II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 11 March 2008

on State aid C 15/07 (ex NN 20/07) implemented by Italy on the tax incentives in favour of certain restructured banks

(notified under document number C(2008) 869)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2008/711/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

1. PROCEDURE

(1) On 24 December 2003, the Italian Parliament enacted Law No 350 of 24 December 2003 (Law 350/2003) [2], which at Article 2(26) provides a special tax realignment scheme for the assets of certain banks resulting from or concerned with banking reorganisations pursuant to Law No 218 of 30 July 1990 (Law 218/1990) on the privatisation of the State-owned banking sector in Italy.

(2) The Italian authorities did not notify the scheme to the Commission for State aid review pursuant to Article 88(3) of the EC Treaty. The Commission, however, initiated a preliminary review of the scheme.

(3) By letter dated 26 September 2005 (D/57424), the Commission requested the Italian authorities to provide all the relevant information to examine the compatibility of the scheme with State aid rules and its lawfulness pursuant to the obligation to notify any plan to grant State aid under Article 88(3) of the EC Treaty.

(4) By letter of 29 November 2005 (A/39913), Italy provided the information requested.

(5) By letter dated 31 March 2006, the Commission requested additional clarifications to Italy as to the possible State aid nature of the scheme in review and its compatibility with the common market.

(6) By letter of 5 May 2006 (A/33466), Italy provided the requested information.

(7) On 3 July 2006, the Commission met the Italian authorities to discuss the functioning and justification of the tax scheme in review. During the meeting the Commission took note of the explanations provided by the Italian authorities while it maintained some doubts about the possible State aid nature of the scheme and its compatibility with the common market.

[1] OJ C 154, 7.7.2007, p. 15.
[2] Italy's Budget Law for 2004, Official Journal of the Italian Republic No 299 of 27.12.2003.

(8) By letter of 28 July 2006 (A/36106), the Italian authorities provided a summary of the information presented by Italy including the clarifications made during the meeting of 3 July 2006.

(9) By letter dated 30 May 2007 (D/203295), the Commission notified Italy of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned measure. In its decision, published in the *Official Journal of the European Union* ([3]), the Commission invited interested parties to submit their comments on its opening of the formal investigation procedure.

(10) By letter dated 5 July 2007 (A/35808), the Italian authorities submitted their comments.

(11) The Commission received comments from interested parties. In particular, the *Paribas* banking group including *Banca Nazionale del Lavoro*, and the *Unicredit* banking group including *Capitalia*, *Banca di Roma* and *Banco di Sicilia* have provided comments.

(12) By letters dated respectively 3 October 2007 (D/53926) and 22 November 2007 (D/54681), the Commission informed the Italian authorities of the comments received from interested parties and asked Italy to formulate its observations. By letters dated 5 November 2007 (A/39031) and 21 December 2007 (A/40631), the Italian authorities informed the Commission that they had no further comments to make.

2. DETAILED DESCRIPTION OF THE SCHEME

2.1. Capital gains taxation

(13) Italy shares with most modern taxing jurisdictions certain fundamental principles of taxation of business entities. There is an entity-level income taxation that is applied to most business entities having legal personality (mainly companies) although with some possibility for mandatory or optional fiscal transparency as for partnerships and certain entities or associations without legal personality. Shareholders of the taxable entity are separate taxpayers from the company of which they own participations and are in principle subject to tax on all gains and dividends earned in respect of stock held, although various reliefs exist to mitigate double taxation. Company capital gains are therefore separately taxable from the shareholders gains when the gains resulting from the sale or transfer of the company assets are realised and fiscally recognised. Company interest expense is in principle deductible, while the cost of equity capital is not, resulting in tax only at the debt holder level (and at the debt holder rate of tax) on earnings paid as interest but tax is applied at the company level and, at least in principle, again at the shareholder level on dividends accruing to equity investors.

(14) An acquisition by a shareholder of an interest in a company does not occasion a change in the company's asset basis. On the other hand, the general rule is that a disposal of company assets generates a company-level taxable gain or loss. Since the tax on disposal is generally paid up front but the tax benefits of the stepped-up basis in the assets being sold arise over time (periodic depreciation), the effects of having a taxable sale of assets at the company level is generally an increase in the net aggregate tax of the seller company and the acquiring company.

(15) The disposal of a company asset to its shareholders should also give rise to taxation of the inherent gain in the asset if there is a corresponding stepped-up basis in the relevant asset in the hands of shareholders, including if the latter are companies, because there should be no step-up in the basis of company assets without company-level tax recognition.

2.2. Assets revaluations and realignments in general

(16) An assets revaluation in a company's commercial statements is an accounting operation by which the book value of fixed assets is stepped-up to the current value (fixed assets are normally depreciable so that their book value devaluates over time, while their current value may be higher than their depreciated value because the assets maintained their value or appreciated over time). As there should be no step-up in the basis of company assets without company-level tax recognition, the revaluation surplus is a capital gain. The surplus is depreciable over time together with the relevant assets. Finally, upon future sale of the assets (with stepped-up value), there will be a lower capital gain resulting from the lower difference between the consideration received for the sale and the book value of the assets.

([3]) See footnote 1.

(17) Revaluations are extraordinary accounting operations because the accounting rules tend to give a prudential value for the companies' assets and a revaluation is based on the assumption that a given asset is worth more than it was paid for and, as with any assumption, it can be proven incorrect in the light of future market events. However, the recently introduced IFRS accounting principles, which became binding rules for certain companies and for banks in Italy, provide for fair values of assets to be booked, especially with respect to financial instruments (as a result, gains and losses will emerge). Furthermore, in company restructurings, assets are exchanged at their current value (which is normally higher than the book value) and re-valuations are accordingly booked.

(18) Assets revaluations would normally be taxable events as far as capital gains are realised and increased tax values recognised. Capital gains would increase the taxable income and accordingly raise the current tax liability of the beneficiaries concerned even in case there is no cash realisation. To avoid paying tax on gains not yet realised in cash, the tax system generally freezes the tax gain by maintaining a lower tax value for the assets than the book value. In such case, the accounting gain (which is a profit realised but not recognised as taxable income) is deferred until the assets are eventually sold for cash.

(19) The accounting gain deriving from the realisation exchange is normally booked for tax purposes in a special reserve representing the non-recognised gain. Until the moment the realised gain is fiscally recognised, there is a misalignment between the book value and the tax value of the assets. A realignment is therefore a tax operation by which the tax value is adjusted to the book value of the assets concerned and as a result a capital gain is fiscally recognised and subject to tax. The accounting gain is now released from the reserve and included in the ordinary earnings of the year, while the stepped-up value of assets accordingly becomes fiscally depreciable.

(20) It should be noted that capital gains are particular items of income, which, unlike ordinary income, reflect an economic surplus matured over time, while its tax recognition is necessarily a one-time operation. For this reason, capital gains realised by companies are not only deferred until the time of the tax realignment of the value of the relative assets, but are also subject to a preferential tax in lieu of the ordinary company tax. The preferential tax is an advantage as the company concerned not only pays a lower tax on the gains but can distribute such gains as dividends to its shareholders, which give right to a tax credit or exemption for the corporate taxes paid. The tax advantage deriving from the substitute tax is however justified by the fiscal technique [4] in view of the specificity of capital gains as income vis-à-vis ordinary earnings.

2.3. **Taxation of capital gains in Italy**

(21) In order to describe the nature of the scheme in review, it is necessary to summarise the Italian rules governing the taxation of capital gains resulting from the contributions of assets following certain company restructurings of the type foreseen by Law 218/1990 for the Italian banking system.

Asset contributions relative to banking reorganisations pursuant to Law 218/1990

(22) Law 218/1990 had enacted a special scheme to facilitate the transfer of banking assets or branches of banking businesses held by the local public entities to newly created or existing private banks, with a view to rationalize the exercise of the banking activity in Italy (Article 1 of Law 218/1990). In 1990, the transfer of a branch of business was a sale of assets which would

[4] Cf. Judgement of 10 January 2006, Case C-222/04, Fondazione Cassa di Risparmio di San Miniato, points 136 and 137.

have triggered company tax at the ordinary rate on the difference between the current value of the assets transferred and the cost of such assets pursuant to Articles 54(5) and 9 of DPR No 917 of 22 December 1986 (DPR 917/1986) in force at that time.

(23) To facilitate the transfer of the banking assets, Article 7(2) of Law 218/1990 provided, among other tax facilities, a derogatory tax scheme by which the gain realised from the transfer of assets contributed to private banks in the framework of a reorganisation foreseen by the said Article 1 in exchange for the stock of such banks is not recognised for taxation until such time when the gain is further realised either from the sale of the assets or is distributed to the shareholders (suspended recognition of gains).

(24) The objectives of Law 218/1990 can be summarised as follows:

(i) permit the public entities exercising a banking activity (essentially retail banking) to transform their legal form into that of a joint-stock company, considered a more appropriate form for a commercial activity;

(ii) permit such public banking entities to recapitalise by raising new capital, attract investors and consolidate;

(iii) establish a level playing field between public and private banks by recognising to the latter companies the same tax neutrality privilege previously granted to the sole public banks.

(25) Article 7(2) of Law 218/1990 provided that 15 % of the gain realised at the time of the transfers was taxed upon the contributing entity (the local public entity) at the ordinary company tax rate (at the time 52,2 %, including 36 % of company tax IRPEG and 16,2 % of local tax ILOR). The statute provided that the 15 % amount of the gain being taxed could be imputed to either the single assets as new tax basis recognised by the transferee bank or goodwill. The statute also provided that the cost basis of the assets contributed to the beneficiary bank was carried over to the recipient bank (carried-over assets basis) and substituted to the shares of the bank received by the contributing entity (substituted shares basis), except for the taxed 15 % gain which was recognised (basis step-up).

(26) The scheme in essence provided for a regime of partial tax neutrality by which the contribution of a branch of business benefited from a roll-over relief provided that the tax basis of the business contributed was substituted to the shares received by the transferor and the business acquired is attributed by the transferee a tax basis equal to that which the assets had in the hands of the transferor prior to the contribution. Such a regime provided for a misalignment between the current values of the assets at the moment of the contribution and their tax basis. Pursuant to Article 7(2) of Law 218/1990 both the transferee and the transferor had to annex to their tax returns a prospectus to record the misalignment of values.

Asset contributions relative to company reorganisations pursuant to the Merger Directive

(27) By the D.Lgs. No 544 of 30 December 1992 (D.Lgs. 544/1992), Italy transposed in its national legal system the Merger Directive 90/434/EEC [5]. The Merger Directive since its original version covers mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States when the following three requirements are met: (1) the companies must be listed in the Annex to the Directive; (2) the companies must be fiscally resident in a Member State and (3) the company must be subject to one of the national company taxes listed in Article 3(c) of the Directive.

(28) Under the Merger Directive, a transfer of assets is defined as a transaction whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer (either a newly established subsidiary whose initial capitalisation consists of the transferred shares or an existing company).

[5] Council Directive 90/433/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ L 225, 20.8.1990, p. 1).

(29) The Merger Directive requires the assets transferred to represent a branch of activity, which means all the assets and liabilities of a division of a company that from an organisational point of view constitute an independent business or entity capable of functioning by its own means (Article 2(i) of the Directive). In a recent judgement ([6]), the Court of Justice has clarified that in order to be covered by the Merger Directive a transfer of assets must encompass all the assets and liabilities relating to a branch of activity in their entirety. The Merger Directive requires the consideration for the transfer of assets to consist exclusively of shares, since in contrast to the other transactions such as the mergers, divisions and exchanges of shares covered by the Merger Directive, no cash payment is permitted in the case of the transfer of assets.

(30) Article 4 of the Merger Directive as cross-referenced by Article 9 provides that no taxes on capital gains may be levied at the transferee company level as a result of a transfer of assets. Capital gains are defined as the full difference between the real values (the fair market value) of the assets and liabilities transferred and their values for tax purposes (tax basis), irrespective of any specific definition of values under domestic laws. The favourable treatment of realised gains pursuant to the Merger Directive dealing with transfers between companies of different Member States is based on a permanent establishment condition, meaning that only the assets that remain in a resident company or are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company may benefit from the tax deferral provided in Article 4 of the Directive.

(31) The Merger Directive thus provides a system of tax neutrality or deferral, rather than an exemption, because the Member State of the transferee company retains the right to tax the capital gains realised upon transfer of the assets at the time of their future disposal. In order to remain taxable, the realised gains inherent in the transferred property have to be reflected in the tax accounts of the receiving company. To satisfy this condition, all assets and liabilities transferred must enter the tax accounts of the receiving company at their value immediately prior to the transfer. Therefore the receiving company has to take over the tax basis of the transferring company without benefiting from an option to step up the tax basis to fair market value. Therefore, the transfers of assets that qualify for the preferential treatment under the Merger Directive are in essence similar to those foreseen by Article 1 of Law 218/1990, except that the Merger Directive does not provide any rules for the valuation of the shares received by the transferee company in exchange of assets, while the use of the substituted basis is expressly foreseen by Article 7(2) of Law 218/1990, thus resulting in a system of double misalignment.

Asset contributions relative to company reorganisations pursuant to D.Lgs. 358/1997

(32) As the Merger Directive — transposed in Italy's law by D.Lgs. 544/1992 — only dealt with reorganisations of companies of different Member States, Italy has voluntarily extended the tax neutrality system to domestic reorganisations. By the D.Lgs. No 358 of 8 October 1997 (D.Lgs. 358/1997), Italy provided general tax provisions for company reorganisations in Italy including the transfer of assets relating to contribution of a branch of a business in exchange of shares.

(33) The general system of taxation of gains deriving from company reorganisations in Italy and more particularly for contributions of assets pursuant to D.Lgs. 358/1997 was indeed based on two alternative optional systems.

(34) On the one hand, Article 3 of D.Lgs. 358/1997 provided for an optional substitute capital gain tax regime for the contributions of a branch of business or a qualified participation to a recipient company in exchange of its shares. Article 3 first set a discipline to determine the relative gains as the difference between the tax basis of the assets transferred in the hands of the transferor prior to the transfer and either the accounting value attributed by the transferor to the shares received as a result of the contribution or if higher the accounting value attributed by the transferee to the branch of business transferred. Article 3 further provided that the gains could be recognised if a substitute tax of 19 % was paid. Under the new system, the tax bases inclusive of the realised

([6]) Judgement of 15 January 2002, Case C-43/00, Andersen of Jensen ApS, [2002] ECR I-00379, point 34 et seq.

gains were recognised as the new values of the assets both for the transferor and the transferee so that no misalignment between tax and accounting values was produced (contributions in accounting neutrality).

(35) On the other hand, Article 4 of D.Lgs. 358/1997 provided that the parties of the transfer could opt for a roll-over relief system comparable to the one available under the Merger Directive. Under this system the contribution of the assets of a branch of business between companies in Italy was fiscally neutral, meaning that the gains realised from the transfer of assets in exchange of shares were not fiscally recognised provided that the tax basis of the business contributed was substituted over to the shares received by the transferor and the assets acquired received the carried-over basis that the assets had in the hands of the transferor (contribution in tax neutrality).

(36) The Italian company tax system eventually underwent a major reform in 2003, at the same time that the realignment scheme of Law 350/2003 entered into force (1 January 2004). The reform was enacted by the D.Lgs. No 344 of 12 December 2003, which for what is of interest of this review provided for:

(i) the abolition of IRPEG (the old company tax) and the introduction of a new company tax (IRES) at the rate of 33 %, with the abolition of the Dual Income Tax consisting of the application of a reduced IRPEG rate of 19 % to the amount of the taxable income reinvested in the company;

(ii) the repeal of the credit imputation system, by which dividends were taxed again when received by the shareholders, but the company tax paid was deducted by imputation of a tax credit, and its replacement with an exemption system applicable to both domestic and foreign dividends;

(iii) the introduction of a participation exemption regime for capital gains deriving from the sale of qualified shareholdings along with the repeal of the possibility to deduct the write-downs of participations held;

(iv) the repeal of the 19 % substitute tax on capital gains arising from company restructuring pursuant to Article 3 of D.Lgs. 358/1997. With the repeal of D.Lgs. 358/1997 by D.Lgs. 344/2003, the tax-neutrality regime for all company reorganisations such as company mergers and divisions was transposed in the amended general tax code Articles 170 to 174 of DPR 917/1986. The contributions of branches of activity and of qualifying shareholdings were not however transposed in the amended tax code, giving rise to a disparity of treatment between contributions of branches which are subject to the scheme of contribution in accounting neutrality pursuant to Article 175 of DPR 917/1986 and other company reorganisations subject to the tax neutrality scheme.

(37) With the tax reform of D.Lgs. 344/2003, all reorganisations between companies of different Member States keep on being governed by the tax-neutrality regime of the Merger Directive based on the option that allowed a contribution in tax neutrality. The option to apply the substitute tax of 19 % pursuant to Article 3 of D.Lgs. 358/1997 was repealed as of 1 January 2004, while the system of determination of capital gains deriving from the contribution of business branches in accounting neutrality was maintained. The optional system of taxation provided by Article 4 of D.Lgs. 358/1997 was also repealed. As a result of the reform, the tax regime of capital gains realised through the sale or contribution of a branch of business is the same as that provided for the sale of the single assets.

(38) In conclusion, as the law stood at the time of Law 350/2003 it was still more convenient from a tax viewpoint to transfer assets by way of an exchange of shares rather then the sale of assets because the sale of qualified participations was exempt (participation exemption), while the disposition of the underlying assets was taxable.

(39) The Commission considered it necessary to describe the framework set by the above described Merger Directive and D.Lgs. 358/1997 with a view to examining the various schemes for companies to revaluate or realign the value of their capital assets.

2.4. **The realignments under Laws 342/2000, 448/2001 and 350/2003**

Banking reorganisations under Law 218/1990

(40) Law 218/1990 concerned the privatisation by transformation and asset-reorganisations of certain registered public banks (under Article 29 of the Royal Decree No 375 of 12 March 1936, converted into Law No 141 of 7 March 1938) into private joint stock companies to operate in the banking sector (Article 1 of Law 218/1990). Pursuant to Article 7(2) of Law 218/1990, the capital gains realised from the contribution of banking assets were not fiscally recognised to ensure tax neutrality. 15 % of such gains, however, was recognised and subject to the general company tax rate of the time. As a result, the tax base of the assets transferred under Article 7(2) of Law 218/1990 was adjusted upward (realigned) by only 15 %, leaving the remainder 85 % of the gain unrecognised.

(41) The balance resulting from the difference between, on the one hand, the value of the stocks received and the assets contributed and, on the other hand, the book value of such assets (only realigned by 15 %) was a suspended capital gain. Its tax recognition was deferred until the moment the assets concerned would be sold for cash or the accounting reserve corresponding to the unrecognised balance would be distributed to the company's shareholders as dividends.

(42) As a result, under the tax accounting of Law 218/1990, the capital gains relative to the assets exchanged in the course of the reorganisations covered by the Law were fiscally unrecognised for 85 % of their economic value. The banking reorganisations in question took place, according to the Italian authorities, between 1990 and 1998. The gains realised at that time were frozen since then and for the following years, with the obligation for the companies concerned to keep track of the misaligned values by specific documents to attach to the annual tax returns.

Realignments under Law 342/2000

(43) Pursuant to Article 17 of Law No 342 of 21 November 2000 ([7]) (Law 342/2000), the companies resulting from the banking reorganisations under Law 218/1990 were allowed to realign the tax bases with the accounting gains realised from the exchange of the assets in such reorganisations and still resulting from the companies' books at the date of 31 December 1999, provided such companies paid a substitute company tax of 19 % on the amount of the gains in lieu of the 42,4 % global tax rate of the time (including 37 % company tax and 5,4 % local business tax). The realignment was limited to the initial 85 % unrecognised or suspended gain.

(44) By payment of the 19 % capital gain tax, both the companies holding the banking assets, and the companies holding the stock of the companies in question could realign their tax bases, respectively, of the assets and of the stocks concerned. In case the stocks had been contributed or exchanged with other companies without cash realisation, such latter companies could also realign the value of the stocks exchanged.

(45) The capital gain tax was however reduced to 15 % (in lieu of the 19 % substitute tax), if the banking company elected to only realign the tax value of its assets, rather than both the value of the assets and of the stock. In this case, the sole beneficiaries of the realignment scheme were the banking companies holding the assets exchanged *ab origine*.

(46) As a result of the capital gain tax payment, the beneficiaries eventually release the gains realised at the time of the original transactions (and held as non-distributable profit reserves) and may distribute them to shareholders as dividends.

(47) In parallel to the realignment of the assets and shares exchanged in the described banking reorganisations, Article 19 of Law 342/2000 provided that the same substitute capital gain tax could be paid by the companies willing to realign the tax bases of the assets and shares held following any other company reorganisations which benefited from the tax neutrality regime pursuant to the said D.Lgs. 358/1997.

(48) The latter parallel scheme of Article 19 (providing substitute capital gain taxes of 19 % and 15 % on assets and shares realignments) effectively equalised the recognition of gains resulting from tax realignments relative to the company reorganisations carried out under D.Lgs. 358/1997 with those made by banks under the Law 218/1990.

([7]) Official Journal of the Italian Republic No 276 of 21.11.2000.

(49) Moreover, Article 20 of Law 342/2000 provided detailed rules for the substitute capital gain tax to be paid and for the tax credit relative to such tax in favour of the shareholders receiving dividends resulting from the capital gains recognised.

Realignments pursuant to Law 448/2001

(50) Law No 448 of 28 December 2001 (Law 448/2001) extended the time scope of the realignment schemes provided by Law 342/2000 with respect to assets resulting from the balance sheet of a company and whose value had not yet been realigned.

(51) Article 3(11) of Law 448/2001 provided that the realignment scheme under Articles from 17 to 20 of Law 342/2000 would apply to unrecognised gains relative both to the assets and shares deriving from the banking reorganisations pursuant to Law 218/1990 and to the assets deriving from other reorganisations under Legislative Decree No 358/1997, still held at the date of 31 December 2001. Law 448/2001 provided that the substitute taxes due on the gains recognised were set at 12 % and 9 % respectively for dual realignments (realignment of both the assets held by the operating company and the stocks received by the participating company) and single realignment (only the assets held by the operating company are realigned) in lieu of the company tax of 41 % applicable at the time of the realignment (36 % company tax plus 5 % local business tax).

Realignments under Law 350/2003

(52) Finally, Article 2(26) of Law 350/2003 provided that the realignment scheme foreseen by Article 17 of Law 342/2000 could also apply to the realised but unrecognised gains relative to the assets concerned with the banking reorganisations pursuant to Law 218/1990, still resulting from the company's accounting at the date of 31 December 2003. Law 350/2003 provided that the substitute capital gain taxes on the realignments of such gains were 12 % and 9 %, respectively for dual realignments (realignment of both the assets held by the banking company and the stocks received by the banking holding) and single realignment (only the assets held by the banking company are realigned). Article 26 of Law 350/2003, however, did not foresee any other asset realignments relative to general company reorganisations under D.Lgs. 358/1997.

(53) In particular, pursuant to Article 2(26) of Law 350/2003, the historic gains realised under Law 218/1990 with respect to the contributions of banking assets to newly created or existing private banks in exchange for the stocks of such banks could be fiscally recognised by payment of a substitute capital gain tax under the preferential tax rates of 12 % or 9 % in lieu of the company tax of 37,25 % of the time (33 % company tax plus 4,25 % local business tax). Law 350/2003 also provided that the substitute tax was payable in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006), without interest.

(54) According to the information provided by the Italian authorities, nine banking groups realigned their assets pursuant to Article 26(26) of Law 350/2003, by payment of the substitute capital gain tax of 9 % (single realignment). The global capital gains thereto recognised totalled over EUR 2 059 millions. The nine beneficiaries borne a substitute tax of EUR 180 615 534. To compute the effective equivalent of the tax for State aid purposes, the instalments payable in 2005 and 2006 shall be compounded by the applicable 3,7 % reference rate for the recovery of unlawful aid provided under the Commission Regulation (EC) No 794/2004 ([8]). The tax effectively incurred accordingly amounts to EUR 185 505 996 ([9]), which is the term of reference to compute the eventual aid grant equivalent.

Revaluations under Law 350/2003

(55) Article 2(25) of Law 350/2003 provided that all taxable companies may revalue the tax bases of their assets existing at the date of 31 December 2002 to mark them to their market value of the time, by payment of a substitute tax of 19 % in case of revaluation of depreciable assets and 15 % in case of non-depreciable assets, payable in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006).

([8]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Chapter V — Interest rate for the recovery of unlawful aid) (OJ L 140, 30.4.2004, p. 1).

([9]) The amounts paid are: (a) EUR 92 760 506 in 2004; (b) EUR 46 380 253 payable in 2005, corresponding to a net present value of EUR 44 725 412 in 2004; and (c) EUR 46 380 253 payable in 2006, corresponding to a net present value of EUR 43 129 616,9 in 2004.

(56) As indicated above, revaluations are extraordinary operations which are occasionally allowed by special tax regulations to reconcile the historic value of assets with their current value. A tax revaluation is distinct from a realignment, because in the revaluation the tax base of the assets held by a company may be stepped up to the current market value at the time of the revaluation, while in a realignment the fiscal gain recognised is capped at the value realised at the time of a prior realisation event as for example a reorganisation.

3. GROUNDS FOR INITIATING THE PROCEDURE

(57) By its decision of 30 May 2007 ([10]), the Commission initiated the formal investigation procedure laid down in Article 88(2) of the EC Treaty on the tax realignment scheme provided for by Article 2(26) of Law 350/2003 because it appeared to fulfil all the conditions to be considered State aid within the meaning of Article 87(1) EC and there were doubts about its compatibility with the common market as none of the exceptions provided for in Articles 87(2) and (3) seemed applicable.

(58) In particular, the Commission considered that Article 2(26) of Law 350/2003 provided a financial advantage represented by the difference between the tax effectively paid in 2004 to realign the value of the assets and the tax which would have been normally borne if the same realignment would have been made in the absence of the same Article 2(26) of Law 350/2003. The effective tax rate applicable in 2004 on such gains would have been 37,25 % (including 33 % company tax and 4,25 % local business tax), while the substitute tax effectively paid was 9 %. The Commission further considered that, under Law 350/2003, the substitute tax was payable in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006) without interests, while the tax which would have ordinarily be applied in the absence of Article 2(26) of Law 350/2003 would have been payable in 2004. The Commission has computed that the grant equivalent value of the tax effectively paid by the nine beneficiaries of the scheme in review was EUR 185 505 996, while the tax ordinarily due would have been EUR 771 991 022 (37,25 % of the realised gain totalling over EUR 2 059 millions). The difference between the tax ordinarily payable and the tax paid thus amounted to EUR 586 485 026.

([10]) Cf. footnote 1.

(59) The Commission also considered that while the beneficial tax realignments obtained under the abovementioned Laws 342/2000 and 448/2001 constituted general measures to ensure equitable taxation of the gains realised, the realignment provided for by Article 2(26) of Law 350/2003 was only limited to the banks concerned with the reorganisations governed by Law 218/1990, and therefore could not be considered a general measure, nor did it ensure neutrality of treatment between the capital gains concerned and those realised from comparable company reorganisations. The Commission also held that the fact that certain Italian banks had cleared their suspended tax liabilities relative to unrecognised capital gains in their balance-sheets at a nominal tax cost was susceptible to increase their attractiveness as potential company targets and could have distorted the market of banking acquisitions.

(60) The Commission concluded that the scheme in review could represent incompatible State aid and accordingly opened the procedure laid down in Article 88(2) of the EC Treaty. The Commission warned that should it conclude at the closing of the abovementioned procedure that the scheme in review is incompatible State aid, recovery would have to take place in accordance with Article 14 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 ([11]). The Commission considered, however, that in the light of its past practice regarding certain fiscal aid schemes ([12]), recovery should only concern the taxes paid in defect of what a beneficiary of the scheme would have paid had the beneficiary applied other tax schemes available at that time, provided this did not lead to reconstruct merely hypothetical choices which could have been made by the beneficiary concerned ([13]). The Commission invited the Italian authorities and interested parties to comment on the question whether recovery should take place with sole respect to the difference between the tax which would have been paid under the revaluation scheme foresee by Article 2(25) of Law 350/2003 and the substitute tax effectively paid by the beneficiary banks pursuant to the realignment scheme of Article 2(26) of the said Law 350/2003.

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

([12]) See Section VI of the Commission Decision 2006/748/EC of 4 July 2006 on State aid No C 30/04 (ex NN 34/04) implemented by Portugal exempting from corporation tax on capital gains certain operations/transactions by public undertakings (OJ L 307, 7.11.2006, p. 219).

([13]) See points 113 to 119 of the Judgement of the Court of 15 December 2005, Case C-148/04, Unicredito Italiano.

4. COMMENTS BY ITALY

(61) By their submissions, the Italian authorities have essentially (a) rejected the State aid qualification of the scheme in review, and (b) observed in suborder that the possible advantage effectively granted was much less than the one provisionally calculated by the Commission and was *de minimis*.

(62) In particular, Italy argues that Article 2(25) of Law 350/2003 would have implicitly allowed all companies having taken part to company reorganisations to benefit from the possibility to realign the value of their assets. This general realignment scheme was made available by an implicit reference of Article 2(25) to Article 14 of Law 342/2000, providing the recognition of gains suspended following tax neutral reorganisations and therefore covered all misalignments resulting from the company reorganisations carried out under D.Lgs. 358/1977.

(63) For Italy, this general realignment could be effectuated by payment of a substitute tax of 19 % in case of revaluation of depreciable assets and 15 % in case of non-depreciable assets in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006) pursuant to Article 12 of Law 342/2000. Thus, for Italy the regime provided by Article 2(26) would have to be appraised against this implicit realignment scheme set forth by Article 14 of Law 342/2000 rather than the general company tax revaluation system offered by Article 2(25) of Law 359/2003 as alleged by the Commission. Both the implicit realignment and the explicit revaluation schemes would have provided for the same substitute taxes of 19 % and 15 % as described. Unlike what the Commission alleged in its opening of the formal investigation procedure however, the possible advantage resulting from by Article 2(26) of Law 350/2003 would, according to Italy, only amount to the difference between the substitute tax of 9 % paid by the beneficiary banks on their unrecognised gains and the tax of 15 % payable on the same possible gains of all the other companies eligible to realign their asset values. This difference would have to be further discounted by the fact that the beneficiary banks had paid a relatively higher tax on 15 % of their initial gains realised as opposed to all other companies which could have opted for the full tax neutrality under D.Lgs. 358/1997.

(64) Italy further considers that the realignments provided for the gains resulting from the banking reorganisations made under Law 218/1990 are not comparable to all other measures for recognition of gains: first because the banking reorganisations in question were ontologically unique and not comparable to other reorganisations; second, because the tax measure devised to defer the recognition of the realised gains was specific to such reorganisations in that it provided a partial tax neutrality regime for both the transferor and the transferee entities.

(65) As to the uniqueness of the banking reorganisations, Italy maintains that the measure only concerned certain banking reorganisations carried out between 22 August 1990 and 31 December 1995, mainly aimed at privatising the public banking sector in Italy. The joint stock company form was considered the most optimal business form for Italian public banks to ensure the formation of private banking groups in Italy and promoting a level playing field with other banks in the common market. Under Law 218/1990, the stocks of the former-public banks following their reorganisations were either attributed directly to State holding companies where the public ownership was predominant or to newly created banking or pre-existing private (banking) foundations where public ownership was spread among different local governments. Both the State and the foundation holdings were entrusted to temporarily manage and progressively sell the stocks of the newly created companies on the market to allow the consolidation of the banking sector and formation of banking groups in Italy.

(66) As to the special nature of the tax neutral regime for such banking reorganisations, this was justified by the fact that at that time there was no general scheme to ensure neutrality of company reorganisations and contributions of business branches. The legislator intended to facilitate the privatisation of certain publicly-held banks by way of their restructuring and change of their business form into stock companies privately held, while avoiding to provide unnecessary advantages to such banks. To prevent competition distortions vis-à-vis other private banks, the Italian legislator provided for (a) partial tax neutrality for both the transferor and the transferee entities (15 % of the realised gain was fiscally recognised and taxed at the ordinary rate of 52,2 % at the time), (b) the provision of special tax-suspended reserves for unrecognised gains, and (c) the opening of the same partial tax-neutrality regime to the reorganisations of non-public banks to ensure an equal tax treatment of company reorganisations to which both the public and private banks were permitted to participate.

(67) The Italian authorities consider that the Commission's conclusions that the tax neutrality regimes, provided by both Law 218/1990 and D.Lgs. 358/1999 were not State aid because they are justified by the logic of the tax system are correct (point (30) of the Decision opening the formal investigation procedure). Italy further considers that if such conclusions are correct, the tax realignment regime of Article 2(26) of Law 350/2003 should also be considered as not being State aid as this was the necessary completion of the partial tax-neutrality regime provided by Article 7(2) of Law 218/1990 and in view of the special nature of such banking reorganisations.

(68) Italy stresses that the sole gains that could be realigned were the remainder of the historical gains resulting from the original reorganisations carried out between 22 August 1990 and 31 December 1995, following the taxable recognition of 15 % of the gains. For such gains, which are not new but have been realised in such prior years, the application of a reduced substitute tax would be fully justified by the specific nature of the revenues in question, and more particularly by the special nature of the banking reorganisations under Law 218/2000 for which a tax of 52,2 % on 15 % of the realised gains was paid. If one averages the 52,2 % tax rate applied with the 9 % and 12 % substitute taxes foreseen by Article 2(26) of Law 350/2003 on the remaining 85 % of the gain the comprehensive rate applied would have ranged between 15,48 % and 17,85 %. For Italy, such rates would be effectively comparable to the rates of 15 % and 19 % applicable under the implicit realignment scheme provided by Law 350/2003, respectively for depreciable and non-depreciable assets of all companies.

(69) Furthermore, Italy considers that the realignment scheme of Article 2(26) of Law 350/2003 was less flexible as it provided to opt for the realignment of all the remaining gains resulting from the historic reorganisation, while the implicit realignment scheme of Article 2(25) provided for the possibility to realign the single assets registering an inherent gain. For Italy, this flexibility would be highly valuable for the beneficiary companies as these could have opted to realign the sole assets being depreciable and not those whose sale gave rise to non-exempt gains. For example, the sale of qualified shareholdings under the participation exemption scheme is 95 % exempt as of 1 January 2004 and therefore it would not be convenient for a company to pay the tax to recognise gains relative to assets which would in any event be almost fully tax exempt. This is not an anodyne difference, for Italy, as many of the assets historically contributed to the newly formed banking companies in the '90s consisted of company participations being exempt following the above-described 2003 tax reform.

(70) Finally, Italy considers that even if the Commission should conclude that the tax rate paid under Article 2(26) of Law 350/2003 was more favourable than the one which would have been paid under the 'general' realignment scheme under Article 2(25) of the same Law, the concrete difference would be minimal and should be considered as *de minimis* aid.

5. COMMENTS BY INTERESTED PARTIES

(71) In their submissions, the interested parties have presented several arguments to reject the State aid qualification of the tax realignment scheme in review. They argued that it would be a technical tax measure aimed at addressing a specific situation, namely that of the realignment of certain unrecognised tax values relative to assets exchanged upon certain company reorganisations in the banking sector, and that it would not even provide an advantage to the banking groups concerned because it would in fact result in the payment of extra charges, which are not normally due by other companies having taken part to comparable reorganisations under the applicable general tax-neutrality scheme provided for by D.Lgs. 358/1997 and the Merger Directive.

(72) The interested parties in essence claim that the scheme in review is not selective because it is justified by the specificities of the banking sector and more particularly by the specificities of the banking restructurings in Italy. The Commission would have already considered the partial tax-neutrality scheme foreseen by Law 218/1990 as compatible with the common market in its prior practice, such as, for example, its Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy [14], which further refers to its Notice opening the formal investigation procedure on the aid granted by Italy to *Banco di Napoli* [15].

(73) The interested parties also claim that there would be no specific advantage in favour of the restructured banks, should one compare the substitute tax paid to realign their gains and the tax payable by other companies having undergone similar tax-neutral reorganisations. The different tax rates applied in 2003 to the restructured banks as opposed to other companies can be explained by the different tax regimes for the two sets of restructurings. The parties observed that while the unrecognised gains resulting from the D.Lgs. 358/1997 restructurings were 'freely distributable gains' in that such gains could be distributed to shareholders without further company taxation, the gains realised under Law 218/1990 were 'suspended' for both the transferee and the transferor companies until such gains would have been distributed to respective shareholders.

(74) The different tax regimes of the realised gains resulting from the two situations would have been interpretatively confirmed by the *Risoluzione* No 82/2000 of the Italian Ministry of Finance [16], whereby the tax administration would have recognised that the difference between the fair market value of a contributed branch and its tax basis did not give rise to a taxable gain, under the contribution in tax neutrality regime, provided that the tax bases of both the transferor and the transferee were not stepped up to the fair value. The *Risoluzione* would have further stated *in fine* that the difference realised from the transfer of the branch had a mere accounting relevance until the assets included in the branch are effectively sold and thus the 'suspended gain' was distributable to shareholders without any company tax. On the other hand, the accounting difference resulting from a partial tax-neutral contribution following the bank restructurings in question is, pursuant to Article 7(2) of Law 218/1990, expressly taxed not only if the assets are sold but also if the gain is distributed.

(75) According to the comments received from interested parties, the fact that the tax rates set under Laws 342/2000 and 448/2001 for gain realignments in 2000 and 2001 were the same for banks and other company restructurings while in 2003 the tax rates were apparently more advantageous for the banks can be explained by the change introduced by the Italian company tax reform enacted in 2003 with the replacement of the tax imputation system with the 95 %-exemption system to avoid double economic taxation of dividends.

[14] Cf. point 32 of the Decision (OJ L 184, 13.7.2002, p. 27)

[15] Cf. point 3.2.1 of the Decision (OJ C 328, 1.11.1996, p. 23).

[16] Risoluzione No 82/E-67004 of 6 June 2000, in the tax database of the Italian Ministry of Finance: http://dt.finanze.it/doctrib/PDF/Documento.pdf?Request=0&DocumentID=14000008220000606FIN110000006700400&Info=1,0,0

(76) According to the comments received from interested parties, the restructured companies (unlike the restructured banks) could have distributed their historical gains without payment of any company tax. Under the imputation system applicable until 31 December 2003, however, the relative dividends would have been taxable at the level of the beneficiary-shareholder. In case a substitute company tax was imposed to recognise such gains (like in the case of the tax realignment schemes of 2000 and 2001), the tax paid would have been credited against the tax payable by the shareholder upon receipt of the dividend. Thus, under the old imputation system, the shareholder-level tax would have in any event absorbed the company tax possibly paid and therefore would have equalised the tax treatment of any realignment schemes. This would have justified the same substitute tax rate applicable to both restructured banks and other reorganised companies at that time.

(77) The situation would have substantively changed after 31 December 2003 with the 95 %-dividend exemption system applicable to gains being further distributed as dividends. As of 2004, the tax on the gains realised from company reorganisations and further distributed as dividends would have been only applicable on 5 % of the gain distributed as dividend, with the latter being the only tax applicable (in the absence of any substitute tax), while the ordinary company tax rate would have applied to the gains of the reorganised banks in case distributed (also in the absence of any substitute tax). To correct this difference of treatment, the legislator would have provided the nominal substitute tax rate set forth by Article 2(26) of Law 350/2003 to recognise the gains suspended with sole respect of the reorganised banks in question, while excluding the gains suspended under D.Lgs. 358/1997 because they were less severely taxed upon distribution (95 % excluded from taxation at the level of the recipient).

(78) In sum, according to interested parties, the 2003 tax realignment scheme did not provide an advantage to the restructured banks but it was a measure to readjust the disparity between the considerably harsher tax realignment regime of restructured banks under Law 218/1990 and the more generous regime of gains distributed by reorganised companies under the general regime of D.Lgs. 358/1997.

(79) Finally, the interested parties have subordinately suggested that even if the Commission were to conclude that the tax realignment scheme of Article 2(26) of Law 350/2003 provided a specific advantage only of the banks having taken part to the restructurings under Law 218/1990, the advantage would not amount to that preliminarily identified by the Commission. The advantage would in fact only consist in the difference between the realignment tax paid and the distinct tax payable to revaluate single depreciable or non-depreciable assets pursuant to Article 2(25) of Law 350/2003. Such difference would total a fraction of the tax on the revaluation made and should even be reduced by the tax in excess paid to realign assets that do not give rise to taxable gains if sold (assets the transfer of which gives rise to exempt capital gains).

6. ASSESSMENT

6.1. State aid within the meaning of Article 87(1) of the EC Treaty

(80) Under the settled case law of the Court [17], to be considered State aid, a measure must fulfil all the criteria set by Article 87(1) of the EC Treaty; that is the measure must be granted by the State or through State resources, provide an advantage selectively favouring certain undertakings or productions without there being a justification deriving from the logic of the tax scheme, distort or threaten to distort competition and affect trade.

State resources

(81) The Commission considers that the scheme in review is clearly financed through State resources as the payment of a nominal substitute tax in lieu of the ordinary company tax on the gains recognised by effect of Article 2(26) of Law 350/2003 amounts to a relief from the company tax that should have been paid, at the expense of the State treasury.

[17] Cf., *inter alia*, the judgement of the Court of 10 January 2006, Case C-222/04, Fondazione Cassa di Risparmio di San Miniato, point 129.

Presence of a selective advantage

(82) The Italian authorities and the interested parties have observed that, in its prior Decisions 2000/600/EC [18] on the conditional approval of the aid granted by Italy to the public banks *Banco di Sicilia* and *Sicilcassa*, and 1999/288/EC [19] on the conditional approval of the aid granted by Italy to *Banco di Napoli*, the Commission would have examined and approved the partial tax-neutrality scheme of Law 218/1990 because it concluded that the measure did not constitute State aid. For this reason, the scheme in review would also not constitute State aid as it would be the natural outcome of the tax suspension scheme set forth by Law 218/1990.

(83) The Commission considers that Article 7(2) of Law 218/1990 provided that the transfers of assets and stocks effected in the context of the banking reorganisations in question were treated as partially tax neutral. This implied the partial non-recognition of gains realised from the transfer of the banking branches both for the transferor and the transferee entities, provided that the assets composing the transferred branch take the same tax basis they had in the hands of the transferor (carried-over basis) and the stock received by the transferor takes the same basis of the assets transferred (substituted basis).

(84) Under that regime, since there was no step-up in the tax bases of the assets and stocks exchanged, there was no tax advantage granted to the reorganising parties and the taxation of the gain realised from the transfer was only temporarily deferred for future recognition (such as the sale of the assets by the transferee or the stocks by the transferor). As there was no basis step-up both for the transferor and of the transferee, there was no aid resulting from deferring the company-level gain recognition.

(85) This tax deferral under the regime of Law 218/1990 was indeed consistent with the founding principles of company taxation according to which income taxation is applied to all revenues and gains realised by any company, and the realised gains were not recognised because there was no corresponding stepped-up tax basis for the assets concerned, so that taxation could still take place at a later stage.

(86) In the light of the foregoing, the Commission confirms the initial assessment made in its Decision opening the formal investigation procedure that both (a) the non-recognition of 85 % of the capital gains realised in the transactions governed by Law 218/1990, and (b) the non-recognition of the gains realised in the transactions governed by D.Lgs. 358/1997 are not State aid because the fiscal values of the assets exchanged remained unaltered [20], so that the fiscal gains did not materialise and no tax advantage was in conclusion granted. As the realised gains were frozen, the relative earnings could not be distributed, nor could the correspondingly increased value of the assets be depreciated, amortised or otherwise deducted from the taxable income of the companies resulting from such transactions. The Commission therefore concludes that the tax neutrality was justified by the inherent logic of the tax system and does not constitute State aid.

(87) By contrast, the tax realignment scheme foreseen by Article 2(26) of Law 350/2003 gave right to basis step-up, for which the ordinary company tax would have been paid, should a special substitute tax payable like the one in review not have been available. The Commission understands that to facilitate the taxation of capital gains, the national legislator may apply a substitute tax at a more convenient rate than the ordinary tax. Since the tax on disposition is generally paid up front but the tax benefits of the stepped-up basis in the assets being transferred arise over time through their periodic depreciation or at the time of disposition of the assets, ordinary taxation of such gains would generally lead to an increase in the net aggregate tax of the transferor-company and the transferee-company. Thus, a lower substitute tax on the gains realised from company reorganisations could be justified in principle as a technical measure to facilitate capital gain recognition.

[18] OJ L 256, 10.10.2000, p. 21.
[19] OJ L 116, 4.5.1999, p. 36.
[20] Or if the realised value was recognised, it was subject to tax as in the case of the 15 % gain recognised in the transactions governed by Law 218/1990.

(88) Such a favourable tax realignment may however only be justified if it is objectively open to all similar recognitions of capital gains, such as those resulting from other reorganisations not covered by Law 218/1990 including those relating to other banks.

(89) The Commission considers that the realignments provided for by Laws 342/2000 and 448/2001 allowed the undertakings concerned with the reorganisations governed by both Law 218/1990 and Legislative Decree 358/1997 to recognise the historical gains realised by payment of a substitute tax set at the same level for all the undertakings concerned. The Commission therefore concludes that the possibility to realign was a general tax measure and the reduced substitute tax as opposed to the ordinary company tax applicable at the time did not provide any competitive advantage to the companies in question because it was applied under identical conditions to all undertakings choosing to recognise the historical gains realised but temporarily non-recognised under the relevant provisions of Law 218/1990 or Legislative Decree 358/1997. The Commission therefore concludes that such realignments are general measures justified by the logic of the tax system and do not constitute State aid.

(90) By contrast the Commission considers that the tax realignment foreseen by Article 2(26) of Law 350/2003 was not a general measure because it was only applicable to the capital gains derived by certain banks from the reorganisations effected under Law 218/1990.

(91) The Commission considers in particular that the tax scheme in review provided an advantage represented by the difference between the tax effectively paid to realign the value of the assets and the tax which would have been normally paid if the same realignment would have been made in the absence of the same Article 2(26) of Law 350/2003. The effective tax rate applicable in 2004 on such gains would have been 37,25 % (including 33 % company tax and 4,25 % local business tax), while the substitute tax effectively paid was 9 % (excluding the allowance for deferred payments).

(92) The Commission further considers that, under Law 350/2003, the substitute tax was payable in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006) without interests, while the tax which would ordinarily have been applied in the absence of Article 2(26) of Law 350/2003 would have been payable in 2004. The Commission therefore notes that the grant equivalent value of the tax effectively paid by the nine beneficiaries of the scheme in review was EUR 185 505 996, while the tax ordinarily payable would have been EUR 771 991 022 (37,25 % of the realised gain totalling over EUR 2 059 millions). As a result, the difference between the tax ordinarily payable and the tax paid amounts to EUR 586 485 026.

(93) The Commission considers that the above advantage was effectively limited to the sole banks concerned with the transactions governed by Law 218/1990, while other banks and other companies concerned with equivalent transactions governed by D.Lgs. 358/1997 could not benefit from the same tax realignment scheme and its favourable conditions.

(94) The Italian authorities and the interested parties have observed that none of the nine beneficiaries of the scheme would have ever accepted to realign the value of their assets had they known that they would have been subject to the ordinary company tax on the gains so recognised. Furthermore, as explained by the Italian authorities, the other companies not concerned by the reorganisations effected under Law 218/1990 would have benefited from the implicit tax realignment scheme of Article 2(25) of Law 350/2003 at the substantively equivalent conditions generally set by Article 17 of Law 342/2000.

(95) For the Italian authorities and the interested parties, to rightly compute the advantage in question, account should be taken of the taxes paid at the time of the initial contributions at a global tax rate of over 40 %. The combined effective taxation on the capital gains in question in 1990 and 2004 would have largely exceeded the general rate for realignments applied in 2000 and therefore there would be no advantage.

(96) The Commission maintains however that the scheme provided for by Article 2(25) of Law 350/2003 was not a tax realignment of values misaligned following tax neutral reorganisations but rather a tax revaluation scheme which permitted to realise the hidden gains deriving from the adjustment of the tax value of the assets held by the beneficiary companies to their current value. The Commission considers that the two schemes a not comparable, nor was the tax revaluation scheme of Article 2(25) of Law 350/2003 equivalent to the tax realignment provided for by Article 2(26) of Law 350/2003, considering the difference between the statutory substitute tax rates foreseen by the two schemes.

(97) The Commission therefore concludes that the companies having realigned the tax bases of their assets pursuant to Article 2(26) of Law 350/2003 benefited from a specific tax advantage consisting in the difference between the ordinary tax rate on the gains recognised and the special substitute tax on the same gains.

(98) The interested parties have objected that the lower substitute tax rate used by Article 2(26) of Law 350/2003 was not selective because it was justified by the legal and factual specificities of the taxation of the capital gains resulting from the reorganisations effected under Law 218/1990. Furthermore, they argued that Italy would not have been entitled to recognise these gains as taxable after so many years under the same conditions applicable to the capital gains resulting from other company reorganisations.

(99) The Commission takes note of the fact that the reorganisations effected under Law 218/1990 provided specific conditions and provision to defer the fiscal recognition of the gains realised following such reorganisations, as also indicated by the said *Risoluzione*. It nonetheless considers that the partial tax neutrality regime provided by Law 218/1990 was in essence equivalent to the full tax neutrality regime provided by D.Lgs. 358/1997, as to the capital gains realised but not fiscally recognised. Since the two situations were indeed comparable they should have been treated alike when the legislator in 2003 provided for the fiscal recognition of the suspended gains.

(100) The Commission further considers that the lower tax rate applied did not merely offset the harsher tax treatment of distributions to shareholders of the gains deriving from the banking restructurings of Law 218/1990 vis-à-vis the distributions of the gains relating to other tax-neutral reorganisations in the case of the distribution of the capital gains to shareholders, as indicated by the said *Risoluzione*. This view cannot be followed because the application of different substitute taxes to capital gains cannot always be imputed to a distribution of the capital gains suspended. The Commission considers that accepting this justification would effectively result into allowing the application of different effective company tax rates to some companies solely because these took part to certain types of reorganisations preferred by the State.

(101) The Commission considers that the tax advantage resulting from the application of the tax realignment scheme foreseen by Article 2(26) of Law 350/2003 was not *de-minimis*. In determining the presence of an aid, the Commission shall indeed compare the nominal taxation applied under the scheme in review and the tax which would have been applied had the scheme in review not been available, and had the beneficiary banks stepped-up the tax bases of their assets and distributed the capital gains resulting from such fiscal realignments to their shareholders.

(102) Furthermore the Commission considers that the alleged reduced amount of an advantage may not per se be sufficient to exclude its aid character. The Commission also notes that the *de minimis* exclusion provided by the Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [21] cannot be invoked because the measure gives rise to non-transparent aid as postulated by the Regulation and because the Italian authorities have not complied with the conditions of this Regulation.

[21] OJ L 379, 28.12.2006, p. 5.

Justification by the Nature of the Scheme

(103) The Italian authorities and the interested parties have observed that the realignment scheme provided by Article 2(26) of Law 350/2003 would be justified by the peculiarities of the banking sector and for this reason it would not be State aid.

(104) Under the case law of the Court, a tax measure is specific only if it unreasonably discriminates between situations being legally and factually comparable in the light of the objectives set by the tax system ([22]) and 'the fact that undertakings are treated differently does not automatically imply the existence of an advantage for the purposes of Article 92(1) of the Treaty' ([23]).

(105) The Commission considers, however, that the scheme under examination does not seem to represent an adaptation of the general system to the distinctive features of banking, but, rather, a specific advantage having the effect of improving the competitiveness of certain undertakings, i.e. the banks concerned with certain reorganisations.

(106) The Italian authorities also argue that the scheme would be a mere repetition of the scheme enacted under Law 342/2000 which did not involve State aid as it applied to realised gains deriving from all company restructurings. The scheme under the Law 350/2003 should be compared to the one foreseen by the Law 342/2000 and would not provide any possible additional advantage. As illustrated above, the Commission disagrees with this opinion, because the realignment under Law 350/2003 has a more limited scope than the general realignment under Law 342/2000.

(107) In the light of the foregoing, the Commission concludes that the advantage granted to certain banks, consisting in the special substitute tax for the gains realised from certain contributions of assets in lieu of the ordinary tax rate, under the Law 218/1990 is specific and not justified by the nature of the tax system.

Distortion of competition and effect on trade between Member States

(108) Under the settled case law of the Court ([24]), for a State measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. Furthermore, a measure affects intra-Community trade when the financial aid received from the State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade ([25]).

(109) The Commission considers that the considerable amount of the aid has strengthened the financial position of its beneficiaries belonging to the banking sector and competing on the liberalised market of financial services being open to competition with other undertakings being active in providing intra-Community services.

(110) The Commission further considers that the advantage granted in favour of the banks in question is also susceptible to distort competition in the current context characterised by consolidation opportunities in the Italian banking sector. The fact that certain Italian banks have eliminated their tax liabilities inherent to hidden gains in their assets at a nominal tax cost is susceptible to increase the attractiveness of such banks and their economic value both for investors and company acquirers. The Commission considers that the advantage provided by the tax scheme in review is susceptible of unduly altering the market for company acquisitions in the banking sector in Italy.

6.2. **Compatibility**

(111) Insofar as the scheme in review constitutes State aid within the meaning of Article 87(1) EC, its compatibility must be evaluated in the light of the exceptions provided for in Articles 87(2) and 87(3) EC. The Italian authorities or the interested parties have advanced no arguments to show that any of the above exceptions are applicable in this case.

(112) The exceptions provided for by Article 87(2) EC, concerning aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

([22]) Judgement of 8 November 2001, Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, [2001] ECR I-8365.

([23]) Judgement of 22 November 2001, Case C-53/00, Ferring v ACOSS, [2001] ECR I-9067.

([24]) Judgement of the Court of First Instance in Case T-214/95 *Het Vlaamse Gewest v Commission*, [1998] ECR II-717.

([25]) Judgement of the Court of Justice in Case 730/79, *Philip Morris v Commission*, [1980] ECR 2671, paragraph 11.

(113) The exception provided for in Article 87(3)(a) EC provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, but does not apply in this case as the aid does not favour economic development in such regions in Italy.

(114) The scheme cannot be considered either as a project of common European interest or to remedy a serious disturbance in the economy of a Member State, as provided for by Article 87(3)(b) EC, nor does it have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d) EC.

(115) Finally, the scheme must be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In this respect, it should first be noted that the aid in question does not fall under any of the frameworks or guidelines which define the conditions to consider certain types of aid compatible with the common market. In particular, it is not in line with the Community guidelines on State aid for rescuing and restructuring firms in difficulties in force at the time ([26]). Second, since the tax advantage was granted retrospectively in respect of transactions which have already taken place, it cannot be considered to contain the necessary incentive effects to deem such an exception applicable.

(116) The Commission rather considers that the tax scheme in question results in a mitigation of the charges which should have been borne by the beneficiary banks in similar reorganisations and must therefore be considered to be operating aid. Such aid cannot be held compatible with the common market as it does not facilitate the development of any activities or economic areas and it is not limited in time, degressive or proportionate to what is necessary to remedy specific economic handicaps.

([26]) OJ C 288, 9.1.1999, p. 2.

(117) The Commission concludes that the scheme in review is incompatible with the common market.

6.3. **Recovery**

(118) As the scheme was enacted without prior Commission approval, recovery should take place in accordance with Article 14 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 ([27]). Nevertheless, the Commission considers that in the light of the past practice regarding certain fiscal aid schemes ([28]), recovery shall only concern the taxes paid in defect of what a beneficiary of the scheme would have paid had the beneficiary applied other tax schemes available at that time. The Commission considers that in the case at hand the application of the alternative tax revaluation scheme provided by Article 2(25) of Law 350/2003 was not a mere hypothetical choice but a sensible option which could have been used by the beneficiaries concerned wishing to recognise the effective tax value of their assets ([29]).

(119) It should be stressed that Article 2(25) of Law 350/2003 provided a general provision to recognise the gains realised by any undertakings deciding to revalue the assets booked in their accounts on 31 December 2002 to mark them to their market value of the time, by payment of a substitute tax of 19 % in case of revaluation of depreciable assets and 15 % in case of non-depreciable assets, payable in three instalments (50 % in 2004, 25 % in 2005 and 25 % in 2006). This general scheme was also open to the reorganised banks in question. Although realignments and revaluations are not the same, the Commission considers that had the realignment scheme not been available, the banks concerned would have opted for the general revaluation scheme under Article 2(25) of Law 350/2003 to any probable extent.

(120) In the light of the foregoing, the Commission concludes that recovery shall take place with sole respect to the difference between the tax payable to revaluate the assets held pursuant to Article 2(25) of Law 350/2003 (19 % for depreciable assets, 15 % for non depreciable assets typically held by the reorganised banks in question) and the tax effectively paid under Article 2(26) of Law 350/2003.

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

([28]) See Section VI of the Commission Decision 2006/748/EC of 4 July 2006 on State aid C 30/04 (ex NN 34/04) implemented by Portugal exempting from corporation tax on capital gains certain operations/transactions by public undertakings (OJ L 307, 7.11.2006, p. 219).

([29]) See points 113 to 119 of the Judgement of the Court of 15 December 2005, Case C-148/04, Unicredito Italiano.

7. **CONCLUSIONS**

(121) The Commission finds that Italy has unlawfully implemented Article 2(26) of Law 350/2003 in breach of Article 88(3) of the Treaty. The aid scheme is incompatible with the common market.

(122) Only the aid granted by payment of taxes in defect of what a beneficiary of the scheme would have paid had the beneficiary applied other tax schemes available at that time has to be recovered.

(123) The amount to recover shall therefore be limited to the difference between the tax which would have been paid according to Article 2(25) of Law 350/2003 and the one paid according to Article 2(26) of the same Law,

HAS ADOPTED THIS DECISION:

Article 1

The derogatory tax scheme implemented by Italy under Article 2(26) of Law 350/2003 constitutes State aid and is incompatible with the common market.

Article 2

Italy shall repeal the scheme referred to in Article 1.

Article 3

1. Italy shall take all necessary measures to recover from the beneficiaries the aid granted by payment of the substitute tax foreseen by Article 2(26) of Law 350/2003 in relation to the fiscal recognition of the capital gains resulting from the reorganisations carried out under Law 218/1990 and unlawfully made available to the beneficiaries.

2. The amount to recover shall be limited to the difference between the tax which would have been paid had the aid beneficiaries applied the tax revaluation scheme according to Article 2(25) of Law 350/2003 and the one paid according to Article 2(26) of the same Law.

3. Recovery shall be carried out without delay and in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision.

4. The sums to be recovered shall bear interest throughout the period running from the date on which they were put at the disposal of the beneficiary until their actual recovery.

5. Interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

Article 4

Italy shall inform the Commission, within two months of notification of this Decision, of the measures planned or taken to comply with it. It will provide this information using the questionnaire attached in Annex I of this Decision. Italy shall inform within four months of notification of this Decision of the measures taken to execute it.

Article 5

This Decision is addressed to Italy.

Done at Brussels, 11 March 2008.

For the Commission

Neelie KROES

Member of the Commission

ANNEX I

Information regarding the implementation of the Commission Decision C 15/07 (ex NN 20/07), implemented by Italy, providing tax incentives in favour of certain reorganised banks

1. **Total number of beneficiaries and total amount of aid to be recovered**

1.1. Please explain in detail how the amount of aid to be recovered from individual beneficiaries will be calculated?

— The principal

— The interests

1.2. What is the total amount of unlawful aid granted under this scheme that is to be recovered (gross aid equivalents; prices of …):

1.3. What is the total number of beneficiaries from which unlawful aid granted under this scheme is to be recovered:

2. **Measures planned and already taken to recover the aid**

2.1. Please describe in detail what measures are planned and what measures have already been taken to effect an immediate and effective recovery of the aid. Please also indicate where relevant the legal basis for the measures taken/planned.

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

3. **Information by individual beneficiary**

Please provide details for each beneficiary from whom unlawful aid granted under the scheme is to be recovered in the table overleaf.

Identity of the beneficiary	Amount of unlawful aid granted (*) Currency: …	Amounts reimbursed (°) Currency: …

(*) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents; in prices of …).
(°) Gross amounts reimbursed (including interests).