II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 March 2005

concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions

(notified under document number C(2005) 587)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/598/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard of the Treaty establishing the European Community, and in particular Article 88, paragraph 2, first indent,

Having regard of the agreement on the European Economic Area, and in particular Article 62, paragraph 1, point (a),

After having invited the interested parties to present their observation according to these Articles [1], and having regard of these observations,

Whereas:

I. THE PROCEDURE

(1) With its decision of 13 May 2003, notified to Italy by means of letter of the same day, the Commission decided to open the investigation procedure based on Article 88(2) on the case mentioned in the subject and invited Italy and all interested parties to submit comments [2].

(2) Italy wrote on 23 July 2003.

(3) ACEA S.p.A. ('ACEA'), beneficiary of the aid, wrote on 8 September 2003. The letter was sent to Italy for comments, together with a number of other demands, on 15 September 2003. The demands concerned:

— a demand for a copy of the Memorandum of Understanding between ACEA and Electrabel for the constitution of AEP;

— the conditions of transfer of ACEA's activities to AEP, in particular if the measure under consideration had been taken into account;

— on which of the activities of ACEA the recovery would impinge.

(4) Italy responded on 18 March 2004, and again on 29 April 2004.

[1] OJ C 188, 8.8.2003, p. 8.
[2] See footnote 1.

II. DESCRIPTION OF THE CASE

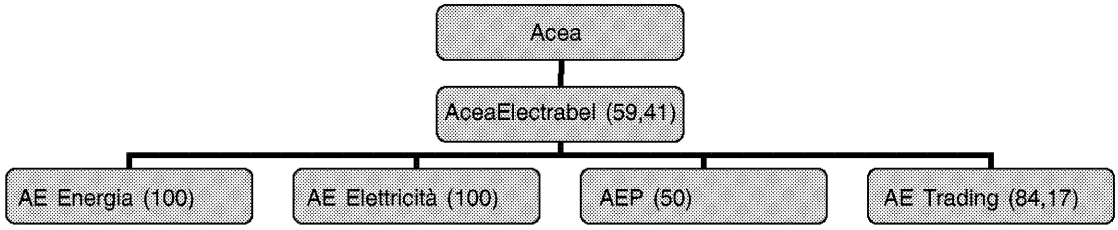
(5) The case originally concerned two energy saving projects supported by the Region Lazio, a district heating project and a windpower plant. Both projects were declared compatible, but it was decided to open the proceedings pursuant to Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999, based on the Deggendorf jurisprudence ([3]). The present case thus concerns only the energy saving project. The project consists in a district heating network in the area of Torrino Mezzocammino, near Rome. The distribution network will be supplied by energy produced in a partly repowered and upgraded (converted) cogeneration plant and will provide heating to a new neighbourhood. Two other neighbourhoods near Rome — Torrino Sud and Mostacciano — are already linked to the combined heat and electricity power plant by means of district heating pipelines. The new project represents an extension of the network. The pipelines will have an extension of 14 km.

(6) Investment costs for this project amount to EUR 9 500 000. They are limited to the amount of the investment related to the heat distribution system, to the exclusion of the re-powered turbine. The aid amount is limited to EUR 3 800 000.

(7) The legal base of the measure is the Deliberazione of the Giunta Regionale del Lazio n. 4556 of 6 August 1999, which selected the projects to fund through the 'carbon tax'. The measure is financed through the funds collected with the 'carbon tax' introduced by Article 8 of the budgetary law ('finanziaria') approved on 23 December 1998 (legge n. 448/98). On 20 July 2000 the Ministry of the Environment adopted a decree (decreto n. 337 del Ministero dell'Ambiente) lying down the operational criteria that the Region had to respect in spending the resources collected through the tax.

III. DESCRIPTION OF THE BENEFICIARY

(8) The undertaking benefiting from the aid was ACEA S.p.A., former municipalizzata of Rome. After a series of reorganisations which involved a number of other undertakings, notably Electrabel, the beneficiary is now a different one, AceaElectrabel Produzione (AEP). AEP is controlled at 50 % by Electrabel Italia, and at 50 % by AceaElectrabel. The first is controlled at 100 % by Electrabel (Belgium). The second is controlled at 40,59 % by Electrabel Italia, and at 59,41 % by ACEA S.p.A.



Note: Chart of the ACEA Group; the figures between brackets indicate the level of control by the parent company; the rest belongs to Electrabel Italia, Italian subsidiary of the Belgian group Electrabel.

IV. REASONS FOR OPENING ARTICLE 88(2) PROCEDURE

(9) The Commission considered ([4]) that the project under examination does comply with the relevant provisions of the Environmental Guidelines. Nevertheless, the Commission expressed doubts and decided to open the investigation procedure, as it considered that the principles and criteria endorsed in the Court jurisprudence ('Deggendorf') are applicable.

(10) It appeared that the intended recipient, ACEA S.p.A., is one of the former 'aziende municipalizzate' (public utilities owned by local public administrative bodies) in the energy sector which has benefited of the aid schemes assessed in the Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding ([5]) (State aid C 27/99, ex NN 69/98). Even though that decision only concerns the schemes as such and does not deal with the individual situation of the recipients, at least one of those schemes was intended to benefit to all undertakings meeting certain conditions, and at the relevant time ACEA met those conditions.

([3]) Judgement of the Court of 15 May 1997 in the case C-355/95 P (Textilwerke Deggendorf GmbH v Commission of the European Communities and Federal Republic of Germany), Rec. 1997, p. I-2549.

([4]) Point 3.4 of the decision to open the procedure, C(2003) 1468 fin of 13.5.2003, on case N 90/2002.

([5]) OJ L 77, 24.3.2003, p. 21.

(11) The Commission Decision 2003/193/EC declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes. ACEA has challenged that decision before the Court of First Instance ([6]) and, in that context it has submitted that it had benefited from the relevant scheme. Financial reports by ACEA explicitly refer to the risk of recovery, for instance the semi-annual report of September 2004 ([7]).

(12) Following two reminders of the Commission addressed to the Italian authorities concerning their obligation to recover those amounts, the Italian authorities have informed the Commission that, after more than two years from the adoption of the decision in case 2003/193/EC, they are still in the process of fulfilling their recovery obligation by adopting and implementing the appropriate administrative measures. In particular they have not clarified whether the sums that have been received by ACEA have been recovered yet. Based on the above mentioned information, it should be inferred that ACEA S.p.A. has received and not yet reimbursed certain amounts under the incompatible aid schemes assessed in the Decision 2003/193/EC.

(13) Therefore, the Commission concluded, on the one hand, that it was unable to determine the amount of aid which ACEA S.p.A. had already received prior to the new aid granted under the project and which still has to be reimbursed.

(14) On the other hand, the Commission concluded that it could not assess the cumulative effect of both the 'old' and 'new' aid accruing to ACEA S.p.A. and its likely distortionary impact on the common market.

V. **COMMENTS FROM ITALY AND FROM THIRD PARTIES**

1.1. **Comments from Italy**

(15) The arguments of the Italian authorities are the following (recitals 16 to 27):

(16) Italy raises the issue of the identity of the beneficiary, which has changed since the decision of the Commission. In fact, Italy points out that the beneficiary of the aid had changed even prior to that date. However, Italy recognises that the Commission was not made aware of this fact prior to the decision to open the current procedure. The change of the beneficiary would have as a consequence that the Deggendorf jurisprudence should not apply and that the present case would be without object.

(17) Italy contests that the measure constitutes aid, as it concerns a local project with no impact on trade; furthermore since heating is not tradable, and it cannot be taken as a substitute for other energy sources, there is no distortion of competition.

(18) Italy then develops a number of arguments against the application of the Deggendorf jurisprudence (recitals 19 to 23):

(19) Italy claims that the Deggendorf jurisprudence should not apply in this case, given the different origin of the case. The present case is a regional case (granting authority being the Regione Lazio), while the case concerning the municipalizzate was a national case.

(20) Italy claims that there is no absolute identity in the beneficiaries. The Deggendorf jurisprudence should apply only to individual aid and not to schemes.

(21) Italy claims that the Deggendorf jurisprudence should apply only when decisions are incontrovertible, while the decision of the Commission is not final, as there is an appeal pending. Italy states that the Commission cannot exercise such a pressure on Members States' policies before all enforcement means foreseen by the Treaty have been used.

(22) Italy claims that the Commission is making a use of the Deggendorf jurisprudence which is too wide. It notes that a possible consequence would be that Member States would stop notifying.

(23) Italy points out two other features of the project under examination which would not favour the application of the Deggendorf jurisprudence: (a) the energy saving objectives of the project are in line with Commission and EU policies; (b) ACEA would be penalised compared to other municipalizzate, and the Commission would be exercising pressure towards a single subject, through illegitimate means.

(24) In reply to the Commission's questions, Italy points out that (recitals 25 to 27):

(25) The Memorandum of Understanding shows that AEP is subject to double control of AEA and Electrabel.

([6]) Case T-297/02 (OJ C 289, 23.11.2002, p. 37).
([7]) Available on the Internet site of ACEA: www.aceaspa.it

(26) In the Joint Venture Agreement the project under consideration was not taken into account, nor was the recovery decision.

(27) ACEA has various activities, and that it is not possible to determine on which of these the recovery of the aid will impinge.

1.2. **Comments from third parties**

(28) The beneficiary of the aid ACEA, made a number of comments, which, to a very large extent, are identical to those submitted by Italy. There are however three additional comments in particular on the application of the Deggendorf jurisprudence:

(29) The first additional argument from ACEA is that, in the present case, contrary to the Deggendorf case, there are no urgent and serious reasons for the recovery, nor has a long period passed since the decision on the unlawful aid.

(30) The second argument from ACEA points out that, again contrary to the Deggendorf case, ACEA bears no responsibility or unwillingness concerning the recovery; to the contrary, ACEA declares itself as willing to payback, and makes clear that the delay does not depend on it.

(31) The third additional argument that ACEA puts forward is the claim that the Commission is not coherent in its application of the jurisprudence Deggendorf. ACEA mentions the Commission Decision 98/466/EC of 21 January 1998 granting conditional approval to aid which France has decided to grant to Société française de production ([8]), where a previous negative decision concerning the same beneficiary is mentioned, but where Deggendorf was not applied.

VI. **ASSESSMENT**

(32) The assessment of the case will look first at whether the measure under consideration is an aid, and whether it can be considered compatible according to the Treaty.

(33) Secondly, the assessment will look at the identity of the beneficiary and the application of the Deggendorf jurisprudence.

1.1. **Existence of aid**

(34) A number of comments from Italy and from ACEA concern the finding of the Commission that the project is an aid (see paragraph 5.3).

(35) The project is funded through state resources coming from the budget of the Regional Government, and deriving in particular from the 'carbon tax', which was introduced by the Budget Law for the year 1999. The first condition for the existence of an aid is respected.

(36) The measure is selective, as it benefits only one producer, initially ACEA and now AEP. The second condition for the existence of an aid is respected.

(37) Concerning the impact on trade, the 2003 Decision (point 3.1) says: 'Heat is not traded but is substitutable to other primary or secondary energy products, which are themselves traded.'

(38) This is confirmed by other decisions of the Commission, for instance on the case Italy, Regione Piemonte, Aid for the reduction of polluting emissions (N 614/02) ([9]), when it says that a local district heating project 'will allow households to substitute heat to other primary or secondary sources of energy such as oil or electricity which are traded among Member States'.

(39) The objective of district heating is to replace individual heating in buildings in an entire neighbourhood. In other words, the heating provided by the district heating power generator replaces the heating generated by small boilers, which in turn use other energy sources such as oil, gas, or by electricity. Oil, gas and electricity are traded among Member States. There is a substitution effect and the project under consideration does then have an impact on trade. In any event, both the ACEA and the Electrabel groups are active in a number of areas, in particular energy and electricity production and distribution, where intra-Community trade takes place. The third condition for the existence of aid is also respected.

([8]) OJ L 205, 22.7.1998, p. 68.

([9]) OJ C 6, 10.1.2004, p. 21.

(40) Finally, the measure is also distortive, as it favours only a producer that may have its position strengthened in the global energy market, which may then possibly lead to a change in market conditions. Impact on trade and distortion stemming from the measure are thus confirmed, and are consistent with the findings of the Commission in other cases ([10]).

(41) All the four conditions for the existence of an aid are thus respected, and the Commission confirms its finding that the project under examination should be considered as such.

1.2. **Compatibility of the aid**

(42) The Commission then examined if the aid under consideration could have been considered compatible, according to article 87(3)c. It first recognised that the project intends to reach environmental objectives. Second, it looked at whether the measure could fall within the rules foreseen by the Environmental Guidelines. The Commission looked in particular at points 30 and 37.

(43) Point 30 of the Guidelines stipulates that 'investments in energy saving as defined in point 6 are deemed equivalent to investments to promote environmental protection. Such investments play a major role in achieving economically the Community objectives for the environment. They are, therefore, eligible for investment aid at the basic rate of 40 % of eligible costs'.

(44) Within the project under consideration, only investment concerning district heating, consisting in pipelines for the distribution of heat and its accessories, is eligible to aid. The regional authorities of Lazio have provided the Commission with technical and economic evidence which proves that the proposed distribution network for district heating would actually mark a significant step forward in energy saving as compared to the existing — i.e. pre-investment — situation, *ceteris paribus*. Therefore, point 30 of the Guidelines applies.

(45) Point 37 of the Guidelines stipulates that 'eligible costs must be confined strictly to the extra investment costs necessary to meet the environmental objectives'.

([10]) In the case N 707/02 — The Netherlands — MEP — Diffusion of renewable energy, approved by the Commission on 19.3.2003 it is written that the scheme will only favour the producers of renewable electricity and producers of CHP electricity who are feeding that electricity into the grid. The financial assistance provided to these selective groups of producers of electricity will strengthen their position on the global electricity market, which may possibly lead to a change in market conditions. Such strengthening of the position of the relevant undertakings as compared with other undertakings competing with them within the Community must be regarded as affecting trade between Member States.

(46) In view of the fact that the reference investment is nil as the alternative is individual heating of households, the Commission accepted that the full investment cost is eligible. In addition, there is no cost saving accruing from the extension of the network. Therefore, the full cost of the investment can be considered as eligible. The aid granted corresponds to a maximum gross intensity of 40 %.

(47) Therefore, in terms of eligible investment costs and aid intensity, the district heating project, taken in isolation, appears to be in line with points 30 and 37 of the Guidelines.

(48) Based on this analysis the Commission would be able to declare the project, taken in isolation, as compatible to the rules concerning state aid. In taking this decision, the Commission balanced environmental aspects with competition policy, as it is precisely supposed to do. As it is indicated in point 4 of the Environmental Guidelines 'taking long-term environmental requirements into account does not mean that all aid must be authorised'.

(49) Accepting the point of view of Italy, that since the project intended to reach environmental objectives the Commission should then have approved it, would ignore the fact that what matters most for competition rules is the modality through which the objectives are met. It is established jurisprudence that in providing guidelines on the ways it will examine State aid notifications, the Commission indicates to the Member States the less distortive ways of reaching the environmental goals. However, the environmental objective of the aid does not justify a derogation from general rules and principles concerning all State aid measures, whatever their objective.

1.3. **Identity of the beneficiary**

(50) The first aspect of the assessment in the present case is to analyse the identity of the beneficiary.

(51) A number of comments from Italy ([11]) concern the change of beneficiary, the conditions of transfer of the part of the firm that is going to carry out the project and the Memorandum of Understanding between ACEA and Electrabel.

(52) It is useful to underline that, before taking the decision to open the current procedure, the Commission was not made aware that the beneficiary of the aid had become AEP. It's a fact that was communicated from the Italian authorities only in the course of the current procedure.

([11]) See recitals 16 and 25 to 27.

(53) As mentioned above, in the section describing the beneficiary, AEP is different from ACEA. It is a distinct company, jointly controlled by ACEA and Electrabel. But the Commission, in its appreciation in the State aid area, must go beyond the legal separation. As recently confirmed by the Court of First Instance, with extensive references to the jurisprudence of the European Court of Justice and of the Court of First Instance itself ([12]).

(54) 'It should be noted that, according to settled case-law, where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking for the purposes of Community competition law (see, to that effect, Case 170/83 Hydrotherm [1984] ECR 2999, paragraph 11, and, by analogy, Case T-234/95 DSG v Commission [2000] ECR II-2603, paragraph 124). In the field of State aid, the question whether there is an economic unit arises primarily in relation to the question whether there is an aid beneficiary (see, to that effect, Case 323/82 Intermills v Commission [1984] ECR 3809, paragraphs 11 and 12). It has been held in that regard that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit or rather as legally and financially independent for the purpose of applying the rules governing State aid (see, to that effect, Joined Cases T-371/94 and T-394/94 British Airways and Others v Commission [1998] ECR II-2405, paragraphs 313 and 314, and, by analogy, DSG v Commission, paragraph 124).'

(55) The Commission has to assess if ACEA and a company that is still part of the ACEA group should be regarded as an economic unit. To this respect, the analysis of the situation of AEP confirms that this is the case.

(56) ACEA recognises that it has joint control over AEP, together with Electrabel. It mentions it explicitly in one of the submissions ([13]). This is confirmed by the financial reporting of ACEA, which lists AEP among the consolidated companies. The fact that ACEA exercises control on AEP jointly with Electrabel and not alone is not relevant.

(57) AEP is mentioned in the accounts of ACEA: in page 35 of the report for the first half of 2004, it is written that 'having regard of the possibility allowed by Article 37 of the legislative decree 127/91, are also included within the consolidation boundaries the following undertakings over which the holding exercise the control jointly with other partners and on the basis of agreements with them'. The list includes AEP.

([12]) Judgement of the Court of First Instance of 14 October 2004, in the case T-137/02 (Pollmeier Malchow GmbH & Co. KG v Commission of European Communities).

([13]) Letter from Italy of 29.4.2004.

(58) The Memorandum of Understanding between ACEA and Electrabel, concerning the transfer of the branch from ACEA to AEP does not mention the project at all. However, it is clear that AEP inherited the project and became the intended beneficiary of the aid as a result of a restructuring within the ACEA group and that it pursues some of the activities that were previously performed by ACEA itself. Furthermore, Article 4 of the agreement to confer the branch to AEP (named at that time GEN.CO) says that any dispute concerning that branch would be left out from the agreement itself, and that the conferred undertaking would not be subject to any dispute that may arise, even if they would originate after December 1, 2002 (date of entering into effect of the agreement) but would be based on facts preceding that date.

(59) An agreement between two parties cannot lead to an exemption from the obligation to reimburse the illegal and incompatible aid. If such an agreement would be accepted, it could lead to the systematic circumvention of the obligation of the companies to reimburse the illegal and incompatible aid. Furthermore, it should be noted that, at the time of the entering into effect of the agreement, the decision on the aid granted to ACEA had already been taken by the Commission and that ACEA at that time had already introduced an action for annulment of this decision. The obligations imposed on ACEA were therefore well known, so that a circumvention of the State aid recovery obligation cannot be excluded.

(60) Therefore we conclude that ACEA and AEP are to be considered as a single entity and that, notwithstanding the reorganisation that has taken place within the ACEA group, the group itself, including ACEA, must be considered as beneficiary of the aid. In addition, a different approach might make it possible to circumvent State aid rules.

1.4. **The Deggendorf Jurisprudence**

(61) After more than two years from the Decision 2003/193/EC, Italy has yet to define the amounts which the municipalizzate have to reimburse, let alone recover the aid which had been declared illegal and incompatible. The situation thus has not changed since the opening of the proceedings in 2003. More, the Commission decided to bring Italy to the Court for non-implementation of the Decision 2003/193/EC ([14]). The latest development is the inclusion in the so-called Legge Comunitaria for 2004, whose approval is still pending by both Chambers of Parliament, of a provision which sets out the main directions for the recovery, like asking local governments to indicate possible beneficiaries or asking beneficiaries to self-declare the amount of aid perceived.

([14]) Decision notified under document number C(2005) 41 of 20.1.2005. See press release IP05/76 of 20.1.2005.

(62) Therefore the Commission considers that the situation that was in place at the moment of the opening is still present. The Commission confirms that it still cannot determine the exact amount of the advantages perceived by ACEA prior to the new aid. Neither the Italian government nor ACEA have put forward any specific elements showing that, in the case of ACEA, the advantages arising from the scheme considered as incompatible must be considering as not constituting aid, or constituting existing aid, or compatible aid because of the specific features of its beneficiary. On the contrary, because of its size and because of the activities it performed at the time of the grant of the aid in different markets, including the production and distribution of energy and electricity, advantages granted to ACEA must be considered as affecting intra-Community trade and distorting competition. In addition, the advantages are considerable since they correspond to the amounts due under the Italian corporate tax (IRPEG) for three years. Therefore, the ACEA group, including AEP, is still in receipt of illegal and incompatible aid which still has to be reimbursed and the distortion of competition is still in place.

(63) Under such circumstances, and even if the exact amount of the first aid is not known, the cumulative effect of the two aids accruing to ACEA and its distortionary impact on the common market render the grant of the notified aid incompatible with the common market.

1.5. **Application of the Deggendorf jurisprudence to the case**

(64) Italy and ACEA put forward a number of arguments on the application of the Deggendorf jurisprudence to this case.

(65) To recall, the Deggendorf jurisprudence established by the Court ([15]) states that the Commission, when examining the compatibility of an aid, should take into account all the relevant elements and in particular the cumulative effect of the new aid and of aid which has been declared incompatible and has not yet been reimbursed. This jurisprudence gives the possibility to suspend the granting of compatible aid as long as the previous illegal and incompatible aid has not been reimbursed.

(66) First, it is worth repeating what is mentioned in the paragraphs 51 to 60 concerning the identity of the beneficiary. For the present case, the Commission considers, for the arguments presented above, that AEP is still part of the ACEA Group, and that to the effect of this case the beneficiary is basically the same.

(67) The fact that this is a regional case, while the case concerning the municipalizzate was a national case, is not relevant ([16]). For the Commission, all cases are national, as is confirmed by the fact that the national authorities are the only direct interlocutors of the Community institutions. Proof is that the measure was notified by Italy, and that Italy is the addressee of the decision, according to Articles 87 and 88 of the EC Treaty. Furthermore, the resources involved are national, whether they are distributed from the national government or a regional institution. Hence this argument does not hold.

(68) The Deggendorf jurisprudence applies whenever a beneficiary of an aid has not paid back what the Commission decided, irrespective of the fact that the case is individual or concerns a scheme ([17]). The Commission must consider that ACEA was among the beneficiaries of the aid to the municipalizzate, since at least part of that aid was given to all undertakings falling into that category, hence also to ACEA.

(69) Furthermore, ACEA presented observations in the course of that procedure in its quality of third interested party arguing for the compatibility of those schemes. The Commission Decision declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes ([18]). ACEA has challenged that decision before the Court of First Instance ([19]) and, in that context it has submitted that it had benefited from the relevant scheme. As explained above, neither Italy nor ACEA have put forward any specific reasons that could prevent or limit recovery in its specific case.

(70) Financial reporting by ACEA mentions the decision of the Commission and the financial risks that may derive for the group. It even quantifies the likely amounts of the aid that Italy should recover from ACEA, at least for the years 1998 and 1999, since in 1997 ACEA reported a loss (hence no benefits in terms of reduced tax). ACEA mentions possible figures for 1998 (EUR 28 million) and for 1999 (EUR 290 million, due to some exceptional operations of de-merging).

([15]) See footnote 3.

([16]) See recital 19.

([17]) See recital 20.

([18]) Article 3 of the Commission Decision stipulates that all necessary measure must be taken by Italy in order to recover from the beneficiaries the unlawful aid thus granted.

([19]) See footnote 6.

(71) Contrary to the claim that Deggendorf should apply only when the decision of the Commission are incontrovertible (e.g. only when they are finally confirmed by a ruling of the Court) ([20]), the Commission reminds that its decisions have immediate effect and validity, as is recognised by Italy ([21]). This is in line with the general principle that appeals do not have any suspension effects (Article 242 EC Treaty). Also, it should be mentioned that no interim measures have been asked for this case.

(72) Italy claims that the use of the Deggendorf jurisprudence is an exceptional way to proceed, and should be applied only as *extrema ratio*. Contrary to this point of view, an effective control of State aid policy would push to a constant and immediate use of the Deggendorf jurisprudence in order to ensure the effectiveness of the system, whose purpose is to take into account all State aid that is still available to the beneficiary, thereby reducing distortions of competition and to ensure an effective application of its decisions.

(73) Contrary to the claim by Italy that the application of the Deggendorf jurisprudence by Italy would lead to a reduced number of notifications from Member States ([22]), the Commission notes that notification is not an option, but an obligation according to Article 88(3) of the EC Treaty. Non-notified aid becomes illegal, even if it may be compatible.

(74) Concerning the claim by Italy that the Commission is exercising a particular pressure ([23]), the Commission notes that this case is a simple application of the existing jurisprudence. ACEA is penalised only to the extent it is the beneficiary of another aid.

(75) Furthermore, it should be pointed out that ACEA is not particularly penalised. The Commission approved (Decision on case N 614/02 mentioned in paragraph 38) a number of projects in the Region Piemonte. Two of the projects approved were to be carried out by AEM, the municipalizzata from Torino, and by ASM, the municipalizzata from Settimo Torinese. In the case of AEM, the decision considered whether the Deggendorf jurisprudence would apply. It finally said no, because of the *de minimis* rule, the amount in question being limited to EUR 17 240. The local authority further took the engagement to verify if there was no cumulation with other *de minimis* aid over a three years period, for a total amount over EUR 100 000, in which case there would have been aid which would not have been granted precisely because of Deggendorf.

([20]) See recital 21.
([21]) Letter from Italy, 23.7.2003, p. 6.
([22]) See recital 22.
([23]) See recital 23.

(76) In the case of ASM, the same Decision on case N 614/02 (mentioned in paragraphs 38 and 75) said:

'In view of the Deggendorf case law ([24]), the Italian authorities have therefore committed to check if Azienda Sviluppo Multiservizi S.p.A. and the other beneficiaries have indeed benefited of such aid and if so not to grant the present State aid before the unlawful and incompatible State aid previously granted has been reimbursed in line with the above mentioned decision.'

(77) Finally, the fact that ACEA had various activities, and that it cannot determine on which of these the recovery of the aid will impinge ([25]), does not influence this case. It would be too easy for a company to escape to a recovery decision simply by not specifying on which part of its activities or on which branch the recovery would fall.

(78) To the contrary, it can be argued that, since part of the aid that was declared illegal and incompatible concerned a fiscal measure, all branches of ACEA have benefited from it in the past. Fiscal aid, being operating aid, is not as such referable to any activity of the firm in particular. The illegal and incompatible aid covered thus the entire economic activity of ACEA, including the branch that was then transferred to AEP. This implies that part of that non-recovered aid can be attributed to AEP too.

1.6. **On third parties' comments**

(79) Contrary to what is said by ACEA ([26]), indeed a long period has passed since the decision to recover was made, without any real step taken by the Italian authorities to recover the aid. At the end of January 2005, Italy had yet to approve the procedure for the recovery. Article 14.3 of the Regulation (EC) No 659/1999 of 22 March 1999 ([27]) clearly indicates that recovery shall be effected without delay. Until now, as mentioned above, no clear procedure has been defined to recover the aid, and no recovery proceedings have been started yet.

(80) The goodwill of ACEA ([28]) does not change the situation *de facto*, which is still of a non recovered aid. The issue under examination — the recovery of an aid that was declared illegal — is a factual one, and is not influenced by the disposition of one of the parties in one sense or another. Furthermore, beyond a simple expression of goodwill, ACEA could have acted towards speeding up the recovery, for instance by indicating the amounts that would be involved, and especially by putting a reserve in a blocked bank account.

([24]) See footnote 3.
([25]) See recital 27.
([26]) See recital 29.
([27]) OJ L 83, 27.3.1999, p. 1.
([28]) See recital 30.

(81) Finally, concerning a pretended incoherence by the Commission in the application of the Deggendorf jurisprudence, of which the decision on SFP would be an example ([29]), it should be noted that the 1998 decision ([30]) was based on a commitment from France to reimburse the previous aid which had been the subject of a negative decision. So, Deggendorf was not applicable. The Decision 1998/466/EC also says that no further aid can be given, except in exceptional circumstances. In 2002, the Commission has adopted a decision on a new intervention from France in favour of SFP, but it concluded that the intervention was not an aid. As a consequence, there was no reason to apply the Deggendorf jurisprudence.

VII. **CONCLUSION**

(82) On the basis of the considerations above, the Commission finds that the aid amounting to EUR 3 800 000 for a district heating project near Rome to be granted to the company AEP, taken in isolation, would be compatible with the Treaty.

(83) The payment of the aid to AEP is however suspended until the moment that Italy submits the proof of the reimbursement of the aid by ACEA that was declared illegal and incompatible in the case assessed in the Decision 2003/193/EC, in application of the Deggendorf jurisprudence,

HAS ADOPTED THE PRESENT DECISION:

Article 1

1. The aid that Italy intends to grant to the company AEP for a district heating project on the base of '*Deliberazione della Giunta Regionale del Lazio n. 4556*' of 6 August 1999 is compatible with the common market.

2. The aid referred to in paragraph 1 may not be granted before Italy has submitted evidence that ACEA has reimbursed the previous aid assessed on the case covered by the Decision 2003/193/EC, and the interests.

Article 2

Italy informs the Commission, within a deadline of two months starting from the date of the notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to Italy.

Done at Brussels, 16 March 2005.

For the Commission
Neelie KROES
Member of the Commission

([29]) See recital 31.
([30]) See in particular the third paragraph in the introduction.