IV

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

COMMISSION DECISION

of 28 October 2009

on aid scheme C 61/03 (ex NN 42/01) implemented by Italy for the aeronautical industry

(notified under document C(2009) 8097)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/564/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 those provisions [1],

Whereas:

(1) The measure under assessment concerns individual aid for two R&D projects in the aeronautical industry (A139/AB139 and BA609). The aid was granted by Italy on the basis of Act No 808/1985 'Interventi per lo sviluppo e l'accrescimento di competitività delle industrie operanti nel settore aeronautico (Measures to develop and boost the competitiveness of the aeronautical industry)' (hereinafter 'Act 808/85'). The Act was adopted by the Italian Parliament on 24 December 1985. The Commission approved the scheme in 1986 [2]. Aid for these two projects was omitted from the scope of Commission Decision 2008/806/EC [3] because they raised the issue of the applicability of Article 296 of the EC Treaty and at the time the Commission did not have sufficient information to reach a conclusion on its assessment.

1. PROCEDURE

(2) On 1 October 2003, following the submission of a complaint and after evaluation by independent experts, the Commission initiated the formal investigation procedure (hereinafter 'the first opening decision') with regard to six aid schemes for R&D projects that had not been individually notified by Italy. For the six cases, the Commission raised doubts about their compatibility with the rules applicable to R&D aid [4].

(3) By decision of 22 June 2005 [5], the Commission decided to extend the scope of the procedure (hereinafter the 'second opening decision') to the entire application of Act 808/85, including projects that Italy claimed to fall within the scope of Article 296. On 12 October 2005 the second decision was published [6].

(4) By letter of 17 June 2005, the Italian authorities pointed out that the scope of the two opening decisions touched on issues that were sensitive for national security.

(5) The Commission replied to the letter of 17 June 2005 by letter of 15 July 2005, in which it stated that the Commission's investigations would be confined to civil aspects and that the purpose of assessing projects that were a matter of national security was precisely to exclude them from the scope of the final decision.

(6) On 11 March 2008, the Commission adopted Decision 2008/806/EC on several individual R&D projects financed by Italy.

(7) Paragraph 419 of Decision 2008/806/EC reads as follows: 'The Commission cannot reach a conclusion, however, on the two projects regarding whose military character it expressed doubts in the second initiating decision. The Commission reserves the right to ask Italy for further information on these projects with a view to a decision in the near future.'

[1] OJ C 16, 22.1.2004, p. 2 and OJ C 252, 12.10.2005, p. 10.
[2] Case N 281/84, letter SG(86)5685 of 14 May 1986.
[3] OJ L 284, 28.10.2008, p. 1.
[4] The 1996 Community Framework for State aid for R&D (OJ C 45, 17.2.1996, p. 5) or the 1986 Community Framework for State aid for R&D (OJ C 83, 11.4.1986, p. 2).
[5] C(2005) 1813 final.
[6] OJ C 252, 12.10.2005, p. 10.

(8) In several of the letters submitted to the Commission during the examination procedure, the Italian authorities also included references to the above two projects. By letter of 24 April 2007, the Italian authorities provided two detailed memos on the two projects.

(9) On 4 May 2007, a meeting took place at the premises of the Italian Permanent Representation to the European Union, where the Italian authorities allowed a delegation from the Commission to consult documents on the two projects, which were classified for national security reasons.

(10) The Commission requested additional information on the two projects by letter of 5 May 2008.

(11) Italy submitted information on the two projects on 9 July 2008.

(12) On 29 September 2008, the Italian authorities hosted a site visit for two Commission officials at the military base of […] (*) where the BA609 is undergoing tests and at the head offices of AgustaWestland in Cascina Costa (in the province of Varese).

(13) By letter of 7 October 2008, Italy provided a record of the site visit, with a detailed list of the military facilities visited and the evidence provided about the project under assessment.

(14) By letter of 9 October 2008, Italy announced that it would be submitting further documentation on the projects. It also stated its willingness to continue its collaboration with the Commission, even if the projects were relevant for national security purposes and thus fell within the scope of Article 296.

(15) By letter of 29 October 2008, Italy provided additional information on the BA609 project.

(16) By letters of 31 March, 7 May and 24 July 2009, Italy submitted further information on the project under way involving the BA609, including the latest financial developments. The Commission replied by letter of 22 April 2009.

2. REASONS FOR OPENING THE FORMAL INVESTIGATION

(17) In the second opening decision, the Commission expressed serious doubts that the AB139 (or A139, hereinafter 'A139') and BA609 projects could be classified as military as the Italian authorities claimed.

(18) As regards the A139 project, the Commission noted for instance that AgustaWestland's website [1] gave the following list of applications for this product: Emergency Medical Service, Fire Fighting, Harbour Pilot Shuttle, Law Enforcement, Offshore, Search and Rescue, and VIP/Corporate. The Commission considered that none of these applications was military.

(19) As regards the BA609, the Commission noted for instance that Bell Agusta's website [2] contained a list of Frequently Asked Questions, where, to the question 'Does the BA609 carry both civil and military configurations?', the company replied 'The BA609 is currently being planned in civil configurations only. The closest to a military configuration would be the SAR [Search and Rescue] configuration for the Coast Guard type aircraft. No military configurations are available at this time'.

(20) Based on the information available when Decision 2008/806/EC was taken, the Commission was still unable to reach a conclusion on the two projects. It reserved the right to put further questions to Italy in order to clarify certain aspects of the projects before taking a decision. Therefore, it excluded the two projects from the scope of that decision.

3. COMMENTS BY THIRD PARTIES ON THE TWO PROJECTS

(21) The observations submitted by an anonymous third party (hereinafter 'third party') after the second opening decision and during the proceeding contained a number of specific comments on the two projects under assessment.

(22) The third party doubted that the two projects under assessment could be considered military. In its view, the AW139 was a purely civil helicopter because it had no military application. The fact that a few helicopters had been bought by armies in various parts of the world did not alter the civil nature of the AW139.

(23) The third party noted that the distinction between military and civil helicopters is made at the certification stage, usually when the project is first certified. It added that the typical characteristics of military programmes would involve a phase for defining military specifications; a development contract with the Ministry of Defence; and an industrialisation contract with the Ministry of Defence. According to the third party such steps would be public and referred to in the national defence budget.

(24) As regards the BA609, the third party quoted the public information provided by Agusta, which at that time only mentioned civil applications for the tilt-rotor.

(*) Confidential information related to the protection of essential interests of national security or business secrets.

(1) http://www.agustawestland.com/products01_01.asp?id_product=15
(2) http://www.bellagusta.com/air_ba_faq.cfm#8

(25) The third party also submitted that to develop the two projects Agusta needed substantial sums of money, which it could only have obtained as a result of generous state support.

(26) In particular, the third party argued that an investment of at least EUR 700 million would have been needed to develop the A139. The third party further argued that Agusta's participation in the joint project with Bell on the BA609 would have cost at least EUR 200 million.

(27) The third party maintained that, according to the information available to the public, Agusta's R&D expenditure did not cover these costs.

4. DESCRIPTION OF THE PROJECTS BY ITALY

(28) In the second opening decision the Commission raised doubts whether the two projects brought to its attention — A139 and BA609 — could be classified as military, as the Italian authorities claimed.

(29) As indicated in Decision 2008/806/EC, the Commission was unable to reach a conclusion on the two projects on the basis of the information available to it.

(30) The beneficiary of the projects under assessment is Agusta [1], a member of the Finmeccanica group. Agusta specialises in helicopters. In its submissions, Italy indicated that its observations were presented together with Finmeccanica.

(31) First, it is worth recalling that the Italian Government has used Act 808/85 to fund projects in both the civil and the military field. According to the figures provided by the Italian authorities (recitals 171-172 of Decision 2008/806/EC), out of a total of some EUR 3 billion, EUR 1 311 million had been used for projects relating to national security.

(32) Italy also provided a table listing the programmes relating to national security that were funded under this scheme. The use of a civil law for military projects explains why some projects are not mentioned in the national defence budget.

(33) In particular, Italy claimed that the support granted to the two projects was justified on the grounds of national security objectives and it invoked Article 296 of the EC Treaty.

4.1. A139 project

(34) According to the Italian authorities, after initial discussions in the NATO context, the A139 project began life as a cooperation project with the Russian firm Kamov, but this ended in 1997. Subsequently the Italian Government issued an official request via the Italian Ministry of Defence concerning a tactical transport helicopter in support of combat operations.

(35) The Italian authorities showed the Commission the official request for a feasibility study dated […], with the military requirements.

(36) They also showed the technical specifications for the military helicopter, dated […].

(37) Italy indicated that the work carried out by Agusta until 1999 consisted of providing the initial design and the technical feasibility solutions needed to comply with the request for a tactical transport helicopter for combat support. It carried out tests and validation activities on a demonstrator, such as: […] (in 1998) and […] (in 1999).

(38) In 2000, according to Italy, the activities continued with […].

(39) According to the Italian authorities the project funded under Act 808/85 ended with the development of a military demonstrator.

(40) The Italian Government's decision to grant support to the A139 dated from 1998. The government support was paid to the company in […] instalments, as follows:

Table 1

Financial support to the A139 project

(in EUR)

Year	Amount awarded per year	Combined total
[…]	[…]	[…]
[…]	[…]	[…]
[…]	[…]	[…]
[…]	[…]	[…]

[1] Now AgustaWestland, following its merger with Westland.

(in EUR)

Year	Amount awarded per year	Combined total
[…]	[…]	[…]
[…]	[…]	[…]
[…]	[…]	[…]
[…]	[…]	[…]

(41) Italy's explanation for the delays in the development of the military helicopter was that the precise operational needs for the A139 were further adjusted by the Ministry of Defence to take into account the experience of military peace-keeping missions abroad (Albania, Bosnia, Macedonia, Timor, and Kosovo). These adjustments concerned […].

(42) Italy further indicated that the A139 was intended to replace the existing fleet of Bell 212, 205 and 412 helicopters. However, Italy added that the events of 11 September 2001 had forced it to rethink its planning, in order to have […].

(43) According to Italy, the A139 project was different from the subsequent AW139 civil helicopter. Instead, the A139 project under examination by the Commission was at the basis of the development of the AW149 military helicopter.

(44) Italy provided a comparison of the technical characteristics of the two helicopters: AW139 and AW149. According to Italy, the comparison showed that:

— the AW139 has all the characteristics of a civil helicopter,

— the AW149 has all the characteristics of a military helicopter,

— the spill-over effects in terms of know-how between the two helicopters are very limited because they are fundamentally different aircraft.

(45) The following table was compiled from the information provided by Italy. The third column includes a comparison between the two helicopters, i.e. whether the parts developed for the AW149 are different from those of the AW139.

Table 2

Comparison between the AW139 and AW149 projects

	Civil version AW139	Military version AW149	AW149 versus AW139
Main rotor diameter	13,8 m	14,6 m	New
Tail rotor diameter	2,7 m	2,8 m	New
Cockpit size		Width + 3 cm	New structure design

	Civil version AW139	Military version AW149	AW149 versus AW139
Cabin		Length + 30 cm Width + 26 cm	New structure design
Landing gear	Not crashworthy Ground clearance 42 cm	Crashworthy (based on military standards) Ground clearance 50 cm	New design
Tail boom		+ 45 cm	Modification or new
Take-off weight	6 400 kg; civil certification JAR/FAR 29	6 800-7 000 kg (without mission equipments); certification AR 56 (utility version) and DEF STAN 00-970 (UK Ministry of Defence)	New
Engines	Basic PW PT6-67C	PW PT6-67C powered (according to Italy)	New
Transmission		+ 25 % torque available	New mechanical elements with same housing
Auxiliary Power Unit	No	Accessory Drive Module	New
Fuel system	Crashworthy according to civil standards JAR/FAR29	Crashworthy according to military standards; self-sealing	New design
Weapons	No	Guns 7,62 mm; equipped to install a launcher 7 × 70 mm; machine guns 20 mm	New
External loads	Standard for utility (search and rescue)	Winglets to bear loads according to NATO standards	New design
Ballistic protection	No	Yes	New
Avionic system	Normal civil systems	Flexible system able to integrate new instruments for missions, communications and navigation according to military requirements	New

(46) Italy also provided information on the development of the AW139. A Ground Test Vehicle was developed in 2000 and a demonstrator/prototype capable of flying was assembled in 2001. In 2000 and 2001 the first prototypes were made, and development and certification was started. In June 2003 the helicopter was certified by EASA (later by the FAA in the US). In 2004 a new certification was issued which allowed the first deliveries in a basic version. In 2005 there was further certification of auxiliary installations for a more complete helicopter, with more avionics such as meteorological radar, infrared, emergency floaters, auxiliary tanks, etc.

(47) Italy also provided clarifications on Agusta's financial situation and its funding of R&D projects. It has provided the list of risk and revenue sharing partners involved in the development of the AW139, which allowed Agusta to reduce its initial investment in the project significantly.

(48) Italy provided the overall figures for Agusta's R&D expenditure. In particular, according to Italy, Agusta's investment in R&D amounted to some [20-30] % of its annual turnover (average of EUR [550-700] million in the period 1998-2000). Military projects funded under Act 808/85 accounted for […] % of total R&D expenditure. The rest was spent either on civil projects co-funded by the State (10,30 %, financed under Act 808/85) or on R&D projects with own funding ([35-45] %). Funding for the R&D project that became the AW139 reached a level of EUR […] million per year ([…] % of the […] %).

(49) Italy also provided a statement by Agusta's auditors (PricewaterhouseCoopers) dated 15 September 2006, according to which:

— data concerning costs for materials, equipment and other external costs are correctly extrapolated from the company's analytical industrial accounting for the project,

— cost of labour is determined on the basis of standard hourly rates, which are not above those set by the Ministry of Defence, and

— the data on funding correspond to the amounts granted by the Ministry for Industry under Act 808.

(50) Finally, as regards the allegation by the third party that the first certification is essential for defining the nature of the R&D project, the Italian authorities replied that certification is not a sufficient condition to decide on the nature of a helicopter. To back up their argument, the Italian authorities provided a long list of helicopters that had first received military certification and then civil certification, or vice versa, or even underwent two parallel certification processes.

(51) Italy further argued that it has recently become normal practice to require military helicopters to be certified by the civil authorities as well and then limit the military certification just to some elements (such as avionics and armaments).

(52) In conclusion, Italy maintained that civil certification does not rule out the original development of a helicopter having been funded for military purposes (as the Italian authorities claim was the case for the A139) and the subsequent development and certification of a civil version being funded entirely by the company through its own funds.

4.2. **BA609 project**

(53) The BA609 project concerns the development of a tilt-rotor aircraft, which is an aircraft that can take off and land as a helicopter and fly like an aeroplane. The rotors on the wings are placed vertically during take-off and landing and then horizontally during flight. It combines the flexibility of a helicopter in taking off and landing in small spaces with the capacity to fly longer distances at much higher speeds. At the same time, given its size and characteristics, compared with other helicopters, it still needs to land on prepared ground (cement platform) which means it is unsuitable for missions in the desert, or for landing on oil platforms.

(54) The BA609 project is led by the US company, Bell. According to Italy, the origins of the BA609 derive from the V22, a tilt-rotor aircraft used by the US Government.

(55) Italy maintains that the civil version is developed by Bell together with Agusta, with their own funding, through BellAgusta, which is 60 % controlled by Bell and 40 % by Agusta.

(56) According to Italy, the parallel development of the two versions of the BA609 would be as follows.

Table 3

Stages in the BA609 project

Year	Stages in the development of the BA609 civil helicopter	Stages in the development of the BA609 military helicopter
1996	Bell starts development	
October 1998	Agreement Bell Agusta	[…]
October 1998		[…]
December 2002	First ground tests of the BA609 prototype	
March 2003	First flight of first prototype	
2004		[…]
September 2005		[…]

Year	Stages in the development of the BA609 civil helicopter	Stages in the development of the BA609 military helicopter
July 2006	First flight of second civil prototype	
2012	Certification expected to be issued	

(57) In May 2007 the Italian authorities showed the Commission the documents concerning the military requirements.

(58) Italy also provided letters from the Navy expressing its strategic interest in the development of the BA609. Italy indicated its intention that […] should also be able to carry tilt-rotor aircraft on board.

(59) According to Italy, the work carried out by Agusta in Italy on the BA609, which is the project Italy says that it is supporting, concerns a military version of the BA609, separate and different from the civil version of the BA609 currently under development in Bell's US plants.

(60) Italy provided detailed information on the technical characteristics of the two versions — military and civil — which according to the Italian authorities confirms that a military version exists:

— the military version is heavier (8 t versus 7,6 t) and has a heavier take-off weight (18 000 lb versus 16 800 lb),

— in the military version the structural cell is reinforced in order to have sliding doors, ballistic protection, specific reinforcements where additional loads are added, and energy absorption in the fuselage, responding to more stringent requisites for crashworthiness,

— the engine for the military version is the higher-powered PWC PT6C-67 (rather than the PWC PT6C-67A),

— the military version has an auxiliary power unit (APU) to provide power while the engines are stopped and increase the operational capacity of the aircraft; the civil version does not have an APU,

— the landing gear for the military version is designed for hard landings and impacts, typical of military use; the civil version is equipped with retractable landing gear,

— the military version is equipped with a crashworthy fuel system which is self-sealing and which can be refilled during flight, in line with military requirements for other helicopters; the civil version of the fuel system has more limited crashworthiness,

— the military version has other specific characteristics which are not present in the civil version: it is equipped with 20 mm machine guns and rocket launchers; it allows for additional external loads for military use (to allow entry and exit of troops, etc.); it is equipped with ballistic protection for wings and rotors, with armoured cockpits, etc.

(61) On 29 September 2008 Commission officials made a site visit at the invitation of the Italian authorities. The Italian authorities showed them the military base where the BA609 is undergoing testing and Agusta's head offices, with its R&D departments.

(62) The Italian authorities showed them:

— the Telemetry Control Room and information about ongoing operations on a test flight of the BA609,

— the flight and the landing by the second prototype of the BA609 ([1]), including the tilting of the rotors from aircraft to helicopter mode,

— the BA609 itself, with a presentation by its pilot,

— the third prototype of the BA609, which is under development in a hangar at the military base.

([1]) The first prototype is being tested at the Bell Agusta Aerospace Company in Texas.

(63) While at the military base, Agusta's CEO gave a detailed presentation of the BA609. A representative from the Italian Ministry of Defence gave some details on the military configuration and missions with respect to that Ministry's requirements.

(64) Evidence was also produced about the concerns raised by the US authorities responsible for the V22, […] [1].

(65) Information was also provided about the evolution from the basic avionics of the tilt-rotor technology to the military mission configurations […].

(66) In the security segregated area at Agusta's head offices in Cascina Costa, the Commission officials were shown the following items directly related to the BA609:

— a one-to-one scale mock-up of the BA609 in its […] configuration, with relevant mission equipment […],

— the mission system integration laboratory, where it was possible to see simulated missions with […].

(67) Italy provided information on the support granted to the BA609, under two aid decisions. The first decision concerned the period from 1998 to 2000, and amounted to around EUR […] million.

(68) The second decision covered activities in the period 2001-2004, and amounted to a further EUR […] million. These activities are still in progress because the project has encountered major delays, and the latest instalments were paid by the Italian Government in […].

(69) Italy provided a detailed table on the amount of support [2].

Table 4

Financial support for the BA609 project

(in million EUR)

	1998	1999	2000	2001	2002	2003	2004	Total
Military technologies of the platform								
Tilt rotor simulation code	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Power transfer system tech.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Flight control system	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Flight test HW and SW	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Sub-total	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Further military and security configuration of the BA609								
Architecture	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Airframe	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Systems	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Avionics	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Sub-total	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

[1] […]

[2] It should be noted that there is a slight discrepancy between the amounts indicated by Italy in the table and the information provided by Italy on the amounts in the two aid decisions.

(70) Italy has also provided information on the R&D expenditure by Agusta (see recital 48. Expenditure on the civil BA609 in the period 1998-2000 was EUR […] million per year on average ([…] % of the […] % mentioned above).

(71) As stated in recital 49, for the A139, Italy has provided a statement by Agusta's auditors (PricewaterhouseCoopers).

(72) According to Italy there has been no technological spillover from the military project to the civil project developed by BellAgusta. Furthermore, Italy maintains that even if there were a transfer of know-how, it would be very difficult to quantify the technological spillover.

(73) Italy recognises that the basic technology of helicopters is always essentially dual, and the same would apply to the tilt rotor. Italy further notes, however, that in the case under assessment, the matter is even more complex as the project concerns a very innovative aircraft, born out of a much larger-scale military project.

(74) Finally, Italy notes that the development of the tilt-rotor aircraft would have no impact on competition, since there are no alternative and comparable projects in Europe or indeed the world.

(75) By way of conclusion, Italy states that the only R&D project concerning a tilt-rotor that it had intended to support, the BA609, concerns an aircraft intended for military use.

4.3. **Conclusions by Italy on the two projects**

(76) For both aircraft, the Italian authorities therefore invoke Article 296 of the EC Treaty. Accordingly, they ask the Commission to close the current investigation procedure as it serves no purpose because the measures at issue fall outside the scope of Articles 87 and 88 of the EC Treaty.

(77) As mentioned in several submissions, the Italian authorities also indicate that, if the Commission has competition concerns related to the measures adopted by the Italian Government, then it should examine these measures together with Italy on the basis of Article 298 (1) of the EC Treaty.

5. **ASSESSMENT**

(78) In essence, the purpose of the Commission's assessment is to establish whether the support granted by Italy to the above two projects falls within the scope of Article 296 of the EC Treaty.

(79) If the measure adopted by the Italian Government in support of the two projects does not fall within the scope of Article 296 of the EC Treaty, as the third party contends, the Commission would need to assess them on the basis of Article 87 of the EC Treaty, and in particular the rules applicable to the assessment of aid for R&D projects. If, on the contrary, the Italian measures fall within the scope of Article 296 of the EC Treaty, competition rules would not apply [1].

(80) The information submitted by Italy and the site visit have enabled the Commission to reach a conclusion on the two projects and on the measures taken by the Italian Government in support thereof.

(81) It should be recalled from the outset that the military nature and purpose of equipment is, in itself, insufficient to justify an exemption from Community rules on the basis of Article 296 of the EC Treaty. Such a measure must also be necessary for the protection of a Member State's essential security interests. According to the case law of the European Court of Justice, Article 296 of the EC Treaty must be interpreted in a restrictive way and limited to exceptional, clearly defined cases. Moreover, the burden of proof as to whether the conditions for application of the exemption are met lies with the Member States.

(82) First, therefore, the assessment must start by verifying the nature of the two research projects.

(83) Second, the assessment must examine whether Italy has demonstrated that the measures taken were considered necessary for the protection of its essential security interests, as regards the production of or trade in arms, munitions and war material — in other words whether Article 296 of the EC Treaty applies.

(84) Third, the assessment will also examine whether such support may have affected the conditions of competition in the common market as regards the development of civil helicopters by Agusta.

(85) In assessing the two projects, it is important to stress that the measures under examination concern the R&D phases. It is not only the nature of the final products per se which matters, but also the nature of the work carried out during the R&D phase. Further, it should be noted that the projects under assessment were limited to the R&D phase, and it is not possible to assess them on the basis of an industrialisation contract, as the third party requires, which takes place at a later stage.

[1] See Case T-26/01 *Fiocchi munizioni SpA* v *Commission* [2003] ECR II-3951, paragraph 59.

(86) Italy has submitted significant evidence on the two projects and has allowed a site visit to a military base.

(87) Finally, it should be recalled that Italy has used the same legal basis, Act 808/85, to support both civil and military projects. As noted in Decision 2008/806/EC the use of a civil law as a legal basis to support military projects on the one hand contributed to the uncertainty about the nature of the projects financed, but on the other hand explains why such projects were absent from the defence budget.

5.1. **A139 project**

(88) The documentation provided by the Italian authorities show that the A139 R&D project supported by the Italian Government was intended for uses linked to national security.

(89) In particular, in the case of the A139, the project under assessment concerned only the development of a demonstrator, which is one of the very first phases of the development of a helicopter. Italy has explained that the demonstrator served only for the development of the AW149 military helicopter.

(90) Italy has shown the military documents which defined the missions to be accomplished by the military helicopter (see recital 35).

(91) Italy has also shown the military document containing the technical specifications of the project under development (see recital 36). These specifications are the result of the R&D project. According to the third party, military requirements and military technical specifications are two steps that characterise the development of military programmes.

(92) According to the information provided and the evidence produced by Italy, this demonstrator would be used to develop the AW149 helicopter, whose final development has taken much longer than initially planned.

(93) It should be noted that the aims and characteristics of the AW149 are indeed those of a military helicopter [1].

(94) Italy has also provided information on the overall public funding granted to the project under assessment, and on general investment in R&D activities by Agusta. These figures are compatible with the financing of only the initial development of a demonstrator.

(95) Italy provided a statement from the company's auditors, which certifies that the expenditure for the A139 project was recorded as military expenditure and corresponds to the parameters set by the Italian Ministry of Defence.

(96) The missions defined for the AW149 primarily involve air support activities for battlefield operations, which are essential for national security.

(97) The information provided by Italy therefore points to the conclusion that the AW149 is a helicopter that is essential for the national security purposes defined by the Ministry of Defence and subsequently adapted on the basis of experience gained from the Italian Army's operational missions [2].

(98) The information provided by Italy shows that the support measures taken by the Italian authorities for the A139 project were considered necessary for the protection of Italy's essential security interests as it allowed it to respond to military needs and to finance the development of arms production technologies, in this case military helicopters, which are included in the list referred to in Article 296(2). Therefore the assessment of this measure is that on the basis of the information available it is not possible to conclude that Italy had wrongly invoked Article 296.

(99) Italy argues that the A139 project would have been of no benefit to the development of the AW139 civil helicopter.

(100) At the same time, it is clear, however, that the company's use of the same acronym (A139) for a civil helicopter (AW139) raised doubts about the nature of the project.

(101) Italy has provided detailed information on the two helicopters and on their equipment. This has made it possible to conclude that the A139 civil helicopter (AW139) and the AW149 are two different helicopters.

(102) Italy's support was granted at the beginning of the R&D phase for the development of a helicopter with features that met specific strategic requirements of Italian defence.

[1] According to the information available to the public, for instance, on the company website, the AW149 is suited to battlefield support, combat SAR, reconnaissance, surveillance, medical evacuation, search and rescue, and command and control support roles.

[2] In the field of national security Member States frequently start projects in order to explore new technologies without necessarily reaching the industrialisation phase. It is inconceivable for military R&D projects to fall outside the scope of Article 296 of the EC Treaty because they were not successful or because there was no decision to exploit the results of the projects. Therefore, the existence of industrialisation contracts by the Ministry of Defence was not considered to be a necessary step for the application of Article 296 of the EC Treaty to R&D projects.

(103) The information provided by Italy on the military characteristics of the A139 project and the arguments by the third party on the civil nature of the AW139 are consistent. On the other hand, it is possible, and indeed likely, that the R&D activities carried out under the A139 assisted project have been of benefit to the development of the AW139 civil helicopter ([1]).

(104) It should be recalled that helicopters have features that allow dual use. According to Italy, it is not infrequent in this sector for companies to exploit R&D projects for military helicopters in order to develop civil helicopters.

(105) It is therefore possible to conclude that, while the Italian authorities have not been wrong in invoking Article 296 of the EC Treaty, it also appears that these measures had the effect of distorting the conditions of competition in the common market because they were also of benefit to the development of the AW139 civil helicopter.

(106) On the basis of Article 298(1), the Commission will therefore examine, together with the Italian authorities, how such measures can be adjusted to the rules laid down in the Treaty.

5.2. **BA609 project**

(107) As regards the BA609, the Italian authorities have provided sufficient information to prove that a military version of the tilt-rotor aircraft is under development.

(108) The Italian authorities have given a detailed presentation of the missions required from the BA609. They have produced evidence of the demand by the Ministry of Defence for such an aircraft. This is a step that the third party considers to be necessary for military projects.

(109) The Italian authorities also organised a site visit to a military base. The visit provided an opportunity to see actual prototypes of the aircraft under development and life-size mock-ups of the equipment and to verify that they are indeed for military use (see recitals 62 to 66).

(110) The Italian authorities have also provided information on the funding for the development of the aircraft.

(111) They have also provided a statement by the auditors, certifying that the sums paid by the Italian Government were used entirely by the company for military projects.

(112) Furthermore, the Italian authorities have explained that features of the tilt-rotor allow a strategic use of the aircraft for national security purposes, such as sea surveillance, which is of particular relevance for Italy given its geographic location in the central Mediterranean area.

(113) The demonstration of the development of the avionics systems, in particular, gave an idea of the potential national security missions that the tilt-rotor could carry out.

(114) The information provided by Italy shows that the support measures taken by the Italian authorities for the BA609 project were considered necessary for the protection of Italy's essential security interests as it allowed it to respond to military needs and to finance the development of arms production technologies, in this case military helicopters, which are included in the list referred to in Article 296(2). Therefore the assessment of these measures is that on the basis of the information available it is not possible to conclude that Italy has wrongly invoked Article 296 of the Treaty.

(115) On the other hand, it should also be noted that the parallel development of two versions of an aircraft, even if it is a very innovative aircraft like the BA609, inevitably brings a transfer of know-how from one part of the project to the other. Even if, as Italy has shown, there are substantial differences in the aircraft designed for military development compared with the version for the civil market, it is highly likely that the technological spillover from the work carried out on the military aircraft were of benefit to the civil version.

(116) This is particularly the case with the initial work carried out by Agusta on the tilt-rotor mechanisms.

(117) In order to assess this initial work correctly, it must also be acknowledged that such work — mainly carried out at the end of the 1990s — is very far removed from the final product, which will only be put on the market in 2013, according to the most recent forecasts — if not later ([2]).

(118) The information submitted by Italy on the military nature of the BA609 project is consistent with the information submitted by the third party about the civil nature of the BA609 aircraft. Italy recognises that there are two parallel developments. It is therefore possible, and indeed likely, that the work carried out under the funded BA609 project has benefited the civil aircraft currently under development ([3]).

(119) It is therefore possible to conclude that while the Italian authorities have not been incorrect in invoking of Article 296 of the EC Treaty, it also appears that these measures had the effect of distorting the conditions of competition in the common market because they were also of benefit to the development of the BA609 civil aircraft.

(120) On the basis of Article 298(1) of the EC Treaty, the Commission will therefore examine together with the Italian authorities how such measures can be adjusted to the rules laid down in the Treaty.

([1]) For instance through reduced R&D costs or through the use of technology initially developed under the A139 military project but then immediately used in the AW139 civil product.

([2]) The fact that the project is still under development has two further implications: there are no technical specifications finalised yet, as the project concerns a completely new technology which will require a complex certification process; and there cannot be an industrialisation contract, since the R&D project is far from being finished.

([3]) For instance through reduced R&D costs for the civil project, or through the use of technology initially developed for the BA609 military project and used at the same time in the BA609 civil project.

6. **CONCLUSION**

(121) In the light of all the above factors, the Commission is able to conclude that the support granted by the Italian Government under Act 808/85 to the two R&D projects, A139 and BA609, falls within the scope of Article 296.

(122) Consequently, there is no purpose in pursuing this procedure under Article 88(2) and it can be terminated.

(123) However, the Commission's examination has also shown that the measures have altered the conditions of competition in the common market as regards products not intended for specifically military purposes.

(124) For these reasons, pursuant to Article 298(1), the Commission must examine together with the Italian authorities in a separate proceeding how these measures can be adjusted to the rules laid down in the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measures adopted by Italy on the basis of Act 808/1985 in favour of two R&D projects, A139 and BA609, fall within the scope of Article 296 of the EC Treaty. Therefore there is no reason to pursue the current procedure.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 28 October 2009.

For the Commission

Neelie KROES

Member of the Commission