COMMISSION DECISION

of 8 March 2006

concerning the aid scheme that the Region of Veneto in Italy plans to introduce to improve processing and marketing conditions for agricultural products

(notified under document number C(2006) 639)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/642/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 called on interested parties to submit their comments pursuant to the above provision [1],

Whereas:

I. PROCEDURE

(1) By letter dated 23 February 2000, registered as received on 28 February 2000, the Office of the Italian Permanent Representative to the European Union notified to the Commission, within the meaning of Article 88(3) of the Treaty, Article 35 of Region of Veneto Law No 5/2000 [2] (hereafter RL No 5/2000), which provides for aid for the processing and marketing of agricultural products.

(2) By letters dated 12 May 2000, registered as received on 18 May 2000, 1 August 2000, registered as received on 7 August 2000, 15 November 2000, registered as received on 16 November 2000, and 24 January 2001, registered as received on 30 January 2000, the Office of the Italian Permanent Representative to the European Union provided the Commission with the additional information requested from the Italian authorities by letters dated 18 April 2000, 5 July 2000 and 21 September 2000 and at a bilateral meeting held on 13 December 2000.

(3) By letter dated 2 April 2001 the Commission notified Italy of its Decision to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of the aid in question.

(4) The Commission Decision initiating the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure in question.

(5) The Italian authorities submitted their comments by letters dated 12 June and 22 June 2001. The Commission did not receive any comments from other interested parties.

II. DESCRIPTION

(6) Article 35 of RL No 5/2000 provides for state aid aimed at improving the processing and marketing conditions for agricultural products. The aid is targeted at projects carried out by agrifood undertakings that applied for funding under Council Regulation (EC) No 951/97 of 20 May 1997 on improving the processing and marketing conditions for agricultural products [4] during the 1994-99 programming period [5]. Some of the undertakings actually went ahead with the work, but failed to receive any public aid due to a funding shortfall.

(7) According to Decision of the Regional Government No 4202 of 14 September 1993, during the above period, the undertakings concerned could submit applications for part-financing under the programme for such projects to the competent authorities (Regional Government — Department for Agriculture and Relations with the EEC) before 30 April and before 30 September each year. On completion of the project-selection procedure, the competent authorities drew up a ranking list of the projects selected and informed the potential beneficiaries of their 'eligibility for financing' by publishing the Decision of the Regional Government approving the ranking list in the Official Journal of the Region of Veneto. Those undertakings whose investment projects had not been selected were sent a letter explaining why their application had been rejected.

(8) In the opinion of the Italian authorities, the publication of the Decision approving the above ranking list amounted (under the law on the publication of official acts [6] to notification by the official authorities of the acceptance of applications for financing for the projects concerned, which, according to those authorities, created in the undertakings on the ranking list a legitimate expectation that aid would be granted.

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[1] OJ C 140, 12.5.2001, p. 2.

[2] Veneto Regional Law No 5/2000 of 28.1.2000. General provisions refinancing and amending regional laws for the preparation of the yearly and multi-annual budget of the Region (2000 Financial Law).

[3] See footnote 1.

[4] OJ L 142, 2.6.1997, p. 22.

[5] The Veneto Regional Operational Programme was approved by Commission Decision of 2 October 1996 (96/2598/EC).

[6] Law No 241 of 7.8.1990, Italian Official Journal (General Series) No 192 of 18.8.1990, lays down 'New rules on administrative procedures and on access to administrative documents'.

(9) According to the Italian authorities, the investments concerned could be made following notification of the eligibility of expenditure on the projects and, in any case, after submission of applications for funding ([7]).

(10) It was planned to compile ranking lists every six months until all the funding provided for in the Veneto Regional Operational Programme (Veneto ROP) had been used up. By Decision of the Regional Government No 4102 of 23 November 1999 ([8]) the final ranking list of applications submitted up until 14 July 1999 was published. The resources were used up before all the projects on the ranking list could be financed. A number of projects could not be financed although they were on the published list of projects eligible for financing.

(11) Faced with this situation, various sources of financing were used (for example, resources from overbooking, agrimonetary funding and funding under Article 29 of Regional Law No 88 of 31 October 1980 ([9])), leaving 36 projects of the 150 contained on the final ranking list as eligible for financing still to be financed.

(12) Article 35 of RL No 5/2000 provided for the financing of the 36 projects that had not received public financing during the 1994-99 programming period but which did, however, figure on the list of selected projects and on some of which work had already started.

(13) The budget allocated for financing the aid was ITL 5 billion (EUR 2 582 284), but the Italian authorities affirmed that if other financial resources became available at a later date they would allocate further financing to those same projects. The scheme would continue until the available budget had been used up (as initially indicated or as subsequently increased).

(14) The planned aid could not be combined with other aid granted for the same purpose.

(15) The regional measure is an extraordinary measure and is of limited duration. It concerns initiatives that, at the time they were approved by means of their inclusion in the published ranking list, complied with the sectoral limits and the requirements laid down in the Veneto ROP, approved by the Commission, with Commission Decision 94/173/EC on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC ([10]) and with Regulation (EC) No 951/97, on the basis of which the regional authorities approved applications for financing.

(16) In addition, the Italian authorities stated that, although the measure involved the 1994-99 programming period, the compatibility of the projects concerned with the common market had to be evaluated on the basis of the 'Community guidelines for state aid in the agriculture sector' ([11]) (hereafter referred to as 'the guidelines'), since the state aid scheme was notified after the entry into force of those guidelines. In particular, the Italian authorities undertook to comply with the conditions, limits and provisions laid down in point 4.2 of the guidelines, i.e:

(a) the aid rate would not exceed 40 % of eligible investments,

(b) no aid would be granted to undertakings in financial difficulty,

(c) to be eligible, undertakings had to comply with minimum standards regarding the environment, hygiene and animal welfare, it being understood that aid would be granted to allow undertakings to comply with newly introduced minimum standards regarding the environment, hygiene and animal welfare,

(d) the regional authorities would verify that normal market outlets for the undertaking's products can be found, obtaining and verifying contracts for marketing such products.

(17) As regards the requirements referred to in point 16(b), (c) and (d), the Italian authorities stated that they would comply with the Rural Development Plan for the Region of Veneto for 2000-06 (Veneto RDP) ([12]). The aid was to be provided in the form of a capital grant not exceeding 40 % of the duly certified eligible expenditure in accordance with the conditions, limits and provisions laid down in point 4.2 of the guidelines. Costs arising from the application of this Article would be borne entirely by the region and combination with other existing aid instruments or schemes is prohibited.

(18) The Italian authorities stated that no aid would be granted to projects in contravention of any prohibitions or restrictions laid down in the common organisations of the market or that concerned the manufacture and marketing of products which imitated or substituted for milk and milk products.

([7]) Under Article 11 of Regional Law No 1 of 8 January 1991 (notified to the Commission as state aid No N100/91, approved by Commission Decision SG (91) D/7024), implementation of initiatives for which public financing of any form is requested must begin after the application for financing has been submitted.

([8]) Official Journal of the Region of Veneto No 112, 28.12.1999.

([9]) The Law introduces aid for structures for improving the value of and protecting agricultural and livestock products (aid approved by means of Commission communication No 16065 of 17 October 1980).

([10]) OJ L 79, 23.3.1994 p. 29.

([11]) OJ C 232, 12.8.2000, p. 19.

([12]) Approved by Commission Decision C(2000) 2904 of 29 September 2000.

III. **THE ARGUMENTS PUT FORWARD BY THE COMMISSION WHEN INITIATING THE PROCEDURE**

(19) The Commission initiated the procedure provided for in Article 88(2) of the Treaty because it had doubts regarding the compatibility with the common market of the new aid scheme introduced by Article 35 of RL No 5/2000.

(20) The doubts were raised by the fact that the aid could be granted to undertakings that had already made the investments planned under a project for which they had submitted applications for financing for the 1994-99 programming period, i.e. under a part-financed aid scheme.

(21) The Commission could therefore not rule out when it initiated the procedure the possibility that the aid constituted retroactive funding for activities already carried out by the beneficiaries and therefore lacking the necessary incentive element and that it should consequently be regarded as operating aid with the sole aim of relieving the beneficiary of a financial burden.

(22) Under points 3.5 and 3.6 of the guidelines, in order to be considered compatible with the common market, any aid measure must contain some incentive element or require some counterpart on the part of the beneficiary ([13]).

(23) The notified aid scheme therefore appeared to fall within the scope of points 3.5 and 3.6 of the guidelines. On the basis of the information available to it when it initiated the procedure, the Commission took the view that the reasons put forward by Italy were not sufficient to demonstrate the existence, either under the aid scheme implemented during the 1994-99 programming period nor under the notified aid scheme, of a legal obligation towards the (potential) beneficiaries that might have given rise to (or justified the existence of) a legitimate expectation on their part and therefore constitute a sufficient incentive for starting the work.

(24) The Commission took the view that neither the Law on the publication of official acts ([14]) nor the letters sent by the regional authorities to those concerned to acknowledge receipt of their applications for funding ([15]) nor the fact that the regional authorities had always granted the expected funding to projects that, after assessment, they had decided to put on the ranking list of projects eligible for public financing should have created in the undertakings on that list a legitimate expectation of receiving any of the financing planned for the 1994-99 programming period.

(25) The Commission takes the view that the regional authorities have no legal obligation as regards applications for financing considered to be eligible and entered on the ranking list published in the Official Journal of the Region of Veneto during the 1994-99 period and consequently there is no basis for a legitimate expectation by the undertakings concerned. The absence of such an incentive element is confirmed by the following: the undertakings eligible for financing, when they did not receive the financing concerned from the competent authorities, did not take steps to enforce their rights, rights which the regional authorities moreover consider to be acquired rights, on the basis in particular of Italian administrative law. According to the Commission, no appeals were lodged because, in the absence of a legal obligation on the part of the regional authorities, the applicants probably did not have any right to request payment of the aid.

(26) The Commission expressed doubts as to whether aid for expenditure incurred before it was confirmed that projects had been accepted could still be deemed to be aid to facilitate the development of certain economic activities within the meaning of Article 87(3)(c) of the Treaty. In accordance with the Commission's constant practice, as confirmed by the Court of Justice ([16]), aid to facilitate the development of certain economic activities or certain regions may be considered as such only if the Commission can establish that the aid will contribute to the attainment of one of the objectives specified, which under normal market conditions the recipient undertakings would not attain by their own actions. In the case in point, it is clear that the undertakings carried out the investments in question without the aid.

(27) Another factor that, in the opinion of the Commission, raised doubts about the existence of an incentive element was the drawing up of the ranking lists. Decision of the Regional Government No 4202 of 1993 lays down that applications must be submitted to the regional authorities by 31 January and 30 September each year. The ranking list of applications submitted is then drawn up and the

([13]) See in particular the following cases: C1/98 (ex N750/B/95) concerning the state aid scheme implemented by Italy for the production, processing and marketing of products listed in Annex I to the EC Treaty (Sicilian Regional Law No 68 of 27 September 1995); C 36/98 concerning the aid scheme Italy plans to implement for small and medium-sized enterprises operating in Objective 1 regions; C70/98 concerning the aid scheme notified by Italy (Marche Region) concerning amendments to the single programming document for 1994–99 for assistance from the Community Structural Funds for Objective 5(b) areas.

([14]) See footnote 6.

([15]) The Italian authorities simply supplied a copy of a letter (dated 1º April 1999) from the authorities of the Region of Veneto acknowledging the receipt by an office (responsible for structural measures in the agrifood sector) of an application from a potential beneficiary for the purposes of the usual technico-administrative enquiry. This communication is compulsory under the law on the publication of official acts (see footnote 6).

([16]) See in particular the judgment of the European Court of Justice in Case 730/79 Philip Morris v Commission [1980] ECR 2671.

authorities must notify those applicants whose applications have been rejected because they fail to fulfil the requirements laid down. If this was the way the mechanism was intended to operate, it could be concluded that drawing up a six-monthly ranking list would have enabled the regional authorities accurately to calculate on a regular basis the resources still available, which would have allowed them to refrain from publishing new calls for applications and receiving new applications that could not be accepted because insufficient resources were available.

(28) Further aspects that, in the opinion of the Commission, raised doubts about the existence of an incentive element are the budget provided for in Article 35 of the Law concerned and the intensity and exact amount of the aid. The budget of ITL 5 billion or EUR 2,5 million announced by the regional authorities would be sufficient to finance only a small part of the expenditure already incurred by the potential beneficiaries (around ITL 70 billion or EUR 35 million). The Commission cannot therefore understand why the Italian authorities stated that 'the capital grant will not exceed verified eligible expenditure', since, on the basis of the information available to the Commission, the aid intensity would be less than 10 % ([17]). The fact that the Italian authorities consider such a low rate of aid as adequate to provide an incentive while a much higher rate of aid was considered necessary for the same type of project in the Regional Operational Programme for 1994-99 ([18]) is a further indication of the lack of any incentive to carry out the sort of projects for which aid was being provided.

(29) In addition, the most recent information received (registered as received on 30 January 2001) contradicted that sent previously:

(a) in particular, the ranking list contained 134 projects considered to be eligible rather than 150; the Italian authorities said that financing was still to be provided for 36 of those projects;

(b) in addition, there were discrepancies concerning the exact amount of investments carried out by the beneficiaries: the most recent figure given is ITL 120 081 million rather than the ITL 70 000 million notified previously.

(30) Another aspect to be clarified was the frequency with which the aid is to be granted. The Italian authorities had initially said that this was an extraordinary measure of limited duration (see point 15). This is in contradiction with other statements made by those authorities ([19]) regarding the possibility of granting further financing for the same projects. The initial notification stated that 'if, when additional verifications have been carried out on the applications, further financing is required, this must be no more than is strictly necessary to cover applications carried over from the previous, 1994-99 programming period'. To that end, the regional authorities undertook to notify cases not falling within the scope of the 20 % rule referred to in Commission communication No 54/94/D24823 (of 22 February 1994). The regional authorities have provided no further details of the possibility of additional sources of financing and the relevant methods of payment and such possibility would appear to contradict the assertion that the notified measure is a one-off measure.

(31) Finally, the Italian authorities stated that projects for which aid applications had been submitted and accepted during the 1994-99 programming period but on which work had not already started would be financed under the new Rural Development Plan for the Veneto Region for 2000-06, after their compliance had been checked in the light of the new Community rules in the agricultural sector. This is, however, difficult to reconcile with the data provided on the final general ranking list (i.e. on the applications accepted for financing), submitted with the most recent additional information (registered as received on 30 January 2001). Of the total of 134 projects accepted, 20 had been financed using agrimonetary aid, 10 using aid originating from overbooking, 54 under Regional Law No 88/80, 4 under Decree Law No 173/98 and 10 had been cancelled. On that basis, only 36 projects remain to be financed: even if financing could be granted under the new Rural Development Plan for 2000-06, it is not clear to which 'applications carried over from the previous […] programming period' the Italian authorities are referring to.

(32) The Commission reserved the right to examine the question of the use of agrimonetary aid and aid originating from overbooking: the use of such sources of financing could be construed as misuse of decisions to authorise aid or might even not have been notified to the Commission.

IV. COMMENTS SUBMITTED BY ITALY AND OTHER INTERESTED PARTIES

(33) By letter dated 22 June 2001, Italy sent the Commission its comments on the aid scheme in response to the Decision to initiate the procedure provided for in Article 88(2) of the Treaty. The Commission did not receive any comments from other interested parties.

(34) In their reply, the Italian authorities first of all detailed the administrative procedure for granting aid during the 1994-99 programming period, in order to demonstrate that that procedure created a legal obligation towards potential beneficiaries that might have given rise to (or justified the existence of) a legitimate expectation on their part and therefore constitute a sufficient incentive for starting the work before receiving the aid. In the description of the scheme submitted before the procedure was initiated, the Italian authorities stated that once they had been placed on the single ranking list of undertakings eligible for aid for the

([17]) The ITL 5 billion available to the Region represents less than 10 % of the total investments carried out by the beneficiaries (ITL 70 billion).

([18]) Regulation (EC) No 951/97 authorises aid of up to 55 % for investments outside Objective 1 regions.

([19]) See point 9 of the letter initiating the procedure.

agrifood sector, undertakings remained on that list until financing from the Region was available. As the necessary resources became available (either from the regional budget, under Article 29 of Regional Law No 88/1980, or under the Veneto ROP under Council Regulation (EC) No 866/90 on improving the processing and marketing conditions for agricultural products ([20]) and Regulation (EC) No 951/97 or from the national budget (overbooking and agrimonetary aid)), the regional authorities took an *ad hoc* administrative decision selecting the undertakings to receive financing from the single ranking list, according to criterion of preference and priority, and in particular those undertakings whose applications would ensure that the resources available would be fully used.

(35) The Region therefore had a pool of projects that could be quickly implemented at the appropriate time when financing became available. The regional authorities consider that drawing up a ranking list of eligible projects, even though financing is not immediately available, providing for actual financing at a future date, does not infringe any Community rule.

(36) According to the regional authorities, Article 35 of RL No 5/2000 will be applied to the 36 projects/undertakings remaining on the ranking list. These remaining projects/undertakings have been re-examined and the procedure has been opened to file two of them that do not comply with the guidelines. The competent authorities also say that 15 undertakings have submitted applications under the Rural Development Plan for the Region of Veneto for 2000-06 (Measure 7 — Improving processing and marketing conditions for agricultural products) and therefore, with the prospect of financing being granted for the new 2000-06 programming period, have withdrawn their previous applications. The regional authorities do not rule out other undertakings withdrawing their projects because, for various reasons, they are no longer interested in carrying them out. The number of potential beneficiaries of the aid has therefore been drastically reduced compared with the initial list.

(37) The Italian authorities take the view that the opinion expressed by the Commission in its letter initiating the procedure provided for in Article 88(2) of the Treaty has no legal basis and contradicts the Commission's usual practice.

(38) The Commission initiated the procedure regarding the aid because it could be granted to undertakings remaining on the list that had begun to make or had already made the investments concerned after submitting their aid application for the 1994-99 programming period. The Commission considers that, in the absence of a legal obligation on the part of the regional authorities towards potential beneficiaries, aid granted retrospectively does not provide the necessary incentive element and therefore constitutes operating aid that is incompatible with the common market.

([20]) OJ L 91, 6.4.1990, p. 1.

(39) The Italian authorities take the view that both point 3.6 of the guidelines ([21]) and the way the Commission has applied it ([22]) created in the mind of applicants, from the time they submitted their application to the competent authorities, a legitimate expectation that they would receive financing. Regional Government Decision No 4202/93 laying down the procedure for submitting applications and for drawing up ranking lists and confirming the provisions of Regional Law 1/1991 ([23]) assured potential beneficiaries of the eligibility for public financing of investments commenced after an application had been submitted but before a decision had been taken to grant aid. In addition, the legitimate expectation that arose when the application was submitted was reinforced when the applicant was entered on the list of undertakings eligible for financing.

(40) Furthermore, the potential beneficiaries of aid, knowing that they had submitted their applications correctly and that they fulfilled the legal requirements, could reasonably expect their applications to be accepted, which was then confirmed with their entry on the ranking list, although they had still to await the decision granting aid.

(41) The Italian authorities also point out that it is Commission practice to accept the extension of aid schemes that have already been approved in order to permit them to achieve their objectives ([24]), which is basically what the Italian authorities are requesting for the aid scheme to be implemented under Article 35 of RL No 5/2000. In other words, according to the Italian authorities, the aid would be compatible with the Treaty if it had been granted not later than 1999, i.e. during the period of application of the scheme or schemes for which the applications for financing had been submitted.

(42) The Italian authorities explain that, under Italian administrative law, it is possible to contest in an administrative court acts of the public authorities which infringe either individual rights or legitimate interests. Legitimate interests are defined as the interest of private individuals in the correct use of power by the public authorities, as regards both expectations concerning the extension of their legal sphere (*interessi pretensivi* — interests involving a claim on

([21]) Point 3.6 of the guidelines lays down that 'aid which is granted retrospectively in respect of activities which have already been undertaken by the beneficiary cannot be considered to contain the necessary incentive element, and must be considered to constitute operating aid which is simply intended to relieve the beneficiary of a financial burden. Except in the case of aid schemes which are compensatory in nature, all aid schemes should therefore provide that no aid may be granted in respect of work begun or activities undertaken before an application for aid has been properly submitted to the competent authority concerned.'

([22]) Decisions of 28 November 2000, SG(2000) D/108799 (Aid N 226/2000), 13 March 2001, SG(2001) D 286857 (Aid N 729/a/2000), 28 February 2001 SG(2001) D/286508 and 4 August 2000, SG(2000) D/105958.

([23]) Article 11 of the Law lays down that 'initiatives forming part of a business plan … may be implemented before the decision to grant aid is adopted provided that they are begun after submission of the aid application…'.

([24]) Aid N 63/2001 and aid N 24/2001.

the authorities) and the correct application of the procedural obligations imposed on them (*interessi procedimentali* — procedural interests), in particular under the law on the publication of official acts. In accordance with the case law of the Italian Court of Cassation ([25]), private individuals may take action under administrative law not only to obtain the annulment of an act by a public authority that infringes their legitimate interests or their subjective rights, but also to obtain the adoption of an expected act and compensation for losses caused by the adoption or by the failure to adopt an act.

(43) In the case in question, the legitimate interest of the applicants (for public financing) remaining on the list is an interest involving a claim on the authorities, since the applicants legitimately expected their rights to be extended by the decision granting aid.

(44) On the basis of that case law of the Court of Cassation, the Italian authorities do not rule out that, if an action were brought, an administrative court might decide to order the regional authorities to pay compensation.

(45) The Italian authorities state that none of the undertakings eligible for financing remaining on the list has brought an administrative action in the reasonable expectation of being granted aid. To bring action against the Region of Veneto, the undertakings concerned would have to demonstrate an interest in so doing because of an act that causes them an actual loss. The Italian authorities define that act as a failure to grant financing and the cancellation of the ranking list: an action could legitimately be brought only against a decision to cancel the aid or to repeal Decision 4102/99, since this would damage their legitimate and actual aspiration to obtain the aid concerned.

(46) As regards the Commission's reservations concerning the use of agrimonetary aid and aid originating from overbooking referred to in point 31 of the letter initiating the procedure, the Italian authorities state that:

(a) the aid scheme relating to initiatives in the agrifood sector, which is covered by Regulation (EC) No 951/97 and which used funding resulting from the revaluation of the Italian lira in accordance with Council Regulation (EC) No 724/97 ([26]), falls within the programme of measures for Italy approved by the Commission by note No 5372 of 2 July 1998;

(b) the overbooking amounts originate from financing additional to that already granted by the rotating fund for implementing Community policies for the Veneto ROP covered by Regulation (EC) No 951/97, the Veneto ROP constituting a legal basis, as approved by the Commission in Decision C(96) 2598 of 2 October 1996.

(47) The Italian authorities do not agree with the method used for calculating the aid and the argument put forward by the Commission in point 27 of the letter initiating the procedure. They state that the sum made available (ITL 5 billion, or around EUR 2,5 million) is to be used so as to ensure a significant contribution, i.e. 30 % of the investments eligible for aid, which total ITL 15 billion, or around EUR 7,5 million. This total for eligible investments is purely hypothetical, since a technical re-evaluation of projects has to be carried out, as have a new analysis of projects, a new verification of the eligibility of applicants, a new calculation of the investment volume, etc. The re-examination will be carried out when there are definite prospects for financing so as not to cause potential beneficiaries any further problems.

(48) As regards the financing of investments remaining on the ranking list from funds made available under the RDP for the Region of Veneto for 2000-06 (15 undertakings remaining on the list have submitted applications under the RDP, see point 32), the competent authorities have affirmed that they will be eligible for financing provided that they meet all the requirements of that RDP, including the requirement that work for which financing is requested must not have been started.

V. ASSESSMENT OF THE AID

(49) In accordance with Article 87(1) of the EC Treaty, any aid granted by a Member State or using state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. The measures covered by the Decision in question correspond to this definition for the following reasons.

(50) The measures in question, financed by the Region of Veneto, favour certain undertakings and certain operators (undertakings processing and marketing agricultural products) and may affect trade, since Italy accounts for 14,07 % of European agricultural production ([27]).

(51) However, in cases covered by Article 87(2) and (3) of the Treaty, some measures may enjoy derogations and be considered compatible with the common market.

(52) Given the nature of the measures described above, the only possible derogation is laid down in Article 87(3)(c) of the Treaty, according to which aid may be considered compatible with the common market if it is to facilitate the development of certain economic activities or of certain

([25]) Joined Chambers of the Court of Cassation 500/1999.
([26]) OJ L 108, 25.4.1997, p. 9.
([27]) Most recent data available from Eurostat, which are from 2003 and therefore refer to the EU-15.

economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(53) To benefit from the derogation provided for in Article 87(3)(c) of the Treaty, aid for investments for the processing and marketing of agricultural products must comply with the relevant provisions of Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products ([28]). Where that Regulation does not apply, or if all the requirements laid down are not met, the aid must be appraised in the light of the relevant provisions of the Community guidelines for state aid in the agriculture sector.

(54) Since the scheme in question is not limited to small and medium-sized undertakings, Regulation (EC) No 1/2004 does not apply. Therefore, the appraisal of the compatibility of the aid must be based on the guidelines, and more particularly points 3.5, 3.6 and 4.2 thereof.

(55) In accordance with points 3.5 and 3.6 of the guidelines, the Commission takes the view that, in order to be considered compatible with the common market, any aid measure must contain some incentive element or require some counterpart on the part of the beneficiary and that aid granted for work already undertaken by the beneficiary does not contain the necessary incentive element and must therefore be considered to be operating aid. Except in the case of aid schemes which are compensatory in nature, all aid schemes should therefore provide that no aid may be granted in respect of work begun or activities undertaken before an application for aid has been properly submitted to the competent authority concerned.

(56) The aid scheme that Article 35 of RL No 5/2000 intends to introduce provides exclusively for the financing of projects implemented by agrifood undertakings that had submitted applications for aid under a part-financed aid scheme during the 1994-99 programming period and had been declared eligible for financing by being entered on the list drawn up by the regional authorities, but had failed to receive any financing due to a funding shortfall (hereafter referred to as projects remaining on the list). Investments for some of the projects remaining on the list were begun after the applications for financing were submitted for the 1994-99 programming period.

(57) On the basis of the information gathered during the formal investigation procedure, the Commission takes the view that the notified scheme is compatible with the common market, but to be eligible for the aid provided for under the scheme, those projects remaining on the list must fulfil the conditions laid down in point 4.2 of the guidelines. Aid may therefore be granted only:

(a) to economically viable holdings;

(b) to holdings that comply with minimum standards regarding the environment, hygiene and animal welfare;

(c) if the aid rate does not exceed 50 % of eligible investments in Objective 1 regions and 40 % in the other regions;

(d) if the eligible expenditure is for the construction, acquisition or improvement of immovable property, new machinery and equipment and general costs up to 12 % of that expenditure;

(e) if there is sufficient proof that normal market outlets for the products concerned can be found. In granting the aid, the Italian authorities must take account of any restrictions on production or limitations of Community support under the common market organisations. In particular, no aid may be granted in contravention of any prohibitions or restrictions laid down in the common market organisations and no aid may be granted which concerns the manufacture and marketing of products which imitate or substitute for milk and milk products.

(58) As an exceptional measure, aid may be granted for investment projects for which applications were submitted during the programming period ending on 31 December 1999 and that were then considered to be eligible but which were not processed because of a shortage of funds, it being understood that that only those investment projects begun after the submission of applications to the competent authority for financing may receive aid.

(59) After examining the documentation concerning the administrative procedures used by the competent authorities for granting aid during the 1994-99 programming period and in accordance with the interpretation used at the time, the Commission also considers the investments referred to in point 57 to be eligible ([29]). According to that interpretation, under an aid scheme that is presented as completing a previous scheme, aid granted for work already begun by the beneficiary after submission of the aid application in response to the previous call for applications has the necessary incentive element and cannot therefore be considered to be operating aid, provided that the work was begun or the activities undertaken after the aid application was properly submitted to the competent authority and that that authority had declared the project eligible for financing.

(60) The Commission would point out to the Italian authorities that its current interpretation is to consider that aid granted for activities undertaken after an application for aid has been submitted to the competent authority but before that application has been accepted by means of an act that places a legal obligation on the public authorities towards the (prospective) beneficiaries has no incentive effect ([30]).

([28]) OJ L 1, 1.1.2004, p. 1.

([29]) The Commission has previously so ruled with regard to Aid 715/1999, letter SG(2000) D/105754 dated 2 August 2000.

([30]) This is stipulated in Article 17 of Regulation (EC) No 1/2004, see footnote 20.

(61) Regarding the use of agrimonetary aid and aid originating from overbooking to finance projects remaining on the list before 31 December 1999, the Italian authorities stated that the use of funds released by the revaluation of the Italian lira under Regulation (EC) No 724/97 for measures provided for under the Veneto ROP referred to in the Regulation had been approved by the Commission by means of letter No 5372 dated 2 July 1998, while the overbooking amounts originate from financing additional to that already granted by the rotating fund for implementing Community policies under the Veneto ROP. The Commission therefore concludes there was no misuse of decisions to authorise aid or failure to notify aid, since the financing was granted for measures provided for by the ROP then in force.

(62) As regards the one-off nature of the scheme, the authorities responsible explained that this term was used to mean that the scheme cannot be combined with other schemes, that it is exclusively for undertakings remaining on the list and that it cannot be used for other operations: once the list has been exhausted, the scheme will no longer have any legal or financial effects. The competent authorities stated that the initial budget would be around EUR 2,5 million but that this could be increased should this be insufficient to ensure that public aid would constitute a significant contribution to projects accepted for financing. The competent authorities undertook to notify the Commission of any increase of more than 20 % of the original budget.

(63) It is Commission practice to accept increases in the original budget of existing schemes. This practice was confirmed by Article 4(1) of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([31]). The Commission takes the view that, under that provision, an increase in the original budget of an existing aid scheme by up to 20 % should not be considered an alteration to existing aid and that where the national authorities exceed that percentage, the alteration must be notified in accordance with Article 4(2) of Regulation (EC) No 794/2004. There is therefore nothing to prohibit the Italian authorities from increasing the original budget of the scheme under examination provided this is done in accordance with the rules.

VI. **CONCLUSIONS**

(64) In the light of the above, the Commission considers that the aid provided for in Article 35 of RL No 5/2000 in favour of undertakings involved in the processing and marketing of agricultural products is in accordance with point 4.2 of the Community guidelines for state aid in the agriculture sector. The aid measure is therefore eligible for the derogation provided for in Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid that Italy intends to implement under Article 35 of Region of Veneto Law No 5/2000 is compatible with the common market, subject to fulfilment of the conditions laid down in Article 2 of this Decision.

Article 2

The Italian authorities shall notify the Commission of any increase of more than 20 % in the original budget of the aid scheme provided for in Article 35 of Region of Veneto Law No 5/2000.

Article 3

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

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 8 March 2006.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

([31]) OJ L 140, 30.4.2004, p. 1.