out that most of the eligible costs taken into account for the specific aid granted to WAM SpA in 1995, such as rent, insurance, and miscellaneous facilities and operating costs (in particular for personnel, furniture and equipment) for a permanent place of business abroad, might have to be classified as aid for the establishment and operation of a distribution network.

(42) Likewise, in the Commission's opinion, costs for consultancy services related to permanent structures abroad, advertising and business trips had to be classified as current expenditure linked to the export activity.

(43) In accordance with the last paragraph of the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [3], where, at the time of a decision, guidelines have been replaced by a regulation, the Commission considers that the rules set out in the regulation have to be applied to the extent that they are more favourable than those set out in of the guidelines [4]. Accordingly, as regards *de minimis* aid, the rules of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [5] have, in principle, to be applied.

(44) Regulation (EC) No 69/2001 does not apply to aid for export related activities, namely aid directly linked to the quantities exported as well as to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as provided for in Article 1(a).

[3] OJ C 119, 22.5.2002, p. 22.
[4] See Cases C 85/98 D Thüringen — *Konsolidierungsprogramm; C 87/98 D Thüringen — Darlehensprogramm; C 28/99 D Thüringen Umlaufmittelprogramm*, not yet published.
[5] OJ L 10, 13.1.2001, p. 30.

(45) As regards compliance of the aid at issue with the relevant *de minimis* rules, it has to be noted that the Community guidelines on State aid for SMEs of 1992 ([6]), which included the *de minimis* rule in force at the time the aid was granted, did not explicitly exclude export aid but set a lower threshold of ECU 50 000.

(46) In the light of the above, the Commission expressed doubts as to whether the aid granted to WAM SpA in 1995 under Law No 394/81 could be considered to comply with any relevant *de minimis* rule.

(47) Furthermore, in the light of a preliminary examination, the Commission had serious doubts whether the aid to WAM SpA could be declared compatible with the EC Treaty on the basis of any provision.

(48) In particular, in view of the fact that, at the time the procedure was initiated, WAM SpA was not regarded as a small or medium-sized enterprise (SME), the Commission also stressed that aid for market surveys and for participation in fairs and exhibitions, which in principle could qualify as aid for consultancy and other services and activities within the meaning of Article 5 of Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([7]), could not be granted an exemption in the present case.

(49) Furthermore, if the aid were to be assessed as foreign direct investment (FDI), it should be noted that, until now, the Commission has not authorised State aid for FDI in the case of large enterprises. By Decision 97/241/EC of 5 June 1996 ([8]), the Commission approved a scheme subject to the aid being granted only for foreign direct investment by SMEs — provided that all the conditions laid down for the granting of state aid to SMEs were met — and subject to any aid for large enterprises being notified individually.

(50) The only notification of an individual aid to a large enterprise on the basis of the above mentioned decision resulted in a negative decision ([9]).

([6]) OJ C 213, 19.8.1992, p. 2.
([7]) OJ L 10, 13.1.2001, p. 33.
([8]) Decision concerning aid that the Republic of Austria intends to grant pursuant to the ERP Eastern European progamme (OJ L 96, 11.4.1997, p. 23).
([9]) Decision of 14 October 1998 concerning LiftgmbH (OJ L 142, 5.6.1999, p. 32).

(51) The Italian authorities then pointed out in their letter of 24 October 2002 (A/37783) that no aid has ever been granted directly to 'WAM Engineering' and that there was no undertaking registered as such in the Italian business register.

(52) First of all, it has to be noted that 'WAM Engineering Ltd' is the subsidiary for the United Kingdom and Ireland of 'WAM SpA'. Secondly, following their letter of 11 October 1999, the Italian authorities announced that in 1995 'WAM SpA' had been granted a subsidised loan under Law No 394/81 and added, by letter A/33699 of 21 May 2002, that the 'WAM group' has been granted another subsidised loan under the same scheme on 9 November 2000.

(53) According to Article 10(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([10]), 'Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.'

(54) In conclusion, having regard to the above, the Commission expressed strong doubts as to whether the aid granted in 1995 to WAM SpA under Law No 394/81 might qualify, pursuant to any provision, for an exemption under Article 87(3) of the EC Treaty.

Aid granted to WAM SpA in 2000

(55) At the time the formal investigation procedure was initiated, the Commission was not aware of any specific feature, such as aid intensity or eligible expenditure, of the aid granted to the 'WAM group' (as defined by the Italian authorities) in 2000, again in the form of a subsidised loan under Law No 394/81. No relevant information had been submitted by the Italian authorities.

(56) Accordingly, the Commission was not able at that stage to assess the specific aid in depth. However, given that it served the same purpose and was granted on the same legal basis as the aid granted in 1995, it doubted whether the aid could be deemed to be in compliance with the provisions of the Treaty pursuant to any relevant rule.

([10]) OJ L 83, 27.3.1999, p. 1.

IV. COMMENTS FROM INTERESTED PARTIES

(57) Comments on the opening of proceedings were received from a third party interested in the case at hand, who asked for confidentiality to be preserved.

(58) These comments applaud the Commission's efforts to restore a level playing field for competitors in the sector concerned and complain about the engineering skills and jobs being lost on account of the position of WAM SpA on the market.

(59) By letter A/37525 of 3 November 2003, Italy, which was made aware of the third party's comments by Commission letter D/56068 of 25 September 2003, pointed out that, in its opinion, these comments made no new contribution as they simply confirmed some points already made in the case, including by the complainant. In particular, Italy considers that sufficient proof has been provided of the lack of any link between the facts claimed in the above-mentioned comments and the funding of WAM SpA under Law No 394/81.

V. COMMENTS FROM ITALY

(60) Evidence has been provided that, at the moment of the granting of the first aid measure and of the introduction of the relevant application, WAM SpA, on the basis of its 1994 annual accounts, complied with the definition of medium-sized enterprise given at point 2.2 of the 1992 Community guidelines on State aid for small and medium-sized enterprises ([11]), on the grounds that it had 163 employees, had an annual turnover of EUR 16,8 million and a balance-sheet total of EUR 20,1 million and was owned by two undertakings, both fulfilling the definition of an SME. But the Italian authorities themselves agree that WAM SpA was no longer an SME after 1998 or when the second aid measure was granted (2000).

(61) No new substantive element concerning the first aid measure has been added to the information that the Commission already possessed at the time of the opening of procedure, save for the fact that the loan was made available to the recipient in several instalments for which the grace period could vary from 2 years to zero. Apparently, there was no provision in the original contract for reviewing the interest rate. This aid should have been repaid in full by April 2004.

(62) As far as the second subsidised loan granted to WAM SpA in 2000 is concerned, the Italian authorities provided clarification, after the opening of the procedure, by letter A/35269 of 25 July 2003 that its actual overall amount was ITL 3 603 574 689 (EUR 1 861 091,01), instead of ITL 1 940 579 808 (about EUR 1 million), as previously declared by letter A/33699 of 21 May 2002 and mentioned in the decision to initiate the procedure, since the latter figure referred only to the part of the loan which had already been paid at the moment the letter was written, irrespective of the overall amount of aid granted.

(63) Two more instalments of the aid were, in fact, paid. In particular, the last one, amounting to EUR 248 091,01, was paid on 29 January 2003, while the Commission decision to initiate the procedure had been taken on 21 January 2003 and the Commission letter notifying Italy of that fact is dated 24 January 2003. The conditions on which this loan was granted are the same as those for the first loan since both were granted under Law No 394/81. The granting of the entire amount of the loan in question was decided on 9 November 2000 and the contract was signed on 20 December 2000.

(64) A schedule of the eligible costs taken into consideration for the aid at issue, transmitted by the Italian Government in the Annex to letter A/35269, is reproduced below.

Eligible costs	Loan granted (EUR 000)
PERMANENT STRUCTURES	
Rent and fitting-out of premises, vehicles	331,27
Operating costs (management, goods and personnel)	973,50
Display models	0,87
Training	25,24
Consultancy	30,29
Subtotal 1	**1 361,17**
TRADE PROMOTION	
Storage of goods	353,39
Fairs and exhibitions	6,37
Advertising	42,74
Business trips	94,84
Trips by customers to Italy	2,59
Subtotal 2	**499,92**
Grand total	**1 861,09**

([11]) See footnote 6.

(65) Furthermore, it transpires from the documents annexed to letter A/30263 of 14 January 2004 that the programme in question was to be carried out jointly by WAM SpA and 'WAM Bulk Handling Machinery Shangai (Co Ltd', which is a local firm wholly owned by WAM SpA.

(66) Eligible costs were considered to include the rent of premises for offices, storage, showrooms and a technical assistance workshop (with a total surface area of 7 500 m^2), the purchase, renting or leasing of 3 vehicles, personnel costs for the parent firm and abroad (in particular 1 sales manager and 6 technicians).

(67) The interest rate applied to the specific loan is 2,32 %, i.e. 40 % of the reference rate of 5,8 % in force when the aid was granted. Once again, no change in the interest rate during the duration of the loan seems to have been provided for in the contract. The loan was paid to the recipient in several instalments, so that the grace period varies from 2 years to zero.

(68) As regards repayment, the data supplied by Italy show that the grace period of two years, during which only the interest on the loan instalments already made over to the recipient was paid, elapsed on 20 February 2003. On 20 August 2003 the five-year repayment period started. Repayment was on a straight-line basis and in equal half-yearly instalments, interest being due on the balance outstanding. According to the schedule, repayment should therefore be completed by February 2008.

(69) As regards modification of the interest rate during the repayment period, the Italian authorities argue that general rules allowing such reductions did exist within the Italian legal framework. However, the Ministerial Decree of 31 March 2000, which is the only legal basis provided for this purpose, applies only to the initiatives funded by Laws Nos 394/81 and 304/1990, and is therefore very selective. No further evidence has been provided that the interest rate on the aid in question was modified. Lastly, such a modification could have been made only to the first subsidised loan granted to WAM SpA as it applied to the funding in existence when it came into force, while the second loan had not as yet been granted to WAM SpA.

(70) With regard to both loans, the Italian authorities claim that the cost of the compulsory bank guarantee, which was requested prior to the granting of the loans, has to be deducted from the amount of the aid. The Commission observes, first of all, that such a guarantee, or its equivalent, would normally have been requested even by a private credit institution granting loans according to the market economy investor principle and, secondly, that it emerges from letter A of the specifications annexed to the contract that the overlapping of aid for the same programme is not permitted, except for aid related to the guarantee, which consequently is deemed itself to be eligible for aid.

(71) As regards WAM SpA's exports inside and outside the EU, the following data were provided:

Year	Exports inside EU	Exports outside EU	Total exports
1995	10 237 196	4 477 951	14 715 147
1996	9 338 640	5 592 951	14 930 762
1997	9 974 814	5 813 442	15 788 256
1998	10 780 161	5 346 514	16 126 675
1999	11 885 473	5 276 525	17 161 998

(72) The Italian authorities informed the Commission that the total export figures above represent between 52 % and 57,5 % of WAM SpA's total annual turnover.

(73) Finally, while the Italian authorities acknowledge that the two loans under examination are covered neither by Regulation (EC) No 69/2001 nor by Regulation (EC) No 70/2001, they take the view that the incentives for Community enterprises designed to support programmes to be implemented outside the EU do not fall within the scope of Article 87 of the EC Treaty.

VI. ASSESSMENT OF THE AID

Existence of aid within the meaning of Article 87(1) of the EC Treaty

(74) Article 87(1) of the EC Treaty states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.'

(75) The aid under scrutiny consist of transfers of public funding, in the form of subsidised loans, to a specific undertaking, WAM SpA. These loans improve the financial situation of the aid recipient. As regards the potential effect on trade between Member States, it has been stressed by the Court of Justice ([12]) that, even if the aid is intended to promote exports outside the EU, intra-Community trade may be affected. Moreover, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that such aid might distort competition within the Community.

(76) WAM SpA has subsidiaries all around the world, including in almost all the EU Member States, including France, the Netherlands, Finland, the United Kingdom, Denmark, Belgium and Germany. In particular, the complainant stressed that it competed on the Community market directly with 'WAM Engineering Ltd', which is the subsidiary for the United Kingdom and Ireland of WAM SpA, and that it was losing many orders to the Italian company. Furthermore, as regards outward-looking competition among Community undertakings, it transpired that the programme financed by the second loan and designed to support business penetration in China, was to be jointly carried out by WAM SpA and 'WAM Bulk Handling Machinery Shangai Co Ltd', a local firm wholly owned by WAM SpA.

(77) According to the case law of the Court of Justice, even if the recipient exports almost its entire production outside the EU, the EEA and the accession countries, any subsidising of export activities can affect trade between Member States.

(78) Moreover, in the case at hand, it has been ascertained that in the period 1995-1999 sales abroad accounted for between 52 % and 57,5 % of the overall annual turnover of WAM SpA, two thirds of which was generated inside the EU (in absolute figures, some EUR 10 million compared with EUR 5 million).

(79) Accordingly, irrespective of whether the aid under consideration supports exports to other Member States or outside the EU, it has the potential to affect trade between Member States and is, therefore, caught by Article 87(1) of the Treaty.

([12]) Case 142/87 *Kingdom of Belgium v Commission* (Tubemeuse ruling) 1990 ECR I-959.

Lawfulness of the aid

(80) The Italian authorities declared, in their letter of 11 October 1999 (A/37761), that the legal basis for the aid granted to WAM SpA, namely Law 394 of 29 July 1981, had been notified to the Commission and to the World Trade Organisation (WTO) under Article 25 of the Agreement on Subsidies and Countervailing Measures (WTO-GATT 1994) ([13]).

(81) The Commission observes that, by way of notification, the Italian authorities intend to include some very concise data relating to the scheme in the aid schedule transmitted to the Commission for the purposes of the annual report on State aid in the European Union, at least since the sixth report (1996). This cannot be deemed to be in compliance with Article 88(3) of the EC Treaty, which states that 'the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.'

(82) The Commission has been also informed of the existence of the scheme as part of its survey on national support schemes for foreign direct investment (FDI) outside the European Union that exist in the Member States.

(83) Since it was not previously notified to the Commission as regards its compatibility with the State aid rules, the aforementioned aid scheme has been implemented in breach of Article 88(3) of the EC Treaty and is therefore unlawful. As the aid to WAM SpA was granted under that scheme, it too is unlawful.

Compatibility of the aid with Article 87 of the EC Treaty

(84) To the extent that the support measures in question fall within the scope of Article 87(1) of the EC Treaty, they have to be assessed to verify whether they are elgible for any exemption under the relevant Community State aid rules.

([13]) Uruguay Round of Multilateral Trade Negotiations (1986-94) — Annex 1 — Annex 1A — Agreement on Subsidies and Countervailing Measures (WOTO-GATT 1994) (OJ L 336, 23.12.1994, pp. 156-183).

First loan granted to WAM SpA

(85) Evidence has been provided by the Italian Government that, at the time of the granting of the first loan (1995), WAM SpA fulfilled the requirements for it to be considered an SME within the meaning of Commission recommendation 96/280/EC ([14]). To be more precise, WAM SpA was a medium-sized enterprise as it had 163 employees, an annual turnover of EUR 16,8 million and a balance sheet total of EUR 20,1 million. Lastly, it was controlled by two finance companies which were themselves SMEs within the meaning of the above mentioned recommendation.

(86) To the extent that the Commission bases its assessment of presumed unlawful aid on the rules in force at the time the aid was granted ([15]), it has to be verified whether the aid granted to WAM SpA in 1995 was in compliance with the SME guidelines of 1992 ([16]), which were in force at the time the specific aid was granted.

(87) As WAM SpA is deemed to belong to the upper end of the SME range, it has to be borne in mind that, at the time of the first loan, the 1992 guidelines on State aid for SMEs stipulated that even investment aid, if available in non-assisted areas for medium-sized companies, not only involves a danger of distortion of competition but also reduces the incentive for smaller SMEs to invest in disadvantaged areas. They also stated that, while the risk of such a perverse effect may be low for very small companies, it obviously increases as the company expands.

(88) Furthermore, the aid granted to WAM SpA in 1995 is intended to support neither productive investments nor any other admissible aim laid down in the 1992 SME guidelines, namely aid for general investment outside or inside national assisted areas, aid for environmental protection investment and aid for research and development, training or dissemination of knowledge, the only exception being 'soft' aid for SMEs, which can include consultancy help, market surveys and participation in fairs and exhibitions.

(89) Accordingly, the Commission is of the opinion that the bulk of the eligible costs for the establishment of permanent structures abroad which were taken into consideration by the Italian Government in granting the first subsidised loan to WAM SpA in 1995, namely rent of premises (ITL 81,21 million), insurance and related facilities, as well as other operating costs such as personnel, fittings and equipment for premises (ITL 10,82 million, ITL 30,55 million and ITL 556,94 million respectively), are costs which the firm had itself to bear; the same applies to display models and spare parts for after-sales service (ITL 38,23 million). In the same way, with respect to the eligible costs intended to support trade promotion, the cost of storage of goods (ITL 456,28 million) does not comply, in the Commission's opinion, with the SME guidelines as it is not deemed to represent an initial investment; nor do the advertising costs (ITL 94,39 million) or business trips (ITL 7,52 million).

(90) In the Commission's view, none of these costs can in any way be regarded as productive investment; aid towards them has to be classified as operating aid.

(91) Furthermore the Commission considers that aid towards all the costs mentioned above has to be classified as aid for export related activities in the sense that it is directly linked to the establishment and operation of a distribution network or to other current expenditure related to the export activity. Therefore this aid cannot be regarded as being linked to foreign direct investment (FDI).

(92) This not only results from the analysis of the actual expenditure taken into consideration in granting the loan (see the table at point 37 and point 89) but has also been borne out by the objective of the loan contract, namely the subsidisation of a commercial penetration programme, and by the purposes of the fund that financed the aid, namely the subsidisation of export undertakings with a view to commercial penetration programmes to be carried out outside the European Union.

(93) By contrast, aid to consultancy services (ITL 29,43 million) and market surveys (ITL 40,95 million) may qualify for an exemption on the ground that WAM SpA was an SME and to the extent that they were provided and carried out by external advisers; the same goes for aid for participation in fairs and exhibitions (ITL 12,19 million). This falls within the 1992 guidelines, and in particular points 4.3 'Aid for consultancy help, training and dissemination of knowledge' and 4.5 'Aid for other purposes'.

([14]) Commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ L 107, 30.4.1996, p. 4).

([15]) See Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

([16]) See footnote 6.

(94) The Commission has long recognised that not all aid is liable to have an appreciable impact on trade between Member States. This concept was laid down for the first time in the *de minimis* rule, as included in the 1992 SME guidelines ([17]). It was subsequently reworded in the Commission notice on the *de minimis* rule for State aid ([18]) and finally confirmed in Article 2 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid ([19]), on the basis of which Commission Regulation (EC) No 69/2001 ([20]) was adopted.

(95) The Commission also recognizes that the wording of the 1992 *de minimis* rule, which was in force when the first aid measure was granted, did not explicitly exclude export aid; as a consequence, an amount of aid of up to ECU (now EUR) 50 000 could be deemed admissible, even with respect to the costs taken into consideration in granting the aid under examination, to the extent that WAM SpA did not benefit from any other subsidy in the form of *de minimis* aid during the relevant three-year period. This has been confirmed by the Italian authorities.

(96) In addition, in the light of the last paragraph of the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([21]), where, at the time of a decision, guidelines have been replaced by a regulation, the Commission considers that the rules set out in the regulation must apply to the extent that they are more favourable than those of the guidelines ([22]).

(97) Thus, an additional assessment of the aid in question has to be made in the light of Commission Regulations (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([23]) (aid in favour of SMEs) and (EC) No 69/2001 ([24]) *de minimis*.

(98) Regulation (EC) No 70/2001 clearly stipulates in Article 1(2)(b) that it does not apply to aid to export-related activities ([25]). Consequently, none of the expenditure listed at point 89 of the present decision can be considered to comply with that Regulation.

(99) Likewise, export aid does not fall within the scope of Regulation (EC) No 69/2001.

Second loan granted to WAM SpA

(100) At the time the second loan was granted in 2000, WAM SpA was on the admission of the Italian authorities themselves, a large undertaking. Furthermore, it was located in a non-assisted area.

(101) Once again, the Commission has to assess the aid in question on the basis of the rules in force at the time the aid was granted. On that basis and given that WAM SpA was no longer an SME, neither the 1996 Community guidelines on State aid for small and medium-sized enterprises ([26]) nor the 1998 regional aid guidelines ([27]), which are still in force, apply to the aid in question.

(102) On the basis of the analysis of the eligible costs, which are enclosed with letter A/35269 and specified in the table at point 37 of the present decision, the Commission takes the view that only training expenses (EUR 25 240 out of a total loan of EUR 1,8 million) may be exempted pursuant to Commission Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ([28]), irrespective of whether the assessment is based on Article 4(2) (specific training) or (3) (general training), given that both conditions are met in respect of the aid intensity applied.

(103) The aid in question does not seem to promote any other horizontal Community objective within the meaning of Article 87(3)(c) of the Treaty, such as research and development, employment, the environment, or rescue and restructuring within the meaning of the relevant guidelines, frameworks and regulations.

([17]) See footnote 6.
([18]) OJ C 68, 6.3.1996, p. 9.
([19]) OJ L 142, 14.5.1998, p. 1.
([20]) See footnote 5.
([21]) See footnote 3.
([22]) See footnote 4.
([23]) See footnote 7.
([24]) See footnote 5.
([25]) According to the wording of Regulation (EC) No 70/2001, 'aid to export-related activities' means aid to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as well as aid directly linked to the quantities exported.

([26]) OJ C 213, 23.7.1996, p. 4.
([27]) OJ C 74, 10.3.1998, p. 9.
([28]) OJ L 10, 13.1.2001, p. 20.

(104) In the Commission's opinion, the costs engendered by rent, fittings for the premises, vehicle purchases, display models, storage of goods, advertising, and business trips abroad and by foreign customers to Italy are strictly linked to the establishment and operation of a distribution network or to current expenditure related to the export activity.

(105) Compliance with the relevant *de minimis* rules has also to be assessed. At the time the specific aid was granted, the 1996 Commission notice on the *de minimis* rule for State aid ([29]) was in force. It clearly stipulates that export aid is excluded from its scope.

(106) The Commission notes that the expenses listed at point 104 have to be classified as aid to export-related activities and stresses that, in particular, aid towards technical assistance workshop premises and personnel abroad (a sales manager, a general manager, 4 employees and 6 technicians) hardly seems to be compatible with a non-sales activity.

(107) It should also be noted that the specific programme had to be carried out jointly by WAM SpA and the local firm, WAM Bulk Handling Machinery Shangai Co Ltd, a wholly owned subsidiary of WAM SpA. This is evidence of the established presence of WAM SpA on the specific market in question.

(108) In addition, the same wording as at point 92 of the present decision, which classifies the first loan to WAM SpA as an incentive to undertake commercial penetration programmes, has been used in the contract for granting the aid in question.

(109) Moreover, in the light of point 96, an additional assessment of the aid under scrutiny has to be made in the light of the 2001 *de minimis* rule, i.e. Commission Regulation (EC) No 69/2001 ([30]).

(110) The two relevant *de minimis* rules explicitly exclude export aid from their respective scope ([31]). Thus, even if WAM SpA did not benefit from any other *de minimis* subsidy during the relevant three-year period, the *de minimis* threshold cannot apply to the aid in question.

([29]) See footnote 18.

([30]) See footnote 5.

([31]) 'Export aid' is defined in the 1996 *de minimis* notice as 'any aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to current expenditure linked to the export activity'. This definition is reproduced, almost unchanged, in Article 1(b) of Commission Regulation (EC) No 69/2001.

VII. **CLOSING REMARKS**

(111) The Commission notes that the exemptions provided for in Article 87(2) (a) to (c) of the EC Treaty ([32]) do not apply to the loans in question since they do not pursue any of the objectives listed in that Article, nor has the Italian Government argued that this was the case.

(112) The loans were not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor were they intended to promote culture or heritage conservation. The Commission therefore considers that neither Article 87(3)(b) ([33]) nor Article 87(3)(d) ([34]) of the EC Treaty applies to the loans under consideration.

VIII. **CONCLUSION**

(113) Both loans to WAM SpA were granted without being 'previously notified to the Commission. Accordingly, the Commission finds that, having been implemented in breach of Article 88(3) of the EC Treaty, the loans were granted unlawfully to the recipient.

(114) The aid granted to WAM SpA in 1995, except for the portion of the loan granted in respect of expenses for consultancy services, market surveys and participation in fairs and exhibitions, is incompatible with the common market in so far as it exceeds the threshold of EUR 50 000.

([32]) Article 87(2) stipulates that the following aid is compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany […].

([33]) Namely, 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'.

([34]) Namely, 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'.

(115) As regards the overall grant equivalent of the specific aid, consideration has been given to the fact that the loan was made available to the recipient in several instalments (three in the case at hand, between 24 April 1996 and 24 April 1998) and that the grace period subsequently varied from 2 years to zero. The interest rate stipulated by the loan contract (4,4 %) relative to the reference rate periodically fixed by the Commission ([35]) and in force at the time the loan was granted (11,35 %) has also been taken into consideration. This resulted in a grant equivalent as at 24 April 1996 (date on which the first instalment of the loan was paid to WAM SpA) of EUR 104 313,20.

(116) As part of the loan at hand has been considered compatible, it must, as indicated at point 93, be deducted from the aid component and be reflected in the calculation of the present grant equivalent. Given the impossibility of establishing a direct link between a given instalment of the loan and certain specific expenses, the same percentage as represented by the compatible items in the overall loan (ITL 82,57 million out of ITL 1 358,51 million, i.e. 6 %) has been applied to the present overall grant equivalent. As 6 % of EUR 104 313,20 is EUR 6 258,79, the present grant equivalent of the incompatible part of the aid is the EUR 98 054,41 exceeding the threshold of EUR 50 000.

(117) The aid granted to WAM SpA in 2000, except for the portion in support of training activities amounting to EUR 25 240, is incompatible with the common market.

(118) In this case, the loan was made available to WAM SpA in five instalments between 12 February 2001 and 29 January 2003; consequently, with the first loan, the grace period varies from 2 years to zero. Likewise, the interest rate stipulated in the loan contract (2,32 %) relative to the reference rate periodically fixed by the Commission and in force at the time the loan in question was granted (5,70 %) has been taken into consideration by the Commission in calculating the grant equivalent. The overall repayment, including principal and interest, is expected to be completed in 2008. Accordingly, the grant equivalent of the aid component of the entire loan as at 24 February 2001 (date on which the first instalment of the specific loan was made available to WAM SpA) would have been EUR 180 203,70, to the extent that the repayments had been made according to the repayment schedule.

(119) At the date on which the present decision is expected to be adopted (19 May 2004), the benefit deriving from the loan, calculated by the Commission, is equivalent to EUR 106 366,60.

([35]) Published regularly in the *Official Journal of the European Communities*.

(120) As regards the compatible portion of the loan, the same reasoning as in the case of the first loan applies. Hence the percentage of the compatible portion of the loan with respect to the entire loan, namely 1,35 %, has to be deducted from the grant equivalent of the aid. As a result, the grant equivalent of the second loan at the time the final decision was adopted has been calculated at EUR 104 930,65 (106 366,60 − 1 435,95).

(121) Since it has been classified as aid to export related activities, neither the 1996 *de minimis* rule ([36]), nor the 2001 *de minimis* Regulation ([37]) applies to this specific aid.

(122) It is the Commission's standard practice, in accordance with Article 87 of the EC Treaty, to require recovery from the recipient of aid which, under that Article, has been unlawfully granted and is incompatible with the common market, provided that the aid is not covered by the *de minimis* rules. This practice was been confirmed by Article 14 of Council Regulation (EC) No 659/1999.

(123) In accordance with Article 14(2) of that Regulation, the aid to be recovered pursuant to a recovery decision must include interest at an appropriate rate fixed by the Commission. Interest is payable from the date on which the unlawful aid was at the disposal of the recipient until the date of its recovery.

(124) The way in which the interest rate has to be applied has been spelt out in the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered ([38]).

(125) The Commission would point out that the present decision is without prejudice to the compatibility of the national framework represented by Law No 394/81, which is the legal basis for the State aid granted to WAM SpA, with respect to which the Commission, in line with the case law of the Court of First Instance ([39]), did not find necessary in the present case to initiate proceedings. It nevertheless does not rule out the possibility of so doing at a later stage,

([36]) See footnote 18.
([37]) See footnote 5.
([38]) OJ C 110, 8.5.2003, p. 21.
([39]) See Cases T-92/00 and T-103/00 *Diputación Foral de Álava v Commission* (Ramondín) [2002] ECR II-1385.

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to WAM SpA pursuant to Law No 394/81 falls within the scope of Article 87(1) of the EC Treaty.

Since it has not been previously notified to the Commission in breach of Article 88(3) of the EC Treaty, it constitutes unlawful aid.

Article 2

1. The aid of EUR 104 313,20 that Italy granted to WAM SpA in the form of an interest-rate subsidy from 24 April 1996, except for the portion corresponding to eligible costs for consultancy services, participation in fairs and exhibitions and market surveys and amounting to EUR 6 258,79, constitutes unlawful aid to the extent that it exceeds the threshold of EUR 50 000 laid down in the 1992 *de minimis* rule ([40]).

Italy shall take all necessary measures to recover the excess amount of EUR 48 054,95.

2. The aid of EUR 106 366,60 that Italy granted to WAM SpA in the form of an interest-rate subsidy from 9 November 2000 up to the date of the present decision constitutes unlawful aid except for the portion corresponding to eligible costs for training measures and amounting to EUR 1 435,95.

Italy shall take all necessary measures to recover the resulting amount of EUR 104 930,65.

3. Recovery of the aid referred to in paragraphs 1 and 2 above shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision.

The aid to be recovered shall include interest until the date of its recovery and with effect respectively:

(a) from 24 April 1996 as regards the aid referred to in paragraph 1 and

(b) from the date of this decision as regards the aid referred to in paragraph 2.

Article 3

1. Italy shall refrain from granting WAM SpA any further aid in the form of an interest-rate subsidy by way of the measure which is the subject of this decision and which is referred to in Article 2(2) above by either ordering the immediate repayment of the loan granted or by adjusting, as of the date of this decision, the interest rate on the loan in line with the reference rate applicable at the time the loan was granted and fixed by the Commission for the purpose of calculating the grant equivalent of regional aid.

2. The reference rate referred to in paragraph 1 of this Article shall be applied on a compound basis throughout the periods referred to in points (a) and (b) of the second subparagraph of Article 2(3).

Article 4

Italy shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it, using the questionnaire in Annex to the decision.

Article 5

This decision is addressed to the Republic of Italy.

Done in Brussels, 19 May 2004.

For the Commission

Mario MONTI

Member of the Commission

([40]) See footnote 6.

ANNEX

Information regarding the implementation of the Commission decision C(2004) 1812

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details regarding the amount of unlawful state aid that has been put at the disposal of the recipient:

Concise identification of the measure (1)	Date(s) of payment (2)	Amount (*)	Date(s) of repayment (**)

(1) If a measure consists of several instalments and reimbursements, use separate rows.
(2) Date or dates on which individual instalments of aid have been put at the disposal of the recipient.
(*) Amount of aid put at the disposal of the recipient, in gross grant equivalents.
(**) Date or dates on which individual instalments of the aid were repaid by the recipient.

Comments:

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. **Recovery measures planned or already taken**

2.1. Please describe in detail what measures are planned and what measures have been taken to bring about the immediate and effective recovery of the aid. Please also indicate, where relevant, the legal basis for the measures planned or taken.

2.2. By what date will the recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details of aid that has been recovered from the recipient:

Concise identification of the measure	Date(s) (1)	Amount of aid repaid

(1) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.