



EUROPEAN COMMISSION

Brussels, 20.01.2016
C(2016) 131 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.38613 (2015/C) (ex 2015/NN) – Italy
Alleged unlawful state aid for Ilva in A.S.**

Sir,

The Commission wishes to inform Italy that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- 1) Following two formal complaints by competitors (who wish their identities not to be disclosed) on 11 and 14 April 2014, the Commission opened a preliminary investigation on potential measures to the steelmaker Ilva S.p.A. in A.S. ("Ilva"). On 28 May 2014 the Commission requested information to Italy and forwarded the two non-confidential versions of the complaints. On 27 June 2014 and 29 August 2014 Italy requested two extensions of the deadline to reply, which were accepted on 30 June 2014 and 29 August 2014, respectively. On 9 July 2014 and 2

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September 2014 the complainants sent additional information. On 9 September 2014 Italy replied to the request for information and provided comments on the complaints. On 28 October 2014 an environmental organisation also sent additional information.

- 2) The Commission requested additional information on 24 October 2014 and on 30 October 2014. Italy replied to both requests on 13 and 21 November 2014. On 9 January 2015 and 17 March 2015 the Commission received additional information from an association of competitors. *Wirtschaftsvereinigung Stahl* (German Steel Federation) and *Eurofer* (European Steel Association) submitted formal complaints on 10 April 2015 and 24 June 2015, respectively. These complainants were supported on 25 June 2015 by the British Steel Association.
- 3) By letters of 20 March 2015 and 6 May 2015 the Commission requested additional information and forwarded the complaint of the German Steel Federation, to which Italy replied on 18 and 19 May 2015. Italy also submitted spontaneous information on 8 June 2015. On 18 September 2015, the Commission forwarded *Eurofer's* complaint to the Italian authorities and requested additional information. Italy provided additional information at a meeting on 22 September 2015 and by letters of 5 and 21 October 2015, further updated on 4 December 2015 and 7 January 2016.

2. DESCRIPTION

2.1. The beneficiary

- 4) Ilva is one of Europe's largest steelmakers, owned by the Riva family since 1996 and previously under the control of the Italian State through *IRI – Istituto per la Ricostruzione Industriale*. It employs more than 15,000 people overall, of which almost 12,000 employees in its main production site in Taranto (Apulia Region). Ilva has also other production units in Italy, France, Tunisia, and Greece.
- 5) Ilva produces iron and steel products included in the list of products which defines the steel sector, as provided in Annex IV of the Guidelines on regional State aid for 2014-2020, points (a), (b), (c), (d), and (e).¹
- 6) With [...] tons of crude steel production capacity, Ilva's plant in Taranto amounts to ca. [...] of total EU production capacity. The largest manufacturers according to EU-based capacity are ArcelorMittal (ca. 19%) and ThyssenKrupp (ca. 9%).² Noticeable competitors are Tata steel and VoestAlpine. Under the current extraordinary administration and environmental constraints, Ilva is running at [...] of its nominal capacity (three furnaces working out of five). Their present output still accounts for [...] of the Italian steel production and [...] of EU steel production. Between 1st January and 31 July 2015, Ilva produced [...] tons of steel. Ilva sells primarily in Italy ([...]), then in other European ([...]) and third countries ([...]).
- 7) Ilva is undergoing criminal investigation for environmental harm. On top of that, Ilva's main shareholders and former management have been indicted for several crimes. In May 2013, the national judge seized (*sequestro preventivo*) EUR [...] in

¹ O J C 209, 23.07.2013.

² Eurofer's website, Arcelor Mittal's 2014 annual report, Thyssen Krupp's website.

liquid assets of Ilva's main shareholders and previous management, pending criminal proceedings against them.

- 8) Since June 2013³ Ilva has been run by a government-appointed Extraordinary Commissioner⁴ with a mandate to guarantee the continuation of the industrial activity and to invest the company's resources to cover the costs of the health and environmental damages caused by past breaches of Ilva's environmental permit. In this context, the Council of Ministers approved on 14 March 2014⁵ an "Environmental Plan" for preventing pollution and upgrading the plant in compliance with the environmental permits. According to the Italian authorities, the total costs of the investments needed to bring the Taranto plant in line with EU law is EUR [...].
- 9) According to the information provided by Italy, the Environmental Plan covers three main categories of investments: 1) decontamination or remediation works on Ilva's site, which are urgently needed to guarantee public health in the city of Taranto; 2) pollution prevention through upgrading the environmental performance of plants/machineries to ensure compliance with the environmental permit; and 3) other investments in assets to ensure safety at work.
- 10) On 5 January 2015 the Government passed Law Decree no. 1/2015 providing for an *ad hoc* procedure for Ilva modelled on the existing law for extraordinary administration of large undertakings in difficulty entrusted with essential public services. As a consequence, Ilva was declared insolvent on 31 January 2015 and three Extraordinary Commissioners were appointed by the Government for the management of the company. The total debt indicated in the declaration of insolvency was EUR [...]. The Law Decree no. 1/2015 was converted into firm law on 3 March 2015 with amendments.⁶
- 11) On 21 October 2015 the Italian authorities informed the Commission about their plans to introduce a new measure in favour of Ilva as an anticipation of the planned disbursement of the judicially seized EUR [...] referred to in recital 7 (see section 2.4.1 below) in case such seized amounts are not transferred on time to allow for the implementation of the Environmental Plan.
- 12) The measure has been included in Article 1, paragraph 837, of Law no. 208/2015, the so-called Stability Law (*Legge di Stabilità*). The measure allows Ilva's Extraordinary Commissioners to request new loans to financing institutions up to EUR 800 million, which shall be guaranteed by the State subject to the payment of a premium which will allegedly be set at a market price. Should Ilva receive the proceeds from the seized EUR [...], it will use those sums to reimburse the loans.
- 13) On 4 December 2015 the Italian authorities also informed the Commission about the adoption on the same day of Law Decree no. 191/2015 entitled "*Disposizioni*

³ Based on Law Decree no. 61/2013 of 4 June 2013, converted into law on 3 August 2013 (Law no. 89/2013). Law no. 89/2013 was further amended on 10 December 2013 by Article 7 of Law Decree no. 136/2013, converted into law on 6 February 2014 (Law no. 6/2014).

⁴ With the expiry of its mandate a new Extraordinary Commissioner was appointed on 6 June 2014.

⁵ See Official Journal no. 105 of 8 May 2014, available at: <http://www.gazzettaufficiale.it/eli/id/2014/05/08/14A03637/sg>

⁶ Law Decree no. 1/2015 converted into law with amendments on 3 March 2015, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2015-01-05:1!vig=2015-06-18

urgenti per la cessione a terzi dei complessi aziendali del Gruppo Ilva". Article 1 of the Law Decree provides the sale of Ilva's assets through a transparent and non-discriminatory public procedure by 30 June 2016 to ensure discontinuity with the current company. In addition, the State will lend EUR 300 million to Ilva through a Ministerial Decree to support Ilva's urgent financial needs. The selected buyer shall reimburse the loan including interests (six months Euribor increased by 300 basis points). The Law Decree also postpones the final deadline for the completion of the Environmental Plan from August 2016 to 31 December 2016.

- 14) On 5 January 2016 Ilva's Extraordinary Administration published a call for expressions of interest in relation to the transfer of businesses owned by Ilva and other companies of the same group. The call refers to the provisions of Law Decree no. 191/2015 and in particular to Article 1, paragraph 3 concerning the EUR 300 million loan. The call indicates that the purpose of the transaction is to: i) ensure that the companies continue operating as a going concern, with the appropriate guarantees that adequate employment levels shall be maintained; ii) develop steel production in Italy; iii) enable the implementation of environmental and health protection measures and activities and of other required and/or appropriate investments to optimise production facilities; iv) ensure management discontinuity of the businesses, including from an economic standpoint; v) speedy and efficient actions and compliance with the requirements provided by Italian national laws and by the Treaties signed by Italy. The deadline to submit the expression of interests is 10 February 2016.

2.2. The public health and environmental aspects

- 15) The Taranto area is heavily polluted. Tests have shown heavy pollution of the air, soil, surface and ground waters both at the Ilva site and in nearby inhabited areas of the city of Taranto, with serious consequences for human health and the environment⁷.
- 16) Ilva, as well as its main shareholders and former management are indicted for alleged environmental disaster (criminal proceeding No. 938/2010 *R.G.*) and have effectively stepped aside from running the company since June 2013. As noted in recital 8), Ilva is administered by Government appointed Commissioners since then.
- 17) Following two letters of formal notice,⁸ on 16 October 2014 the Commission sent its reasoned opinion to Italy for breach of Directive 2008/1/EC on integrated pollution prevention and control (IPPC Directive), and Directive 2010/75/EU on industrial emissions (IED), which set rules for Member States in granting permits aimed at ensuring that the operation of industrial installations complies with certain environmental standards for installations (infringement procedure no. 2013/2177).
- 18) The Italian authorities explained that, following the administrative investigation to identify the polluter (*procedimento di caratterizzazione*) started in 2003 and concluded in 2011,⁹ the Ministry of Environment had already ordered Ilva to carry out decontamination measures on its site. However, Ilva successfully challenged

⁷ See http://europa.eu/rapid/press-release_IP-14-1151_en.htm

⁸ In September 2013 and in April 2014.

⁹ See the results of the *Conferenza di Servizi decisoria* of 15 March 2011.

that order in court.¹⁰ That procedure is still pending following the appeal by the Italian authorities before the Italian Council of State (*Consiglio di Stato*) (proceeding *R.G.* No. 4057/2012). Those judicial proceedings will therefore allow the identification of the polluter for the purposes of the "polluter pays" principle. The Italian authorities confirmed that if a responsible polluter is identified, the State will demand reimbursement of the costs incurred.

2.3. The complaints

- 19) The two complaints received by the Commission in 2014 referred to the transfer of EUR [...] of seized amounts (measure no. 1 described below), which at that time was planned as Ilva's capital increase.¹¹ This transfer and capital increase however was never completed. The new Law Decree no. 1/2015 amended the procedure and introduced instead of a future capital increase the issuance of bonds as described in recital 27) below. The complainants indicated also the risk of granting Ilva a EUR 500 million loan by *Cassa Depositi e Prestiti* (CDP). Such loan was not granted by CDP in 2014. However, as described in recitals 29) and 30) below, after Italy amended the law on pre-deductible¹² loans for Ilva, in September 2014 Ilva received a EUR [...] pre-deductible loan from three private banks (measure no. 2 described below). In addition, as described in recital 33) below, in May 2015 Ilva received a EUR 400 million loan (from CDP, Intesa Sanpaolo and Banco Popolare) accompanied by a State guarantee (measure no. 3 described below).
- 20) The complaints received by the Commission in 2015 referred to Law no. 20/2015 (converting into law and amending Law Decree no. 1/2015), in particular indicating that:
- instead of the capital increase as previously planned, Ilva would receive access to the seized amounts in the form of bonds (measure no. 1 described below);
 - Ilva benefited from EUR 260 million bridge loan; the allegation appears to refer to the EUR [...] pre-deductible loans received by Ilva in 2014 (measure no. 2 described below);
 - Ilva could receive additional financing thanks to a EUR 400 million State guarantee (measure no. 3 described below).
 - following the settlement of an ongoing dispute, Fintecna transferred EUR 156 million to Ilva (measure no. 4 described below); and
 - additional public resources can be granted to Ilva from the national Development and Cohesion Fund.

¹⁰ Recital 2 of the Environmental Liability Directive provides that "an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced".

¹¹ The complainants pointed out to Law Decree no. 136/2013 which at that time provided for a transfer of seized amounts to Ilva in the form of capital increase, based on the original provision in Article 1, paragraph 11 *quinquies* of Law Decree no. 61/2013.

¹² A "pre-deductible" credit is a credit which, under national bankruptcy law, must be fully repaid before the distribution of the mass of assets of the debtor among the creditors according to their privilege.

2.4. The measures under assessment

- 21) The Italian authorities have adopted and amended various measures with regard to Ilva, including setting aside judicial orders requiring the discontinuance of the operation of Ilva on environmental or work safety grounds. Those measures were adopted to maintain the production of plants having a strategic national interest, especially in view of environmental, health and employment considerations.¹³ Ilva's Taranto plant has been consistently considered of strategic national interest by the Italian legislator.¹⁴
- 22) The present decision concerns four measures:
- measure no. 1: the transfer of seized amounts
 - measure no. 2: the law on pre-deductible loans
 - measure no. 3: the State guarantee
 - measure no. 4: the settlement payment by Fintecna
- 23) Since the Italian authorities confirmed that no additional public resources from the national Development and Cohesion Fund sums were neither granted nor paid to Ilva based on Article 3, paragraph 5 *ter*, of Law Decree no. 1/2015, the present decision does not concern this provision. For as long as no such sums are granted, the Commission cannot pronounce on the existence of aid within the meaning of Article 107(1) TFEU, or its compatibility with the internal market.

2.4.1. Measure no. 1: Transfer of seized amounts to Ilva before the end of the criminal proceedings

- 24) The sums (EUR [...]) seized by the national judge on 20 May 2013 (see recital 7) above) are located in US and Swiss trusts. On 11 May 2015 the national judge issued an order (*Decreto di Trasferimento*) for the transfer of those seized amounts to Ilva's accounts pursuant to Article 3, paragraph 1, of Law Decree no. 1/2015.¹⁵ In exchange for the transfer of the seized amounts, Ilva will issue bonds. The transfer cannot be enforced until the seized amounts are first transferred to Italy. Whilst the Swiss judicial authorities initially authorized the transfer, this decision has been successfully challenged. Pending the possibility to appeal, the proceeding is still ongoing.
- 25) Under general procedural law, those amounts should be transferred to a bank account in the name of the so-called Justice Fund (*Fondo Unico Giustizia*), who has the role of a "keeper" (*custode ex lege*) until the criminal procedure comes to an end. The *Fondo Unico Giustizia* is a fund of the Italian Government (Ministry of Justice) managed by Equitalia Giustizia S.p.A. ("Equitalia"). Under Article 2, paragraph 4 of Law Decree no. 143/2008 Equitalia manages bank accounts in the name of the fund, where all the amounts and financial instruments seized are

¹³ See the preamble to Law Decree no. 61/2013: "*considerando che la continuità del funzionamento produttivo di stabilimenti di interesse strategico costituisce una priorità di carattere nazionale, soprattutto in considerazione dei prevalenti profili di protezione dell'ambiente e della salute e di salvaguardia dei livelli occupazionali*".

¹⁴ See for example the preamble to Law Decree no. 1/2015.

¹⁵ The legal basis was first set out in Article 1, paragraph 11 *quinquies* of Law Decree no. 61/2013, which was amended in December 2013, in August 2014 and finally in March 2015. Two of the complaints referred to this measure, as differently designed in December 2013 by Law Decree no. 136/2013, converted into Law no. 6/2014 (see section 2.3).

collected. Equitalia is responsible for the financial management of the liquid sums, which could be only kept in a bank account or invested in State bonds.¹⁶ Throughout the procedure, the seized amounts belong to the original owners, who cannot dispose of them.

- 26) Yet, by adopting Law Decree no. 1/2015 the Italian authorities introduced an *ad hoc* provision which allows a transfer of such seized amounts to Ilva before the criminal proceedings are completed. The transferred sums are to be used to finance Ilva's Environmental Plan. The law applies to all sums seized in the context of criminal proceedings for crimes allegedly committed by persons/entities responsible for Ilva's compliance with its environmental permit, as well as for crimes which are not environmental or not linked to the implementation of the environmental permit.
- 27) The above-mentioned provision allows the Justice Fund to subscribe bonds to be issued by Ilva in exchange for the transfer of the seized amounts. The terms and conditions of the bonds are not yet defined. The credit corresponding to those bonds will be pre-deductible in case of Ilva's bankruptcy but will be subordinated to the other pre-deductible credits (see below section 2.4.2) and certain privileged credits.

2.4.2. Measure no. 2: The law on pre-deductible loans

- 28) According to the press, in May 2014 Ilva was facing liquidity problems having difficulties in paying salaries and suppliers.¹⁷ The press reported that banks appeared reluctant to grant any "bridge loan".¹⁸ It also appears that throughout 2014 the Italian authorities (in particular via the Ministry of Economic Development and regional authorities of Puglia) were fully involved in the meetings and discussions with financial institutions on granting such "bridge loan".¹⁹
- 29) On 11 August 2014²⁰ Italy amended Article 12, paragraph 5, of Law Decree no. 101/2013 exceptionally qualifying as pre-deductible loans granted to undertakings of strategic national interest placed under extraordinary

¹⁶ In this respect, see http://www.giustizia.it/giustizia/it/mg_2_9_1.wp

¹⁷ See <http://www.ilsole24ore.com/art/impresa-e-territori/2014-05-12/ilva-taranto-stipendi-salvi-maresta-crisi-finanziaria-123429.shtml?uuiid=ABUglaHB>

¹⁸ See http://www.ilsole24ore.com/art/impresa-e-territori/2014-07-03/ilva-aggrappata-prestito-ponte-063934_PRV.shtml?uuiid=ABpE6DXB&fromSearch

¹⁹ See "L'incontro di ieri a Palazzo Chigi tra rappresentanti degli istituti di credito e Governo – il sottosegretario alla presidenza, Graziano Del Rio, il ministro e il vice ministro dello Sviluppo economico, rispettivamente Federica Guidi e Claudio De Vincenti – non ha portato i segnali che l'azienda attende in modo da attenuare la propria crisi finanziaria" as reported by <http://www.ilsole24ore.com/art/notizie/2014-05-14/ilva-nessuna-concessione-un-prestito-ponte-132300.shtml?uuiid=ABPqs9HB>: See also the article from May 2014: <http://www.ilsole24ore.com/art/impresa-e-territori/2014-05-12/ilva-taranto-stipendi-salvi-maresta-crisi-finanziaria-123429.shtml?uuiid=ABUglaHB>: "L'Ilva ha avanzato la richiesta ed ha avviato la trattativa con le banche che viene seguita anche dal Governo".

²⁰ Law no. 116 of 11 August 2014 converting into law and amending Law Decree no. 91/2014 of 24 June 2014.

administration for the implementation of environmental and health remediation plans.²¹ Ilva qualifies as such undertaking.²²

- 30) Following this law amendment, a month later (on 11 September 2014) private banks (Intesa Sanpaolo S.p.A., Unicredit S.p.A. and Banco Popolare Società Cooperativa) granted to Ilva a EUR [...] loan. At its expiry on 28 February 2015, Ilva did not reimburse the loan.

2.4.3. Measure no. 3: The State guarantee

- 31) Article 3, paragraph 1^{ter} of Law Decree no. 1/2015 allows Ilva to negotiate with interested banks a EUR 400 million pre-deductible loan, assisted with a State guarantee. The loan is to be used for the implementation of Ilva's Environmental Plan.²³
- 32) On 30 April 2015 the Ministry of Economy and Finance issued the State guarantee with a premium of [...] (Ministerial Decree of 30 April 2015). If the guarantee is called, the State will replace the financial institutions in their pre-deductible credit.
- 33) Thanks to the issuance of the State guarantee, on 27 May 2015 three financing institutions signed a financing contract in favour of Ilva as follows: EUR [...] by *Cassa Depositi e Prestiti* (CDP, [...] State owned), EUR [...] by Intesa Sanpaolo and EUR [...] by Banco Popolare. Those are the same two private banks which granted in 2014 pre-deductible loans totalling EUR [...] (measure no. 2) which Ilva did not reimburse in February 2015. A first instalment of EUR [...] was paid on 10 June 2015 and a second instalment of the same magnitude was scheduled for October 2015. The loan is due to be reimbursed in [...] years, with a grace [...] -year period, until June 2020.
- 34) On 10 September 2015 Ilva paid to the Ministry of Economics and Finance EUR [...] in consideration of the guarantee issued under Article 4, paragraph 1, of the Ministerial Decree of 30 April 2015.

2.4.4. Measure no. 4: The settlement payment by Fintecna

- 35) During Ilva's privatisation in 1995, the State (IRI) agreed under Article 17.7 of the privatisation contract to guarantee future claims for environmental damages which occurred before the privatisation up to LIT [...], plus interests (corresponding to

²¹ Law no. 116 of 11 August 2014, Article 22-*quater*: "(Misure a favore del credito per le imprese sottoposte a commissariamento straordinario e per la realizzazione del piano delle misure e delle attività di tutela ambientale e sanitaria) (...) l'impresa commissariata di cui all'articolo 1, comma 1, del citato decreto-legge n. 61 del 2013, può contrarre finanziamenti, prededucibili a norma dell'articolo 111 del regio decreto 16 marzo 1942, n. 267, funzionali a porre in essere le misure e le attività di tutela ambientale e sanitaria ovvero funzionali alla continuazione dell'esercizio dell'impresa e alla gestione del relativo patrimonio".

²² Based on Article 1, paragraph 1, of Law Decree no. 61/2013 in conjunction with Article 1 of Law Decree no. 207/2012 of 3 December 2012, converted into law on 24 December 2012 by Law no. 231/2012.

²³ "L'organo commissariale di ILVA S.p.A. al fine della realizzazione degli investimenti necessari al risanamento ambientale, nonché di quelli destinati ad interventi a favore di ricerca, sviluppo e innovazione, formazione e occupazione, nel rispetto della normativa dell'Unione europea in materia, è autorizzato a contrarre finanziamenti per un ammontare complessivo fino a 400 milioni di euro, assistiti dalla garanzia dello Stato. Il predetto finanziamento è rimborsato dall'organo commissariale in prededuazione rispetto agli altri debiti (...)."

around EUR [...] at that time and EUR [...], excluding interests, or EUR [...], including interests, on 31 December 2014). The privatisation contract set 31 December 1996 as the final deadline for the environmental damages' quantification. On 16 April 1996, IRI started an arbitration concerning the price for the sale, which was concluded in 2000 without settling the dispute over the environmental responsibility. In parallel, on 6 May 1996 Ilva also started arbitration on the environmental responsibility, not concluded.

- 36) In 2002, Fintecna became IRI's legal successor (see recital 4) above) and the State was its sole owner. Since 2012, Fintecna is [...] owned by *Cassa Depositi e Prestiti* (CDP), which is 100% owned by the State. Fintecna is subject to checks on the management of financial statements and assets by a magistrate appointed by the Italian Court of Auditors, who assists at the meetings of the management and revision bodies pursuant to Articles 7 and 12 of Law no. 259/1958.
- 37) In the context of the transition from IRI to Fintecna in 2002, the former IRI management decided to set aside an amount of EUR [...] as an estimate of the environmental damages to Ilva (EUR [...] cap plus EUR [...] of accessory costs).
- 38) On 12 June 2008, Ilva and Fintecna signed the minutes of a meeting (*verbale di incontro*) where they agreed that the main open environmental issues concerned the plant in Taranto. In that context, the parties agreed that the split of costs between them could only occur once those costs are determined. In the meantime, with a draft agreement of 3 December 2008, the Ministry of Environment, together with other public entities, planned a settlement on the basis of costs estimation for the clean-up of the underground water and of the environmental damage.
- 39) The documents mentioned in recital 38) above were the main sources to quantify the size of the environmental damage that Fintecna had to compensate to Ilva in compliance with Article 17.7 of the privatisation contract. That quantification explicitly excluded the damages deriving from air pollution to third parties.
- 40) Ilva sent several notices to Fintecna, the latest on 2 May 2011 and 10 June 2013. Fintecna contested any responsibility, particularly concerning damages from air pollution to third parties.
- 41) In the context of the preparation of the balance sheets, the competent Fintecna's offices calculated in 2011 EUR [...] as estimated damages to be paid to Ilva, in 2014 adjusted to EUR [...].
- 42) On 19 December 2013 the Ministry of Environment adopted a ministerial act (*provvedimento*) against Fintecna with an injunction to dispose of waste located on Ilva's premises. The ministerial act was challenged before the Regional Administrative Court (*Tribunale Amministrativo Regionale*) of Puglia which decided on 14 November 2014 that, on substance, the polluting activity certainly predated 1995 and therefore fell within Fintecna's responsibility. The court however annulled the ministerial act for procedural reasons.
- 43) On 12 January 2015 Fintecna entrusted an independent legal consultant to provide assistance during the negotiations with Ilva for the final settlement of the dispute over the environmental responsibility for damages occurred before 1995. The legal opinion of the independent expert of 3 March 2015 confirms that the settlement of the dispute at EUR 156 million, as agreed with Ilva's Extraordinary Administration

in the context of the negotiations, is within the maximum limit set out in the privatisation contract and is also below Fintecna's own estimates.

- 44) Fintecna also requested a legal opinion from a second legal consultant issued on 16 February 2015, concerning: i) any previous payments already made to Ilva in the context of the past arbitration and ii) the starting date for the calculation of interests on the guaranteed amount. That opinion excludes that, in the context of that arbitration, Fintecna made any payments to Ilva linked with the guarantee to compensate environmental damages set out in Article 17.7 of the privatisation contract. The opinion also explains that Ilva's claim on the basis of the contract is still valid and that interests would be due since 1996.
- 45) Article 3, paragraph 5, of Law Decree no. 1/2015 authorises Ilva's Extraordinary Commissioner to settle with Fintecna the dispute over environmental damages arising from the 1995 privatisation contract. The same article quantifies the amount for the settlement as EUR 156 million and stipulates that such settlement will be final and definitive.²⁴
- 46) Following the conversion into law of Law Decree no. 1/2015, Fintecna's Board of Directors decided on 4 March 2015 to proceed with the transaction, taking into account the legal opinions of the two consultants (see recitals 43) and 44) above). In particular, the Board of Directors stressed the final character of the settlement also vis-à-vis third parties (e.g. Ilva's creditors in case of bankruptcy and other potential environmental claims towards Fintecna) and the fact that the maximum exposure deriving from the privatisation contract would correspond to EUR [...], excluding interests, or EUR [...], including interests. The Board of Directors' decision took note of the favourable opinion of the shareholder CDP, in compliance with point 8.3.2 of the Regulation for the exercise of the controlling activity in the CDP group (*Regolamento per l'esercizio dell'attività di direzione e coordinamento sulle società partecipate del gruppo CDP*).
- 47) Fintecna therefore settled the dispute with Ilva on 5 March 2015, and on 6 March 2015 transferred EUR 156 million to Ilva.
- 48) According to the joint press release no. 12/2015 issued by CDP and Fintecna on 11 March 2015, the transaction occurred "*to implement Article 3, paragraph 5 of Law Decree 5 January 2015 no. 1, as converted with amendments into Law 4 March 2015, no. 20 (Ilva Decree)*".²⁵

²⁴ "Allo scopo di definire tempestivamente le pendenze tuttora aperte, il commissario straordinario, entro sessanta giorni dell'entrata in vigore del presente decreto, è autorizzato a sottoscrivere con FINTECNA S.p.A., in qualità di avente causa dell'IRI, un atto convenzionale di liquidazione dell'obbligazione contenuta nell'articolo 17.7 del contratto di cessione dell'ILVA Laminati Piani (oggi ILVA S.p.A.). La liquidazione è determinata nell'importo di 156.000.000 di euro, ha carattere definitivo, non è soggetta ad azione revocatoria e preclude ogni azione concernente il danno ambientale generatosi, relativamente agli stabilimenti produttivi ceduti dall'IRI in sede di privatizzazione dell'ILVA Laminati Piani (oggi ILVA S.p.A.), antecedentemente al 16 marzo 1995. Le somme rinvenienti di detta operazione affluiscono nella contabilità ordinaria del Commissario straordinario".

²⁵ Press release available at: http://www.cdp.it/static/upload/com/0000/comunicato-n.-12-del--11-03-2015_fintecna-ilva.pdf

2.5. The procedure set out in Law Decree no. 1/2015 for the rental and/or sale of Ilva

- 49) Law Decree no. 1/2015 extended the provisions foreseen for the extraordinary administration of large undertakings providing essential public services (Law Decree no. 347/2003, so-called "Marzano Law") to undertakings of "strategic national interest placed under extraordinary administration for the implementation of environmental and health remediation plans".
- 50) In particular, the amendment brought by Law Decree no. 1/2015 adds that the extraordinary commissioner can carry out private negotiations to select an investor willing to buy or rent the assets of the undertaking.²⁶
- 51) As confirmed in the call for expression of interest of 5 January 2016 (see recital 14) above), the selected investor should guarantee the continuation of the production activity of the industrial plant of strategic national interest, also taking into account the need to guarantee an adequate number of jobs. The price for the purchase or rental of the assets cannot be lower than the "market price" established by an independent expert selected by a decree issued by the Ministry of Economic Development.

2.6. Observations provided by the Italian authorities

2.6.1. On measure no. 1: Transfer of seized amounts to Ilva before the end of the criminal proceedings

- 52) According to Italy, the measure is no aid because it does not involve State resources, does not grant an advantage, and in any event is in line with the polluter pays principle.
- 53) As regards State resources, Italy explained that the seized sums belong to Ilva, as they have been illegally diverted from the company by the main shareholders and previous management for personal use. Italy explains that according to a general principle of law (Article 2497 of the Civil Code) managers and controlling entity or persons have a patrimonial responsibility for the activities carried out by the company in case of abuse or misuse of their power. The special provision introduced for Ilva would simply exacerbate their responsibility (as it anticipates this responsibility before the end of the trial). Therefore, according to Italy, only private resources would be at stake.
- 54) The Italian authorities also explained that the seized sums will be transferred to a special account and earmarked for the implementation of Ilva's Environmental Plan and in particular for the investments necessary to remedy the alleged breach of EU law included in the Commission's reasoned opinion (see section 2.2 above). According to Italy the provision strikes a correct balance between a plurality of constitutional interests (health, job, environment) in a situation of objective environmental and employment emergencies.

²⁶ See Article 4, paragraph 4 *quater*, of Law Decree no. 347/2003, as modified by Law Decree no. 1/2015.

- 55) Furthermore, Italy underlines that the Justice Fund would not be free to use the sums as it is bound to follow the instructions given by the judge. Therefore, the State would not have the availability of the sums.
- 56) As regards the lack of advantage, Italy claims that the measure does not grant a (selective) advantage to Ilva, as it merely transfers the burden to pay for the investments to comply with the environmental permits to those responsible for the management of the company at the time where the permits have been breached and the environmental harm has been caused. According to Italy this is in line with the "polluter pays" principle.

2.6.2. On measure no. 2: The law on pre-deductible loans

- 57) According to Italy, the measure is no aid because it is not selective and there is no transfer of State resources.
- 58) As regards the lack of selectivity, the Italian authorities claim that the law applies to any undertakings under extraordinary administration which have to implement an environmental and health remediation plan. Italy also claims that the measure reflects general rules on pre-deductible loans already set out in the Italian law, and in particular in Article 111 of the Italian Bankruptcy Law.
- 59) As regards the lack of impact on State resources, Italy explains that the measure has no potential impact on the repayment of Ilva's credits towards the State, since the implementation of the Environmental Plan will safeguard the value of the company for which Italy does not expect any risk of bankruptcy.

2.6.3. On measure no. 3: The State guarantee

- 60) The Italian authorities claim that the measure does not give any advantage to Ilva since the yearly guarantee premium ([...]) established by the Ministry is market conform. Italy explained that the EUR 400 million loan is pre-deductible and has [...] years duration and an interest rate of [...] months Euribor increased by [...] basis points.
- 61) Italy also underlines that the mere purpose of this measure is to finance the Environmental Plan and, in particular, to remedy the alleged breach of EU law included in the Commission's reasoned opinion (see section 2.2 above).

2.6.4. On measure no. 4: The settlement payment by Fintecna

- 62) Italy explained that during a meeting in 2008 Ilva and Fintecna agreed on the criteria for redistribution of financial claims for environmental damages which occurred before 1995. In the course of these negotiations, Fintecna was always ready to settle as regards the environmental pollution within Ilva's site and in the sea waters; however it refused to cover environmental claims as regards air pollution (since according to Fintecna the biggest air pollution occurred after 1996). Italy explains that, thanks to the Law Decree no. 1/2015, Fintecna and Ilva could finally settle this dispute.
- 63) According to Italian authorities, the transfer of EUR 156 million confers no aid to Ilva, because Fintecna generally operates as a Market Economy Investor. In this

context, Italy refers to a previous European Commission decision concerning Alitalia (case C2/2005).²⁷

2.6.5. *On the planned measure in the Stability Law*

- 64) Similarly to measure no. 3, the Italian authorities claim that the planned measure does not contain aid elements because the guarantee will be given at market price. The amount will also be earmarked to finance the Environmental Plan and, in particular, to remedy the alleged breach of EU law included in the Commission's reasoned opinion (see section 2.2 above).
- 65) The Italian authorities stress that under Article 5, paragraph 4, and Article 6, paragraph 3, of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive), the competent authority shall require that the preventive and remedial measures are taken by the operator. If the operator fails to comply with the obligations, cannot be identified, or is not required to bear the costs under the Environmental Liability Directive, the competent authority may take these measures itself.

3. ASSESSMENT

3.1. Existence of State aid

- 66) According to Article 107(1) TFEU, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- 67) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all the following conditions:
- it must be granted by the State or through State resources;
 - it must confer a selective advantage by favouring certain undertakings or the production of certain goods;
 - it must distort or threaten to distort competition and affect trade between Member States.

3.1.1. *State origin (imputability and use of State resources)*

3.1.1.1. *Measure no. 1: Transfer of seized amounts to Ilva before the end of the criminal proceedings*

- 68) The decision to use the seized amounts for Ilva's future bond subscription is taken by the State on the basis of Law Decree no. 1/2015. The *Fondo Unico Giustizia*, through Equitalia, acts on the basis of the instructions given by the judicial authority, which is an organ of that State and is therefore bound by the duty of

²⁷ See Commission Decision of 07.06.2005 in case C2/2005 Alitalia – Plan industriel de restructuration, recitals 207 and 217-218.

sincere cooperation.²⁸ In the light of the above, at this stage the measure appears to be imputable to the State.

- 69) The seized amounts also appear to constitute State resources. The concept of ‘intervention through State resources’ is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid.²⁹ In principle, the origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they enter under public control and are therefore available to the national authorities,³⁰ even if the resources do not become the property of the public authority.³¹
- 70) In this case, once the seizure is completed, the amount will be under State control and released for uses determined by the State through the provisions of Law Decree no. 1/2015, namely to subscribe bonds issued by Ilva. The amount, even if seized from private parties (Ilva's main shareholders and former management), will pass through the *Fondo Unico Giustizia*, which is the public body designated by national law to keep seized amounts during the criminal procedure. On this ground, the seized amounts are thus to be considered State resources.
- 71) Moreover, as noted in recital 25), the amounts held by the *Fondo Unico Giustizia* can ultimately be invested not only in bank deposits but also in State bonds. Thus, by investing the seized amounts in Ilva's bonds rather than in State bonds, the State may forego possible revenues that could otherwise potentially come to meet its funding needs. Furthermore, Italian sovereign bonds may be a safer investment than Ilva bonds. In the current state of extraordinary administration, it can be presumed that the investment in Ilva Bonds puts both the yields and resources under control of the *Fondo Unico Giustizia* at risk, unless it is shown in the proceedings that the coupon paid for such bonds, given the probability of default, adequately reflects the presumably much higher risk level of investing in Ilva's bonds. On this ground also, the early release of seized funds to the benefit of Ilva involves State resources.
- 72) In the light of the above, at this stage the measure appears to be imputable to the State and to involve a transfer of State resources.

²⁸ See Case C-527/12 *Commission v Germany* EU:C:2014:2193, paragraph 56 and the case law cited. See also, Case C-119/05 *Lucchini* EU:C:2007:434, paragraph 59.

²⁹ See Case 78/76 *Steinike & Weinlig* EU:C:1977:52, paragraph 21; *Sloman Neptun*, paragraph 19; and Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE*, EU:C:2013:348, paragraph 26.

³⁰ See Order of the Court of 22 October 2014, Case C-275/13, *Elcogás SA v Administración del Estado, Iberdrola SA*; Case C-262/12, *Vent de Colère v. Ministre de l'Ecologie*, EU:C:2013:851, paragraph 37; Case C-206/06 *Essent Netwerk Noord* EU:C:2008:413, paragraph 70; Case C-83/98P *France v Ladbroke Racing and Commission* EU:C:2000:248, paragraph 50.

³¹ See Case C-262/12, *Vent de Colère v. Ministre de l'Ecologie*, EU:C:2013:851, paragraph 21; Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE*, EU:C:2013:348, paragraph 35; Case T-358/94 *Air France v Commission* EU:T:1996:194, paragraphs 65 to 67, concerning an aid granted by the *Caisse des Dépôts et Consignations* which was financed with voluntary deposits of private citizens which could be withdrawn at any time. That did not affect the conclusion that those funds were State resources because the Caisse was able to use them from the balance produced by deposits and withdrawals as if they were permanently at its disposal.

3.1.1.2. Measure no. 2: The law on pre-deductible loans

- 73) Although the contested measure results in loans granted by private banks, it is the Commission's preliminary view that the measure is imputable to the Italian State. The relevant law was in fact approved by the Italian State and the loans were granted shortly after and, according to the press, only because of the adoption of the provision exceptionally qualifying future loans granted to Ilva as pre-deductible (see recitals 28) to 30) above).
- 74) It is also the Commission's view that this derogation from the normal insolvency rules may involve a burden for State resources if public bodies are among Ilva's principal creditors. If this is confirmed, measure no. 2 favouring the private loans in case of Ilva's bankruptcy, would *de facto* constitute a waiver of public debts.³² As it is highly probable that the State or public bodies are among the principal creditors of Ilva, the Commission cannot at this stage exclude that, in case of Ilva's bankruptcy, State resources would be affected. The Commission therefore invites Italy to provide more information in this regard and, in particular, with reference to the list of Ilva's creditors and the magnitude of the State's credits, to show that measure no. 2 does not put at risk the reimbursement of Ilva's public creditors.

3.1.1.3. Measure no. 3: The State guarantee

- 75) As regards the State origin of the measure, the Commission observes that the measure consists in a loan guarantee granted by the Ministry of Economy and Finance. Given that the notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority,³³ the Commission concludes that the measure involves State resources and is imputable to the State. State guarantees put State resources at risk, as their call is paid through the State budget. Moreover, any guarantee that is not properly remunerated implies a loss of financial resources for the State.

3.1.1.4. Measure no. 4: The settlement payment by Fintecna

- 76) The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.³⁴ To establish the State's imputability in a decision of a public undertaking the Commission can take into account the following indicators:³⁵
- The body in question could not take the contested decision without taking account of the requirements of the public authorities.
 - The fact that, besides factors of an organic nature which link the public undertaking to the State, the undertaking, through which aid was granted, had to take account of directives issued by governmental bodies.

³² See Case C-200/97, *Ecotrade v. Altiforni e Ferriere di Servola* EU:C:1998:579 and Case C-295/97, *Piaggio v. International Factors Italia SpA (Ifi talia)* EU:C:1999:313.

³³ Case C-248/84 *Germany v Commission*, EU:C:1987:437, para. 17.

³⁴ Case C-482/99 *France v Commission (Stardust)* EU:C:2002:294, paragraph 55.

³⁵ Case C-482/99 *France v Commission (Stardust)* EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs, Case C-482/99 *France v Commission (Stardust)* EU:C:2001:685, paragraphs 65 to 68.

- The legal status of the undertaking (whether it is subject to public law or ordinary company law).
 - The degree of the supervision that the public authorities exercise over the management of the undertaking.
 - Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.
- 77) Taking into account the indicators listed in recital 76) above, it is the Commission's preliminary view that Fintecna's decision is imputable to the Italian State, because:
- Fintecna is a public company (owned 100% by CDP, which is itself [...] owned by the State). CDP directly nominates the three members of the Board of Directors.
 - Fintecna had to take account of Law Decree no. 1/2015 issued by governmental bodies and, in any event, Fintecna states that it took it into account. As Fintecna admits the transaction occurred "*to implement Article 3, paragraph 5 of Law Decree 5 January 2015 no. 1, as converted with amendments into Law 4 March 2015, no. 20 (Ilva Decree)*" (see recital 48) above).
 - Indeed, since 1995, despite numerous attempts, Fintecna was not able to settle with Ilva. The adoption of a Law Decree by the Italian authorities prompted the agreement, and the agreement was reached immediately after the Law Decree, whereas nearly 20 years of discussions had been unsuccessful until then.³⁶
 - Moreover, the State's influence in Fintecna's settlement decision is also shown from the fact that Fintecna's shareholder (CDP, which is [...] State owned) had to provide and did provide a favourable opinion for the final settlement with Ilva (see recital 46) above).
- 78) As regards State resources, the Commission notes that resources of public undertakings constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources.³⁷ In this case, it is not disputed that the Italian State is CDP's sole shareholder and that it appoints the members of its board of directors. Similarly, CDP is the sole shareholder of Fintecna with the right to appoint its board of directors. The fact that Fintecna's shareholder (CDP) had to provide a favourable opinion for the final settlement with

³⁶ The annual report of the Court of Auditors on Fintecna (*delibera* no. 48/2015) also states that Law Decree no. 1/2015 allowed Fintecna to end the dispute with Ilva concerning the compensation of environmental damage; "*L'art. 3, comma 5, del DL 5 gennaio 2015, n. 1, convertito in legge 4 marzo 2015, n. 20 ha consentito di chiudere ogni vertenza riguardante la Fintecna in merito al danno ambientale generatosi, relativamente agli stabilimenti produttivi ceduti dall'IRI in sede di privatizzazione dell'ILVA*", *ibid.*, page 7. The report is available at: http://www.corteconti.it/export/sites/portalecdc/documenti/controllo/sez_controllo_enti/2015/delibera_48_2015.pdf

³⁷ Case C-482/99 *France v Commission (Stardust)* EU:C:2002:294, paragraph 38. See also C-278/00 *Greece v Commission* EU:C:2004:239, paragraphs 53 and 54, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia S.p.A. v Commission* EU:C:2003:252, paragraphs 33 and 34.

Ilva (see recital 46) above) is an indicator of CDP's influence on Fintecna's decisions. The Italian State can therefore have a dominant influence, directly or indirectly, on the use of CDP's and Fintecna's financial resources. The fact that Fintecna used its own funds is irrelevant in that regard since Fintecna's funds are ultimately State resources within the meaning of Article 107(1) TFEU.

- 79) Taking the above into consideration, the Commission concludes at this stage that measure no. 4 is imputable to the Italian State and involves State resources.

3.1.2. Selective economic advantage

- 80) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings and/or the production of certain goods. An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, *i.e.* in the absence of State intervention.

3.1.2.1. Measure no. 1: Transfer of seized amounts to Ilva before the end of the criminal proceedings

- 81) The measure seems to be selective, as the seized amounts will be granted to the benefit of one specific undertaking, *i.e.* Ilva. The Law Decree issued for this purpose clearly quotes Ilva as the beneficiary of the seized amounts (see recital 26) above).
- 82) As regards the presence of an advantage, the measure anticipates the outcome of the pending criminal proceedings. By putting at Ilva's disposal those sums, before the completion of the criminal proceedings, Ilva is in a better situation than if the ordinary procedure was applied. It is the Commission's preliminary view that by having at its disposal³⁸ the amounts that would otherwise be seized until the completion of proceedings (which could take several years and could have different outcomes) Ilva received an economic advantage that it would not have obtained under normal market conditions.
- 83) As regards the quantification of an economic advantage, this depends on the result of the ongoing criminal proceedings. If Ilva's main shareholders and former managers are convicted, it appears from the Italian authorities' observations that the seized amount will be declared to have belonged to Ilva from the beginning. In that case, the Commission considers at this stage that the advantage would at least consist in the early availability of the funds before the date of conviction, provided that the amount will also be subject to the applicable taxation.
- 84) If Ilva's main shareholders and former managers are acquitted, they will restore their power to dispose of the seized amounts in the form of Ilva's bonds. In that case, the Commission considers at this stage that the advantage received by Ilva would correspond to the full amount.
- 85) As indicated by several press reports,³⁹ before Law no. 116 of 11 August 2014, Ilva was not able to receive any loan from private banks. It is therefore most doubtful, *a fortiori* after the declaration of insolvency, that any market operator

³⁸ After those amounts would have been brought to Italy from US and Swiss trusts.

³⁹ See press articles quoted in footnotes 17 to 19 above.

would freely subscribe Ilva's bonds at nominal value, even assuming a company in insolvency could issue bonds under Italian law. Italy can usefully clarify if the ability of Ilva to issue bonds is common practice in insolvency proceedings and/or special administration. However, the terms of the bonds, and in particular the amount of the interests that Ilva will pay, are not set yet (see recital 27) above). Therefore, it cannot be excluded that the payment of those interests will compensate, at least partly, the advantage received by Ilva. The Commission therefore invites the Italian authorities to provide comments and reasoned and factual information on how the interest rate of the bonds will be set and the interest rate, or discount over nominal value, at which market operators acting in lieu of the Justice Fund would consent to subscribing to those bonds.

3.1.2.2. *Measure no. 2: The law on pre-deductible loans*

- 86) Although Italy claims that the measure applies to all undertakings employing at least one thousand employees and managing an industrial plant of national strategic interest,⁴⁰ it is the Commission's preliminary view that the measure *de facto* applies to Ilva only. The measure was adopted *ad hoc*, with close timing with the facts of the case described in section 2.4.2 above, and so far only Ilva seems to fulfil all the conditions to benefit from it. Furthermore, Law no. 116/2014 refers to Law Decree no. 61/2013, which in its preamble clearly mentions Ilva's situation as a motive for adopting the Decree.⁴¹
- 87) By allowing Ilva to meet its liquidity needs, the measure seems to give an advantage to Ilva that it would not have been able to obtain under normal market conditions. As indicated by several press reports,⁴² before Law no. 116 of 11 August 2014, Ilva was not able to receive any loan from private banks. Therefore, Law no. 116/2014 conferred an advantage to Ilva within the meaning of Article 107(1) TFEU, as it allowed Ilva to increase its means of financing and to reassure the banks as to the repayment of the loan due to its pre-deductible nature.
- 88) In this regard, it is enough for the Commission to establish a sufficiently direct link between the advantage given to the beneficiary (*i.e.* EUR [...] loan) and a sufficiently concrete economic risk of burdens on the State budget (*i.e.* a waiver of public debts by giving a priority to private loans). As the Court of Justice pointed out in relatively similar circumstances, it is not necessary that such a reduction, or even such a risk, should correspond or be equivalent to the advantage, or that the advantage should have as its counterpoint such a reduction or such a risk, or be of the same nature as the commitment of State resources from which it derives.⁴³
- 89) Therefore, at this stage, the Commission preliminarily concludes that the measure provides a selective advantage to Ilva and invites Italy to provide a list of companies actually or potentially benefitting from it and any other further

⁴⁰ The definition is contained in Article 1, paragraph 1, of Law Decree no. 61/2013, as referred to by Article 22 *quater*, paragraph 1, of Law Decree no. 91/2014.

⁴¹ "Visto il decreto del Ministro dell'ambiente e della tutela del territorio e del mare (...) con il quale si è provveduto al riesame dell'autorizzazione integrata ambientale (...) rilasciata alla Società ILVA S.p.A. per esercizio dello stabilimento siderurgico ubicato nei comuni di Taranto e di Statte".

⁴² See press articles quoted in footnotes 17 to 19 above.

⁴³ See judgment in joined Cases C-399 10 P and C-401 10 P *Bouygues SA, Bouygues Télécom SA v Commission*, EU:C:2013:175, paragraphs 109 and 110.

observation, in particular, as to the possible *de facto* and *de iure* selectivity of the measure.

3.1.2.3. *Measure no. 3: The State guarantee*

- 90) At this stage, the Commission has doubts whether the [...] rate corresponds to a real market premium for such a guarantee. The Commission also has doubts whether any private guarantor would have taken a similar EUR 400 million risk on an insolvent company two months after the company defaulted on a previous EUR [...] loan. In addition, more than [...] of the new loan is granted by CDP, which is fully public. In that respect, in application of the Communication on the revision of the method for setting the reference and discount rates, the margin for a loan to a technically insolvent company with a rating below CCC would be between 400 and 1 000 basis points, depending on the collateral.⁴⁴ This is well above the [...] basis points margin charged by CDP and the other banks on their loan for a quite long [...] -year period, including a [...] -year grace period for reimbursement. Moreover, pursuant to section 4.1 of the Commission Notice on State aid in the form of guarantees:⁴⁵ *"for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee"*.
- 91) The Commission therefore invites Italy to provide more information in this regard and in particular, to describe how the methodology and credit risk assessment used to set the guarantee rate and the interest rate of the loan, including any collateral, ensures market conformity.

3.1.2.4. *Measure no. 4: The settlement payment by Fintecna*

- 92) The Commission notes that, according to the privatisation contract, Fintecna is a debtor towards Ilva of a non-determined amount corresponding to environmental damages occurred before the sale of Ilva to the current owners. The Commission must therefore first assess whether such exposure was agreed on market terms. In other words, the Commission should verify whether the provision originally set out in the privatisation contract to guarantee future claims arising for environmental damages occurred before the privatisation would have been agreed by any market economy operator in a similar situation.
- 93) In this respect, the Commission notes that it is not uncommon in sale contracts of large industrial complexes that the buyer requires the vendor to undertake to pay for damages caused by the undertaking's activity predating the transfer. On the other hand, a prudent vendor will likely agree to provide the commitment, provided that the responsibility is capped at a certain level. In this case, the fact that the State (IRI) agreed to guarantee up to LIT [...], plus interests, of claims for environmental damages which occurred before the privatisation, does not appear as an unreasonable contract clause that a private vendor would have not undertaken in the context of the sale of a large steel plant.

⁴⁴ OJ C 14 of 18.1.2008, p. 6-9.

⁴⁵ OJ C 155 of 20.6.2008, p. 10-22.

- 94) Secondly, the Commission should assess whether the decision of Fintecna to settle the dispute with Ilva by paying EUR 156 million in March 2015 was a rational decision that a market economy operator would have taken in a similar situation. While making its decision to settle Fintecna must have taken into account the economic situation at the time at which it decided to settle, the level of risk and future expectations.⁴⁶
- 95) In this respect, the Commission notes that, as regards the level of settlement (i.e. EUR 156 million), Fintecna estimated its potential exposure vis-à-vis Ilva, in 2011 as EUR [...] and in 2014 adjusted to EUR [...] (see recital 41) above). Fintecna also requested two legal opinions which confirmed that EUR 156 million was an acceptable amount, within the maximum cap agreed in the privatisation contract (EUR [...], excluding interests, or EUR [...], including interests) and the estimated potential exposure (EUR [...] in 2014). Based on the above, it is the Commission's preliminary view that paying less than its own estimates is in principle a reasonable decision of a private market operator.
- 96) However, the Commission has doubts whether, absent the State Decree, Fintecna took a rational decision by settling with Ilva in this period of time, since it prolonged or avoided payments for 20 years. As noted in recital 40), despite Ilva's requests to pay, Fintecna for years contested any responsibility, particularly concerning damages from air pollution to third parties. The fact that it decided to pay in March 2015 just after Ilva was declared insolvent raises doubts as to Fintecna's proper assessment of the economic context and all risks of non-payment or less immediate payment in the perspective of Ilva's management changes, possibly ownership changes or other changes in the situation of Ilva at the end of the extraordinary administration. The Commission therefore invites Italy to present an analysis of a counterfactual situation absent the Law Decree (for example, Fintecna waiting for Ilva's bankruptcy or liquidation or resale) and to demonstrate that the payment of EUR 156 million in March 2015 was a market driven decision of Fintecna that gives no advantage to Ilva.
- 97) Furthermore, the Commission invites Italy to provide detailed information on the effects of the final and definitive settlement precluding any further claims for environmental damages (see recital 45) above).
- 98) In the light of the above, the Commission has doubts whether by accepting to settle a long dispute in March 2015, Fintecna took a rational decision that a market economy operator would have taken in a similar situation.

3.1.3. Distortion of competition and effect on trade between Member States

- 99) The Commission has also analysed whether the measures distort or threaten to distort competition and affect intra-EU trade. If aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.⁴⁷

⁴⁶ Case T-366/00 *Scott v. Commission*, EU:T:2012:649, paragraph 158.

⁴⁷ See e.g. judgment in *Philip Morris v. Commission*, Case 730/79, EU:C:1980:209, paragraph 11, and judgment in *Italy v. Commission*, C-372/97, EU:C:2004:234, paragraph 44.

100) By granting Ilva access to finance at conditions which it would not otherwise obtain in its current state of insolvency, the measures are liable to improve the competitive position of its business compared to its competitors on the internal market. Ilva is one of the main European players in the steel sector, which is a market open to competition in Europe and in which steel produced in one Member State is traded and sold in another Member State. Ilva sells around [...] of its output produced in Italy in EU Member States other than Italy, in competition with other steel producers (see recitals 5) and 6) above). Therefore, at this stage, the Commission concludes that the measures under examination have the potential to distort or threaten to distort competition on EU steel markets and affect trade of steel between Member States.

3.1.4. Legality of the aid

101) The Commission notes that measures no. 1, 2, 3 and 4 were granted in 2014 and 2015 in breach of stand-still obligations laid down in Article 108(3) TFEU. Although the transfer of the amount under measure no. 1 is not yet completed, the measure already grants Ilva the legal right to receive the amount and can therefore be interpreted as being already put into effect.

102) Therefore, the Commission comes to the conclusion that, should the measures be found to be State aid within the meaning of Article 107(1) TFEU, they would constitute unlawful State aid.

3.1.5. Conclusion

103) At this stage, the Commission considers that the measures no. 1, 2, 3 and 4 are likely to constitute State aid within the meaning of Article 107(1) TFEU but invites observations from interested parties on its preliminary conclusions.

3.2. Compatibility of the aid and legal basis for the assessment

104) The Commission does not see any grounds on which any State aid in favour of Ilva would be compatible with the internal market pursuant to the exceptions laid down in Article 107 of the Treaty, as further spelled out under existing Guidelines or regulations. Regional aid or rescue and restructuring aid to the steel sector as defined in the Guidelines on regional State aid (see recital 5) is not allowed under the applicable State aid Guidelines.⁴⁸ In addition, Ilva does not seem to be eligible for environmental aid under the applicable Guidelines⁴⁹ since it qualifies as an undertaking in difficulty in accordance with point 20(c) of the 2014 Rescue and Restructuring Guidelines.

105) It is settled case-law that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the

⁴⁸ See Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty OJ C249, 31.7.2014. Also regional aid is prohibited under point 9 of the Guidelines on regional State aid for 2014-2020, OJ C209, 23.07.2013.

⁴⁹ See Communication from the Commission - Guidelines on State aid for environmental protection and energy 2014-2020 OJ C 200, 28.6.2014.

derogation sought are fulfilled.⁵⁰ In this case, the Italian authorities do not claim any legal basis for the compatibility assessment.

- 106) The Commission, therefore, invites Italy to indicate the appropriate legal basis for assessment and to substantiate the grounds on which any possible State aid in favour of Ilva could be declared compatible with the internal market.

3.3. Possible economic continuity in the procedure set out in Law Decree no. 1/2015 for the rental and/or sale of Ilva

- 107) The Commission decision-making practice upheld by the Union Courts indicates that, in certain circumstances, the buyer of assets and business of an undertaking having received State aid which is declared to be incompatible with the internal market may be called to repay such aid to the extent that the attempts to recover it from the initial beneficiary are unsuccessful. In such instances, an economic continuity between the initial beneficiary of the incompatible aid and the acquired undertaking may be established. The assessment of economic continuity between the two entities is based on a set of indicators. The following factors may be taken into consideration: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price (such as a market price determined via open, public, unconditional and non-discriminatory tender, offering the bidders the choice as to how the assets are sold, e.g. either individually, by clusters or *en bloc*), the identity of the buyer(s), the moment of the sale and the economic logic of the operation.⁵¹
- 108) As set out in recitals 49) to 51), the extraordinary administration of Ilva at present should eventually lead to the rental and/or sale of the company. The factors mentioned in recital 107) would in principle determine whether there is economic continuity, and thus whether a possible undue advantage of Ilva would be passed-on to the undertaking that would be owned by a future buyer. In that respect, the achievement of the highest possible market price for Ilva by means of an open, public, unconditional and non-discriminatory tender would be a significant factor pointing towards economic discontinuity, if no conditions are attached which would potentially reduce the sale price.
- 109) However, at this stage, the Commission finds that the inclusion of the two conditions in Law Decree no. 1/2015 and in the call for expressions of interest described in recital 51) above, that is the need to guarantee the continuation of the production activity and an adequate number of jobs, increases the likelihood of economic continuity between Ilva and an acquired undertaking operating Ilva's assets in the future. In fact, in such a case, the assets would risk not to be sold at their real market price (as in a sale without any conditions) but at a reduced price that would reflect the acquirer's obligation to comply with those two conditions. Absent the sale of the assets at their real market price, the market distortions created by the possibly incompatible aid would continue to persist.

⁵⁰ See Case C-364/90, *Italian Republic v Commission of the European Communities*, EU:C:1993:157, paragraph 20.

⁵¹ This set of indicators was confirmed by the Union Courts, which confirmed the Commission's Alitalia decision (Judgment of the General Court in Case T-123/09 *Ryanair v. Commission* EU:T:2012:164; Judgment of the Court in Case C-287/12 P *Ryanair v. Commission* EU:C:2013:395).

- 110) Moreover, in application of those two conditions set out in the law and in the call for expressions of interest, Ilva may be preferentially sold "*en bloc*" to a buyer ensuring maximum continuation of total production and employment, as opposed for instance, to one buyer wishing to produce less steel (or qualities of steel e.g. low value added products) and maintain employment to a lesser extent, or several buyers bidding for different assets or clusters of assets of Ilva. If that were the case, the "market price" established by the expert selected or the price of the transaction could be a wrong indicator of the potentially higher market price which would have been achieved with an unconditional tender that would allow bidders to choose which of Ilva's assets they wish to acquire. In fact, the more the sale is organised as a sale of Ilva's assets, the less is the likelihood of economic continuity, whereas the more the acquirers are obliged/incentivised to acquire the full activity of Ilva, the higher becomes the likelihood of economic continuity.
- 111) Furthermore, the rental of Ilva's assets to another entity for a prolonged period is likely to lead to economic continuity between Ilva and that entity, given that the assets would be less detached from their original purpose and economic logic than if they were definitely acquired by that entity. Therefore, for economic discontinuity to be found, any rental of Ilva's assets should only be a short-term temporary stage before their final acquisition by an entity unrelated to Ilva and its owners.
- 112) In addition to the abovementioned risk that an entity acquiring or renting Ilva's assets may be liable for the recovery of possible incompatible aid *previously* granted to Ilva (prior to the acquisition/rental of the assets), there is also a risk of *new* aid being granted to the acquiring/renting entity. As long as public bodies are among Ilva's principal creditors, any reduction of the rental/sale price due to the conditions for the maintenance of production and employment levels may be detrimental to the financial interest of those public bodies, among other creditors. Any losses for those public bodies, compared to a situation where the rental/sale price is potentially determined at a higher level without any condition, would represent foregone State revenues, and thus possibly new aid to the acquiring/renting entity.
- 113) In the light of the above, the Commission invites comments on the application to Ilva of the procedure set out in Law Decree no. 1/2015 for the rental and/or sale of its assets.

3.4. Urgent environmental and health interventions

- 114) The Commission does not intend to oppose any immediate action which the Italian authorities may consider necessary in order to protect the health of citizens due to the officially recognised environmental and health emergency situation in Taranto portrayed in recitals 15) to 18). Therefore, the present decision is without prejudice to any public support to expenditure on works needed to depollute Ilva's site and the surrounding areas, to the extent that such works are urgently necessary to cope with existing pollution and to guarantee public health in the city of Taranto, pending the identification of the polluter to requisite standard in compliance with the applicable rules.
- 115) In this respect the Commission notes that the Italian authorities have taken the necessary steps to identify the polluter (see recital 18)). Pending the outcome of the judicial proceedings, the Italian State is justifiably acting with a view to ensuring

that pollution accumulated so far does not harm the health of citizens and the environment in the area of Taranto. In case any polluter is identified in the ongoing judicial proceedings, it should reimburse with interests, in compliance with applicable rules establishing or implementing the "polluter pays" principle, the amount already spent by the State for decontamination.

3.5. Planned measures in the Stability Law and in Law Decree no. 191/2015

- 116) Although the planned State guarantee in the Stability Law and the planned EUR 300 million loan are not within the scope of the present decision opening the formal investigation given that they are not yet granted within the meaning of State aid rules, in view of the nature of the planned measures, it cannot be excluded that, if implemented in the form currently foreseen, those measures would constitute State aid.
- 117) As regards the measure foreseen in the Stability Law, it is doubtful, in particular, whether any private guarantor would take a similar EUR 800 million risk on an insolvent company in the same situation of Ilva, considering that the company has already defaulted on the EUR [...] loan (measure no. 2) and has not yet reimbursed the EUR 400 million loan (measure no. 3).
- 118) As regards the measure foreseen in Law Decree no. 191/2015, it could be questionable, for the same reasons as for the State guarantee, that there would be any private market operator lending EUR 300 million to Ilva at the same conditions, if at all, considering Ilva's financial difficulties.
- 119) In this respect, the Commission wishes to remind Italy that Article 108(3) TFEU has suspensory effect. Should the planned measures constitute State aid within the meaning of Article 107(1) TFEU, Italy is under the obligation not to implement them without having obtained prior authorisation from the Commission.

4. CONCLUSIONS

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Italy to submit its comments and to provide all such information as may help to assess measures no. 1, 2, 3 and 4 within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission, without prejudice to the considerations set out in recitals 114) and 115) relating to urgent measures which the Italian authorities may take to ensure that pollution accumulated so far does not harm the health of citizens and the environment in the area of Taranto, wishes to remind Italy that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

Furthermore, in relation to the planned measures in the Stability Law and in Law Decree no. 191/2015, the Commission wishes to remind Italy that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect.

The Commission warns Italy that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will

also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission