IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 28 October 2009

concerning the aid granted by Italy for the restructuring of cooperatives in the fisheries sector and of their consortia (State aid C 29/06)

(notified under document C(2009) 8040)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/35/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 that article,

Whereas:

1. PROCEDURE

(1) By letter of 17 October 2002, Italy notified Legislative Decree No 226 of 18 May 2001 (the Decree of 18 May 2001) to the Commission, stating that the measures laid down in Articles 7 and 8 of that decree had been put into effect.

(2) In Article 8 of that decree there is a system of State aid for the restructuring of cooperatives in the fisheries sector and of their consortia. In accordance with Article 8, the scope of assistance of the Fondo centrale per il credito peschereccio (Central Fund for Fisheries Credit) is extended to the funding of the business restructuring plans provided for under Article 11(8) ter of Law No 41 of 17 February 1982 (Law No 41/1982) for cooperatives and their consortia operating in the fisheries and aquaculture sector and in the processing and marketing of products of that sector.

(3) Given that Italy made it known that that measure had been put into effect, it was registered as unlawful aid within the meaning of Article 1(f) 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 [1] [now Article 88].

(4) Italy was asked several times for further information. By letter C(2005) 161 of 20 January 2005 the Commission also sent Italy an information injunction under Article 10(3) of Regulation (EC) No 659/1999. By letter of 3 March 2005, Italy replied to that injunction. Another letter was subsequently received by the Commission on 12 July 2005.

(5) Following doubts as to the compatibility of that aid scheme with the common market, the Commission decided to initiate the formal investigation procedure laid down in Article 93 [now Article 88] of the EC Treaty. The Commission informed Italy of that decision by letter C(2006) 2312 of 22 June 2006 [2].

(6) Italy communicated its comments by letters of 14 September and 31 October 2006.

2. DESCRIPTION

(7) As stated above, the Decree of 18 May 2001 is intended to extend the scope of assistance of the Fondo centrale per il credito peschereccio to the restructuring operations of cooperatives in the fisheries sector and their consortia, as provided for by Article 11(8) ter of Law No 41/1982.

[1] OJ L 83, 27.3.1999, p. 1.
[2] Letter published in OJ C 202, 25.8.2006, p. 11.

(8) The Decree of 18 May 2001 is a provision which, from its entry into force, provides for the funding of aid measures laid down by the decree of the Minister for Agriculture of 10 February 2008 (the Decree of 10 February 1998), which sets out the detailed rules for the application of Article 11(8) ter of Law No 41/1982.

(9) The characteristics of that aid scheme, as described in the Decree of 10 February 1998, are the following:

— the aid is granted in the form of a non-repayable grant up to a maximum of 40 % of eligible expenditure or a soft loan for an amount of up to 85 % of that expenditure,

— the purpose of the restructuring plan must be the recovery of the cooperative and the restoration of its economic and financial viability,

— the eligible costs comprise: the planning and implementation of the restructuring plan; the modernisation, extension and reorganisation of production as regards plant, equipment and immovable property under programmes for the recovery and rehabilitation of firms on the basis of greater efficiency and competitiveness; the funding of any property losses deriving from the cessation of activities and from fixed assets not depreciated in full or the funding of depreciation charges of material and non-material assets which are no longer used in the production process; the organisation of training courses; charges relating to the incorporation and starting up of companies, incurred in order to promote the acquisition by the employees of activities or branches of the firm excluded from the restructuring process; payments in respect of severance and early retirement, facilitation of voluntary redundancies; financial and capital rebalancing owing to write-offs of debts deriving from losses accumulated in the years prior to the adoption of the restructuring plan.

(10) By letter of 3 May 2005, Italy clarified that such aid is intended for firms in the form of cooperatives which correspond to the definition of small and medium-sized enterprises for the purposes of Community law and that that aid is limited to the period necessary for the restructuring and may be granted to the same firm only once.

(11) According to Italy, the duration of that aid scheme is not limited. There are no limits either in the Decree of 10 February 1998 or in the Decree of 18 May 2001. Further, the letter from Italy of 12 July 2005 expressly states that the provisions of that decree remain in force and may be put into effect in subsequent years.

(12) The Commission has not has any information on the amount of the aid actually granted.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(13) The Commission found that that State aid scheme was an unlawful aid scheme within the meaning of Article 1(f) of Regulation (EC) No 659/1999, that is to say, new aid put into effect in contravention of the obligation to notify the Commission in advance.

(14) In the exchange of letters prior to the preliminary analysis carried out by the Commission, Italy maintained that that aid scheme was not a new scheme but a scheme extending the aid scheme examined under number NN 24/98 considered by the Commission to be compatible with the common market (letter SG (99) D/1851 of 11 March 1999).

(15) The Commission could not share Italy's view, even though it had in fact decided in favour of aid scheme NN 24/98 concerning the scheme laid down by the Decree of 10 February 1998. However, the aid measure which had been analysed by the Commission concerned the implementation of the restructuring plans for the years 1997 to 1999 and, by decision of 11 March 1999, the Commission had pointed out to the Italian authorities that they had to inform the Commission, in accordance with Article 88(3) of the EC Treaty, of any plans to refinance, extend or alter that aid measure. On those grounds the Commission found that the Decree of 18 May 2001 constituted a new implementation or refinancing of the aid measure in question through the funds of the Fondo centrale per il credito peschereccio.

(16) On the other hand, by letter of 12 March 2003, Italy informed the Commission that the Regions rather than the Ministry now had powers for the implementation of that measure and that the funds from the Fondo centrale per il credito peschereccio had therefore been transferred to them. Italy also attached to the letter of 1 July 2004 two letters from the Regions of Sicily and Apulia concerning the aid measures implemented under the scheme at issue: in respect of Sicily a letter of 19 June 2004 which stated that that measure had been put into effect by decree of the regional minister for fisheries No 158 of 3 December 2003 and, in respect of Apulia, a letter of 19 May 2004 stating that the measure had been implemented by a dossier which had been submitted to the Region in 2001; Apulia's letter also stated that the financial resources for 2003 had been received only at the end of the same year. Italy did not, however, provide any information on the amount of the funds used under that scheme. In any event, those letters confirmed that some of those funds were made available by the Regions, in accordance with Article 8 of the Decree of 18 May 2001, which means that that aid scheme had in fact been put into effect.

(17) In addition, the Commission found that if, as maintained by Italy, an existing aid scheme were at issue and the Decree of 18 May 2001 did not alter that scheme, the aid scheme notified became a new aid scheme on 1 July 2001.

(18) In fact, that aid scheme had been approved in the light of the Guidelines for the examination of State aid to fisheries and aquaculture [1], adopted by the Commission in 1997 (the 1997 Fisheries Guidelines).

(19) On 1 January 2001 those Fisheries Guidelines were replaced by the Guidelines for the examination of State aid to fisheries and aquaculture [2] (the 2001 Fisheries Guidelines). By letter of 21 December 2000, in accordance with point 3.2 of the 2001 Fisheries Guidelines, the Commission proposed, under the appropriate measures mechanism, that Member States amend their existing aid schemes relating to aids in the fishery sector by 1 July 2001 at the latest. The Member States were invited to confirm that they accept that proposal in writing by 1 March 2001 at the latest. It was specified that in the event that a Member State failed to reply, under the third paragraph of point 3.2 the Commission would assume that the Member State concerned had accepted the proposal. On the other hand, point 3.4 of the 2001 Fisheries Guidelines states that an unlawful aid is to be appraised in accordance with the guidelines prevailing at the time of the entry into force of the administrative measure setting up the aid. Italy did not reply to the Commission's letter of 21 December 2000. By letter of 7 May 2001, the Commission drew Italy's attention to the wording of that letter, informing it that, from that time the Commission considered that Italy's failure to indicate its disagreement in writing meant that it had accepted the proposal for appropriate measures. The Commission therefore took the view that Italy had accepted that proposal and that the existing aid schemes would be amended by 1 July 2001 at the latest.

(20) According to the case-law of the Court of Justice of the European Communities, where new guidelines are set out and accepted by the Member States, the acceptance of appropriate measures has the effect of converting existing aid into new aid. The existing aid must be adapted in accordance with the appropriate measures or converted into new aid schemes and subjected to the obligation of prior notification to the Commission [3].

(21) The provisions in the 2001 Fisheries Guidelines accepted by Italy therefore had the effect of withdrawing the authorisation previously granted to the aid not adapted to those Guidelines and of classifying it as new aid. This was the case with the aid for the restructuring of cooperatives. The 1997 Fisheries Guidelines did not lay down any specific provision on aid for the restructuring of firms in the fisheries sector; they contained, in the last indent of the last paragraph of point 1.3, only a provision stating that operating aid would be examined on a case-by-case basis if it was directly linked to a restructuring plan. On the other hand, the 2001 Fisheries Guidelines contain a specific provision, in point 2.2.4, on aid for rescuing and restructuring firms in difficulty which provided for the application of the Guidelines on State aid for rescuing and restructuring firms in difficulty [4] (the 1999 Restructuring Guidelines) in force on that date.

(22) Consequently, since, according to the wording of Italy's first letter, the aid measure provided for by the Decree of 18 May 2001 was put into effect on 17 October 2002, it became an unlawful aid measure in respect of the period after 1 July 2001, the date fixed for the amendment of existing State aid schemes.

[1] OJ C 100, 27.3.1997, p. 12.
[2] OJ C 19, 20.1.2001, p. 7.
[3] The effect of acceptance of appropriate measures by a Member State was clearly set out in the judgment in Case C-313/90 *Comité International de la Rayonne et des Fibres Synthétiques and Others* v *Commission* [1993] ECR I-1125: '… the rules set out in the discipline and accepted by the Member States themselves have the effect, inter alia, of withdrawing from certain aid falling within its scope the authorisation previously granted and hence of classifying it as new aid and subjecting it to the obligation of prior notification.' (paragraph 35).
[4] OJ C 288, 9.10.1999, p. 2.

(23) The Commission carried out a preliminary analysis of that aid scheme in the light of both the 2001 and 2004 Fisheries Guidelines. Pursuant to the second paragraph of point 5.3 of the Guidelines for the examination of State aid to fisheries and aquaculture [1] of 2004 (the 2004 Fisheries Guidelines), those Guidelines are applicable in the case of aid granted from 1 November 2004, whereas for aid granted prior to that date the 2001 Guidelines apply.

(24) Both the 2001 Fisheries Guidelines (point 2.2.4) and the 2004 Fisheries Guidelines (point 4.1.2) lay down that State aid aimed at rescuing and restructuring firms in difficulty is to be assessed in accordance with the Restructuring Guidelines. In respect of aid granted up to 9 October 2004 the 1999 Restructuring Guidelines are to apply and in respect of aid granted from 10 October 2004 the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [2] of 2004 (the 2004 Restructuring Guidelines) are to apply. In specific cases of firms whose principal activity is fishing at sea, both the 2001 and the 2004 Fisheries Guidelines add that that aid may be granted only when a plan designed to reduce fleet capacity has been submitted to the Commission.

(25) Those Fisheries Guidelines provide that only firms in difficulty are eligible for restructuring aid. The criteria for recognising what constitutes 'difficulty' are set out in points 4 to 8 of the 1999 Restructuring Guidelines and in points 9 to 13 of the 2004 Restructuring Guidelines. The Commission observed that the Decree of 10 February 1998 did not serve to check fulfilment of those criteria. Even firms which did not fulfil the criteria referred to in those Guidelines could therefore benefit from the aid granted by Italy.

(26) Further, the Commission observed that it did not have information on fulfilment of some of the criteria for implementing restructuring plans referred to in the aforesaid Guidelines: criteria on the restoration of long-term viability of beneficiary cooperatives (points 31 to 34 of the 1999 Restructuring Guidelines and points 34 to 37 of the 2004 Restructuring Guidelines), adoption of compensatory measures when medium-sized firms benefit under that aid scheme (point 82(b) of the 2004 Restructuring Guidelines) or contribution of beneficiaries to the financial restructuring of the firm (point 40 of the 1999 Restructuring Guidelines and point 43 of the 2004 Restructuring Guidelines). The Commission also observed that, for firms whose principal activity is fishing at sea, Italy had not submitted a plan designed to reduce fleet capacity.

(27) For all of those reasons the Commission decided to initiate the formal investigation procedure.

4. ITALY'S COMMENTS

(28) Italy states, first of all, that it put the aid at issue into effect entirely in good faith. For Italy, the Decree of 18 May 2001 was merely a renewal of measure NN 24/98 already approved at Community level. It did not consider it to be an unlawful aid scheme. In contradictory fashion, Italy also observes that the Directorate-General of Maritime Fisheries and Aquaculture, like the Regions, to which powers were transferred in 2000, in no case made provision to implement interventions on the basis of that Decree.

(29) Italy states that strict criteria were laid down for the implementation of that aid scheme. In particular, a significant contribution was required from the beneficiary, to ensure that the aid was limited to the minimum needed to restore the viability of the firm, keeping distortions of competition to the minimum. Italy adds that a large part of the aid concerns training and technological innovation programmes; moreover, more than half of the funds paid were not non-repayable but were subject to a repayment obligation since they were long-term loans subject to a special guarantee scheme. In addition, a calculation of the aid intensity showed that the latter was well below the *de minimis* aid threshold.

(30) Moreover, the principle of one-off payment was strictly observed. The purpose of that aid, in accordance with the requirements of the Restructuring Guidelines, is to enable beneficiaries to cover their own costs after restoration of long-term economic capacity. In Italy's opinion, that restructuring aid scheme serves to contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest by meeting the conditions set out in those Guidelines: restructuring of firms within a reasonable period of time, avoidance of distortions of competition, proportionality of the aid, the spreading of payments on the basis of the implementation of the restructuring plan of the firm concerned, monitoring of the implementation of that plan.

[1] OJ C 229, 14.9.2004, p. 5.
[2] OJ C 244, 1.10.2004, p. 2.

(31) Italy concludes its observations by referring to the Communication from the Commission on improving the economic situation in the fishing industry of 9 March 2006 (the Communication of 9 March 2006) [1] and observes that the unfavourable economic situation in the fisheries sector has been aggravated by a rapid rise in fuel costs. In addition, price trends in respect of various fish species has not followed production cost trends. For those reasons, according to Italy it is necessary to retain that type of measure and interventions which have the sole purpose of supporting an economic sector in difficulty.

5. ASSESSMENT

5.1. Existence of unlawful State aid

(32) The Commission observes that that aid scheme, which is designed to grant funding for the restructuring of a particular category of firm which carries on its activities in a specific sector, has the effect of giving a financial advantage to those firms. Since the products of the beneficiary firms are sold on the Community market, that aid scheme strengthens their position, both on the Italian market in relation to the firms of other Member States who want to bring their products into that market and on the markets of other Member States in relation to firms who sell their products on those markets.

(33) Further, firms in a specific sector of the economy benefit from that aid scheme. Consequently, given that the resources needed to put that scheme into effect are public resources, that scheme is a State aid scheme within the meaning of Article 87(1) of the EC Treaty.

(34) The observations which Italy sent to the Commission in reply to the initiation of the formal investigation procedure does not call into question the classification of that State aid scheme as unlawful aid. In fact, irrespective of the way in which Italy's comments may be interpreted, the Commission observes that, in any event, that aid scheme reactivates the aid scheme set up by the Decree of 10 February 1998 and examined and approved by the Commission under number NN 24/98. As stated in the decision to initiate the formal investigation procedure, that reactivation constitutes implementation of a new aid scheme, that is to say, an unlawful aid scheme. A change in the identity of the public authority which puts that scheme into effect does not affect its aid nature and the classification which the Commission may give to it; it is irrelevant that that aid scheme, based on the Decree of 1 February 1998, was reactivated by the Decree of 18 May 2001 or by the Regions, on the basis of other provisions of which the Commission is unaware.

(35) Further, as stated in the decision to initiate the formal investigation procedure, if the aid scheme notified were an existing aid scheme and the Legislative Decree of 18 May 2001 did not alter that scheme, as maintained by the Italian authorities, the Commission considers that it became a new aid scheme on 1 July 2001 when, following the adoption of the new Fisheries Guidelines applicable from 1 January 2001, the existing aid schemes which had not been adapted in line with those Guidelines could no longer benefit from the authorisation previously granted and had to be converted into new aid schemes subject to the obligation to notify the Commission. The Commission, in accordance with point 3.2 of the 2001 Fisheries Guidelines, proposed to the Member States by letter of 21 December 2000, under the appropriate measures mechanism, that they amend their existing aid schemes relating to aids in the fisheries sector by 1 July 2001 at the latest, stating that in the event that the Member State concerned failed to reply it would be assumed that that it had accepted the proposal. Italy did not reply to the Commission's letter of 21 December 2000 nor to the reminder of 7 May 2001 informing it that, from that time, the Commission considered that Italy's failure to indicate its disagreement in writing meant that it had accepted the proposal for appropriate measures. The Commission therefore took the view that Italy had accepted that proposal and that the existing aid schemes had been amended by 1 July 2001 at the latest.

(36) The rules contained in the 2001 Fisheries Guidelines and accepted by Italy had therefore had the effect of withdrawing from certain aid falling within its scope the authorisation previously granted and of classifying it as new aid. This was the case with the restructuring aid for cooperatives. Unlike the 1997 Fisheries Guidelines, the 2001 Fisheries Guidelines contained, in point 2.2.4, a specific rule in respect of aid for rescuing and restructuring firms in difficulty, which provided for the application of the 1999 Restructuring Guidelines.

(37) As stated in the decision to initiate the formal investigation procedure, that State aid scheme therefore certainly constitutes, from 1 July 2001, a new aid scheme which Italy was required to notify to the Commission before putting it into effect.

[1] COM(2006) 103 final.

5.2. **Compatibility with the common market**

(38) The scheme may be considered compatible with the common market only if it may qualify for one of the exceptions provided for in the Treaty. Since it is firms in the fisheries and aquaculture sector which benefit from that scheme, it must be examined in the light of the Guidelines for the examination of State aid to fisheries and aquaculture. The anaysis set out in the decision to initiate the formal investigation procedure remains valid.

(39) The measure is clearly presented as an aid scheme for the restructuring of firms with implementation of restructuring plans by the beneficiary firms. The list of eligible costs referred to in the Decree of 10 February 1998 shows that the operations which may be funded in fact correspond to the operations which serve to restructure the beneficiary firms. Those costs reflect investments or financial and operating charges of firms. It is expenditure which may certainly be linked to a reorganisation of the activities of the beneficiary firms or their adaptation to new economic conditions for the purpose of enabling the restoration of economic and financial viability.

(40) It is therefore appropriate to analyse that aid scheme in the light of the relevant provisions in the Fisheries Guidelines.

(41) Both the 2001 Fisheries Guidelines (point 2.2.4) and the 2004 Fisheries Guidelines (point 4.1.2) state that State aid aimed at rescuing and restructuring firms in difficulty is to be assessed in accordance with the Restructuring Guidelines. If aid had still been paid after 1 April 1998, which is possible since that aid scheme was set up without limits on its duration (see recital 2 above), the Guidelines for the examination of State aid to fisheries and aquaculture [1] adopted in 2008 (the 2008 Fisheries Guidelines), which refer in the same manner to the Restructuring Guidelines, are applicable. For aid granted up to 9 October 2004, the 1999 Restructuring Guidelines apply and for aid granted from 10 October 2004, the 2004 Restructuring Guidelines apply. It is also important to recall that, in the specific case of firms whose principal activity is fishing at sea, the Fisheries Guidelines add that that aid may be granted only when a plan designed to reduce fleet capacity has been submitted to the Commission.

(42) Accordingly, it is appropriate to assess, first of all, whether the conditions for putting that scheme into effect reflect those laid down in the Restructuring Guidelines.

(43) First, the Restructuring Guidelines provide that it is only firms in difficulty fulfilling the express criteria in points 4 to 8 of the 1999 Restructuring Guidelines or in points 9 to 13 of the 2004 Restructuring Guidelines which are eligible for restructuring aid. Those rules set strict criteria for defining what constitutes a firm in difficulty. In accordance with point 5 of the 1999 Restructuring Guidelines and point 10 of the 2004 Restructuring Guidelines, in order to be regarded as being in difficulty a firm must, in the case of a limited company, have lost more than half of its capital, at least one quarter of that capital over the preceding 12 months or, for all other types of company, fulfil the criteria for being the subject of collective insolvency proceedings. Point 11 of the 2004 Restructuring Guidelines also states that, in addition to those criteria, a firm may still be considered to be in difficulties where the usual signs are present, such as increasing losses, diminishing turnover, rising financial charges and so on (pursuant to point 18, Member States may take that criterion into account also for restructuring aid granted to firms in the fisheries sector under an aid scheme).

(44) The Commission observes that the Decree of 10 February 1998 does not contain any criterion of the same or similar kind. Aid granted by Italy may thus benefit firms which do not fulfil the criteria referred to in those Guidelines and which therefore may not be firms in difficulty.

(45) Secondly, given that that aid scheme is directed at small and medium-sized undertakings, in accordance with point 67(a) of the 1999 Restructuring Guidelines the criteria set out in points 31 to 34 of those Guidelines are applicable. The same conditions, in accordance with point 82(a), are restated in points 34 to 37 of the 2004 Restructuring Guidelines. According to those provisions, the restructuring plan must, inter alia, restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions, it must describe the circumstances that led to the firm's difficulties and must provide for a turnaround that will enable the firm, after completing its restructuring, to cover all its costs; the grant of the aid is possible only if the restructuring plan submitted contains all of those elements.

(46) The Commission observes that Italy did not set up a procedure to check fulfilment of those conditions. The information communicated in reply to the initiation of the formal investigation procedure refers only to the general conditions in the Decree of 10 February 1998 for the grant of such aid. But those conditions do not lay down objective criteria for checking that the individual restructuring plans of the firms concerned are really drawn up in accordance with those principles. There is therefore no guarantee that the conditions laid down in points 31 to 34 of the 1999 Restructuring Guidelines or in points 34 to 37 of the 2004 Restructuring Guidelines have been fulfilled.

[1] OJ C 84, 3.4.2008, p. 10.

(47) Thirdly, according to points 40 and 41 of the 1999 Restructuring Guidelines, applicable to small and medium-sized enterprises under point 67(c) of the same, beneficaries must make a significant contribution to the restructuring plan from their own resources in order to limit aid to the minimum. The same principle is found in points 43 and 44 of the 2004 Restructuring Guidelines, applicable pursuant to point 82(c).

(48) In accordance with the Decree of 10 February 1998, the aid is granted in the form of a non-repayable grant up to a maximum of 40 % of eligible expenditure or a soft loan for an amount of up to 85 % of that expenditure. There is no distinction depending on the type of eligible cost (see Part 2 'Description' above). The Commission infers therefrom that the contribution may concern any of the costs in question, for example expenditure for the modernisation of plant, the funding of property losses, debt write-offs and so on.

(49) It is therefore possible that some beneficiaries have made a significant contribution to the implementation of the restructuring plan which concerns them. However, the Commission observes that Italy did not lay down any criterion for adjusting the amount of the aid granted on the basis of the contribution of each beneficiary. The only criterion contained in the Decree of 19 February 1998 is a criterion relating to the order in which the aid applications are received. For those reasons, the Commission considers that Italy did not lay down, in that aid scheme, any procedure for checking that the conditions of contribution of beneficiaries from their own resources and limitation of aid to the minimum have been fulfilled. It is therefore possible that some aid beneficiaries have not fulfilled those conditions.

(50) Fourthly, point 67(b) of the 1999 Restructuring Guidelines states that the compensatory measures to be taken to avoid undue distortions of competition, set out in points 35 to 39 of those Guidelines, do not apply to small and medium-sized undertakings. On the other hand, according to point 82(b) of the 2004 Restructuring Guidelines the compensatory measures, described in points 38 to 42 of those Guidelines, must be taken when a medium-sized undertaking is an aid beneficiary. The Commission observes that Italy did not provide for putting into effect compensatory measures of that type when a medium-sized undertaking benefited from the aid scheme.

(51) Finally, when cooperatives whose principal activity is fishing at sea benefited from that aid scheme, Italy did not submit a plan to reduce fleet capacity, as required by point 2.2.4 of the 2001 Fisheries Guidelines, point 4.1.2 of the 2004 Fisheries Guidelines or point 4.2 of the 2008 Fisheries Guidelines.

(52) The Commission also points out to Italy that the Communication of 6 March 2006 did not change the criteria and conditions applicable to restructuring aid schemes. The purpose was to invite the Member States to use several instruments for the purpose of resolving the difficulties facing the fisheries sector. Among the instruments proposed by the Commission is the opportunity for the Member States to set up rescue and restructuring aid schemes. In that Communication, the Commission wished to specify how to apply the Restructuring Guidelines, but did not make any reference to the possibility of derogating from them. The Restructuring Guidelines remain applicable in their entirety.

(53) Finally, the Italian authorities have not put forward other arguments or submitted additional information to suggest that the aid in question could be compatible with the common market on the basis of other provisions of the EC Treaty or the rules, frameworks or guidelines on State aid.

6. **CONCLUSION**

(54) The Commission considers that Italy unlawfully put into effect, in breach of Article 88(3) of the EC Treaty, the aid scheme for the restructuring of cooperatives in the fisheries sector and of their consortia.

(55) On the basis of the analysis set out in Part 5 of this decision, the Commission finds that that aid scheme is incompatible with the common market.

7. **RECOVERY**

(56) Pursuant to Article 14(1) of Regulation (EC) No 659/1999, where State aid granted unlawfully is incompatible with the common market, it must be recovered from the beneficiaries. The objective is achieved when the aid at issue, together with any default interest, is repaid by the beneficiaries or, in other words, by the firms who actually received it. However, Article 14(1) states that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.' In this case, it is appropriate to examine whether a general principle of Community law, such as the principle of the protection of legitimate expectations or legal certainty, might apply to preclude the recovery of the unlawful and incompatible aid from the beneficiaries.

(57) It is for the Member States to ensure that national measures are compatible with Community rules in the State aid sector in order to avoid distortions of competition; moreover, they are required to notify any State aid to the Commission, in accordance with Article 88(3) of the EC Treaty, and to refrain from putting that measure into effect until it has been examined. For that reason, so far as concerns the possibility of beneficiaries relying on the principle of the protection of legitimate expectations in order to avoid recovery of unlawful and incompatible aid, it is evident from the case-law of the Court that 'undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.' ([1]).

(58) In Case 265/85 *Van den Bergh en Jurgens* v *Commission* ([2]), the Court of Justice stated that '… any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a community measure likely to affect his interests, he cannot plead that principle if the measure is adopted'.

(59) In order to adapt existing aid in line with the new 2001 Fisheries Guidelines, the Commission proposed that Member States amend their existing aid schemes relating to aids in the fishery sector by 1 July 2001 at the latest. The case-law ([3]) confirmed that such a proposal set out in the Guidelines is one element of the regular, periodic cooperation with which the Commission, in cooperation with the Member States, is to keep under constant review the systems of aid existing and propose to them any appropriate measures required. In that manner, an agreement between the Commission and each Member State on a complete list of all existing aid schemes would be impractical and it is reasonable for the Member States to remain responsible for adapting their schemes when necessary. That is particularly true since they participate in drawing up the new guidelines and are well aware, before those guidelines come into force, of the impact which they will have on existing aid schemes.

(60) Italy submits that it considered that the measure at issue was merely a renewal of measure NN 24/98 approved by the Commission on 11 March 1999 and therefore was existing aid. In the Commission's opinion, the measure was existing aid only up to 30 June 2001. In that respect, as stated above, the Commission observes that Italy, under the appropriate measures mechanism, accepted the proposal to amend their existing aid schemes in the fisheries and aquaculture sector after the adoption of both the 2001 Fisheries Guidelines and the 2004 Fisheries Guidelines. From 1 July 2001 the aid therefore became new aid, in view of the fact that it should have been adapted in line with the new 2001 Fisheries Guidelines.

(61) On the basis of Article 26(1) of Regulation (EC) No 659/1999, it is conceivable that the fact that the Commission did not publish the Italian Government's acceptance of the 2001 Fisheries Guidelines might have led some beneficiaries to believe in good faith that the national measure in question was still to be regarded as existing aid. Article 26 stipulates that the Commission must publish 'a summary notice of the decisions which it takes pursuant to …. Article 18 in conjunction with Article 19(1).' Under Article 18 of that Regulation, 'where the Commission … concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned.' Article 19(1) of Regulation (EC) No 659/1999 provides that, when the Member State accepts the proposed appropriate measures, the Commission 'shall record that finding' and inform the Member State thereof.

(62) The Commission did not publish in the *Official Journal of the European Communities* each Member State's acceptance of the appropriate measures it proposed for the implementation of the new 2001 Fisheries Guidelines. It is therefore difficult for the Commission to prove that the beneficiaries were correctly informed of the acceptance of the Italian Government and the change in the status of the aid which resulted. By contrast, that was done for the 2004 Fisheries Guidelines by means of a notice ([4]).

(63) Accordingly, although there is a principle according to which economic operators may not, in general, rely on the principle of the protection of legitimate expectations as far as concerns unlawful State aid, the Commission notes that, in the present case, until the publication of the notice of acceptance of the appropriate measures, on 11 November 2005, a circumspect and prudent economic operator could properly be entitled to consider that the State aid in question was still an existing scheme and it had not therefore become a new aid scheme.

([1]) Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 121.

([2]) Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44.

([3]) Case C-311/94 *Ijssel-Vliet* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraphs 36 to 44.

([4]) OJ C 278, 11.11.2005, p. 14.

(64) Consequently, in the present case the Commission considers that the recovery of the aid granted up to 11 November 2005 might run counter to the principle of the protection of legitimate expectations and legal certainty. It follows that, in accordance with Article 14 of Regulation (EC) No 659/1999, recovery is sought in respect only of the aid granted after 12 November 2005.

(65) This decision concerns the aid scheme in question and must be implemented with immediate effect, in particular so far as concerns the recovery of all the individual aid granted under that scheme, except for that granted to specific projects which, when it was granted, fulfilled all the conditions set in the *de minimis* Regulation or for an applicable exemption or in an aid scheme approved by the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme set up for the restructuring of cooperatives in the fisheries sector and for their consortia and unlawfully put into effect by Italy, in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Article 2

The individual aid granted to a fisheries cooperative or to one of its consortia under the regime referred to in Article 1 of this Decision is not aid if, at the time at which it was granted, it fulfilled the conditions laid down in the Regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 [1] and applicable at that time.

Article 3

Individual aid granted under the scheme referred to in Article 1 of this Decision which, at the time at which it was granted, fulfilled the conditions laid down by a regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other approved aid scheme is compatible with the common market up to the maximum intensity applicable to that type of aid.

Article 4

1. Italy is required to make the beneficiaries repay the incompatible aid referred to in Article 1 granted from 12 November 2005.

2. Interest shall be paid on the amounts to be repaid, from the date on which they were made available to the beneficiaries until they are actually repaid.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 [2].

4. Italy shall cancel all outstanding payments of the aid referred to in Article 1 from the date of adoption of this Decision.

Article 5

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Italy shall ensure that this Decision is put into effect within four months of the date of its notification.

Article 6

1. Within two months of notification of this Decision, Italy shall submit the following information:

(a) the list of the fisheries cooperatives and their consortia which have received aid under Articles 2 and 3 and the total amount received by each of them;

(b) the total amount (principal and interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and those planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Italy shall keep the Commission informed of the progress of the national measures adopted to implement this Decision until recovery of the aid referred to in Articles 1, 2 and 3 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and those planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Italian Republic.

Done at Brussels, 28 October 2009.

For the Commission

Joe BORG

Member of the Commission

[1] OJ L 142, 14.5.1998, p. 1.

[2] OJ L 140, 30.4.2004, p. 1.