JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

3 February 2011 *

In Case T-584/08,

Cantiere Navale De Poli SpA, established in Venice (Italy), represented initially by A. Abate and R. Longanesi Cattani, and subsequently by A. Abate and A. Franchi, lawyers,

applicant,

v

European Commission, represented by E. Righini, C. Urraca Caviedes and V. Di Bucci, acting as Agents,

defendant,

* Language of the case: Italian.

ACTION for annulment of Commission Decision 2010/38/EC of 21 October 2008 on State aid C 20/08 (ex N 62/08) which Italy is planning to implement through a modification of scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding (OJ 2010 L 17, p. 50),

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas and N. Wahl (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2010,

gives the following

Judgment

Legal context

1 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides:

'For the purpose of this Regulation:

…

(b) "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

2 Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1) provides:

'For the purposes of Article 1(c) of Regulation … No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.'

3 On the basis of Article 87(3)(e) EC, the Council adopted Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding (OJ 2002 L 172, p. 1). That regulation authorised such a mechanism in order to assist Community shipyards which had suffered serious harm caused by the unfair competition from shipyards in Korea (recital 3 in the preamble to the regulation). Article 2(2) and (3) of Regulation No 1177/2002 stated that direct aid in support of certain shipbuilding contracts could be considered to be compatible with the common market where that aid did not exceed 6% of the contract value and where the market segment at issue had suffered serious harm as a result of unfair Korean competition.

4 Article 3 of Regulation No 1177/2002 makes the grant of the aid conditional on its being notified, in accordance with Article 88 EC, to the Commission, which must examine it and adopt a decision on it in accordance with Regulation No 659/1999.

5 Articles 2(4), 4 and 5 of Regulation No 1177/2002 are worded as follows:

'*Article 2*

…

4. This Regulation shall not apply in respect of any ship delivered more than three years from the date of signing of the final contract. The Commission may, however, grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company.

…

Article 4

The Regulation shall be applied to final contracts signed from the entry into force of this Regulation until its expiry, with the exception of final contracts signed before the Community gives notice in the *Official Journal of the European Communities* that it has initiated dispute settlement proceedings against Korea by requesting consultations in accordance with the World Trade Organisation's Understanding on the Rules and Procedures for the Settlement of Disputes and final contracts signed one month or more after the Commission gives notice in the *Official Journal of the European Communities* that these dispute settlement proceedings are resolved, or suspended on the grounds that the Community considers that the Agreed Minutes have been effectively implemented.

Article 5

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Communities* and shall expire on 31 March 2004.

…'

6 By Council Regulation (EC) No 502/2004 of 11 March 2004 amending Regulation No 1177/2002 (OJ 2004 L 81, p. 6), the date of expiry of Regulation No 1177/2002 provided for in Article 5 of that regulation was postponed to 31 March 2005.

Background to the dispute

7 The applicant, Cantiere Navale De Poli SpA, runs a shipyard in Venice (Italy).

8 On 15 January 2004, the Italian Republic notified a State aid scheme by which it intended to apply Regulation No 1177/2002 by means of Article 4(153) of legge n. 350 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004) (Law No 350 relating to the provisions for drawing up the annual and pluriannual budget of the State) of 24 December 2003 ('the 2004 Finance Law') (ordinary supplement to GURI No 299 of 27 December 2003) ('Law 350/2003'), which provided:

'In order to enable the application of [Regulation No 1177/2002], the sum of EUR 10 million is granted for 2004. The decree of the Ministry of Infrastructure and Transport lays down the detailed rules for the grant of the aid. The effectiveness of the provisions of the present paragraph is conditional, in accordance with Article 88(3) [EC], on the prior approval of the [Commission].'

9 By decision of 19 May 2004 on aid scheme N 59/2004 relating to a defensive temporary mechanism for shipbuilding, notified under reference C (2004) 1807 ('the 2004 approval decision'), the Commission approved the scheme notified, on the view

that it complied with Regulation No 1177/2002 and was compatible with the common market ('the 2004 scheme').

10 Since, in its estimation, the initial appropriation of EUR 10 million was not sufficient to cover all of the applications for aid submitted before the expiry of Regulation No 1177/2002, as amended by Regulation No 502/2004, the Italian Republic notified the Commission on 1 February 2008 of its plans to allocate, by means of Article 2(206) of the legge n° 244 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008) (Law No 244 relating to the provisions for drawing up the annual and pluriannual budget of the State; 'the 2008 Finance Law') of 24 December 2007 (ordinary supplement to the GURI No 300 of 28 December 2007) ('Law 244/2003'), another EUR 10 million to the budget for the 2004 scheme ('the measure notified').

11 By letter dated 30 April 2008, the Commission informed the Italian Republic that it had decided to initiate the procedure laid down in Article 88(2) EC with regard to the measure notified. The decision to initiate the procedure was, furthermore, published in the *Official Journal of the European Union* (OJ 2008 C 140, p. 20). The Commission invited all the interested parties to submit their comments within one month of the date of publication. By letter dated 12 September 2008, the applicant submitted its comments, which the Commission did not take into account, since it considered that they had been submitted out of time.

12 On 21 October 2008, the Commission adopted Decision 2010/38/EC on State aid C 20/08 (ex N 62/08) which Italy is planning to implement by altering scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding (OJ 2010 L 17, p. 50) ('the contested decision'), Article 1 of which provides:

'The State aid which Italy is planning to implement by altering scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding, which entails an increase [for 2004] of [EUR] 10 million, is incompatible with the common market.

Therefore the aid may not be implemented.'

13 In the contested decision, the Commission held that the measure notified constituted new aid within the meaning of Article 1(c) of Regulation No 659/1999 and Article 4 of Regulation No 794/2004 and that that aid could not be considered to be compatible with the common market, since Regulation No 1177/2002 was no longer in force and could not therefore serve as a legal basis for the assessment of the measure notified. The Commission also stated that that measure could not be considered to be compatible with the common market on the basis of the framework on State aid to shipbuilding (OJ 2003 C 317, p. 11); nor did it appear to be compatible with the common market on the basis of any other provision applicable to State aid.

14 Furthermore, the Commission noted that, following the entry into force of Regulation No 1177/2002, the Republic of Korea had brought to the attention of the Dispute Settlement Body ('the DSB') of the World Trade Organisatíon (WTO) the question of the lawfulness of that regulation in the light of the WTO rules. On 22 April 2005, a panel of experts created by the DSB issued a report in which it was concluded that Regulation No 1177/2002 and several national schemes applying that regulation, which were in place at the time when the Republic of Korea initiated the dispute before the WTO, were in breach of certain WTO rules. On 20 June 2005, the DSB adopted the panel report, which recommended that the Community bring Regulation No 1177/2002 and the national schemes applying it into conformity with the Community's obligations under the agreements entered into in the context of the WTO.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 30 December 2008, the applicant brought the present action.

16 It claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

17 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

18 Acting upon a report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, called on the parties to set out their views on the appropriateness of having the present case joined with Case T-3/09 in which an action with the same subject-matter had been brought by the Italian Republic. On receipt of the observations of the parties, which did not raise any objections, those cases were joined for the purposes of the oral procedure by order of the President of the Eighth Chamber of 2 June 2010, in accordance with Article 50 of the Rules of Procedure.

19 At the hearing on 22 May 2007, the parties presented oral argument and answered the questions put to them by the Court.

Law

20 In support of its action, the applicant puts forward five pleas alleging, respectively: (i) infringement of Regulation No 1177/2002; (ii) erroneous assessment of the measure notified; (iii) irrelevance of the DSB recommendation of 20 June 2005; (iv) infringement of Article 253 EC; and (v) breach of the principles of due process, the right to be heard and the rights of the defence.

The first plea: infringement of Regulation No 1177/200 and Article 253 EC, and breach of the principles of equal treatment and the protection of legitimate expectations

Arguments of the parties

21 In the context of this plea, the applicant claims that the Commission breached the principles governing the temporal application of a rule of law. The Commission confused the period during which Regulation No 1177/2002 was in force with the period during which that regulation was applicable. According to the applicant, the Commission was obliged to apply that regulation to situations existing prior to its date of expiry — 31 March 2005 — to the extent that those situations came about, as a matter

of law, during the period in which Regulation No 1177/2002 was in force. In that context, the applicant claims that recital 34 of the contested decision is vitiated by a failure to state reasons. The applicant also refers to Article 4 of Regulation No 1177/2002 and to Commission Decision C (2008) 4356 of 8 August 2008 on State aid N 68/2008 and N 69/2008 — Italy (extension of the three-month period for the delivery of tankers built by the Giacalone shipyard), in which the Commission applied Regulation No 1177/2002 after 31 March 2005.

22 Furthermore, the applicant alleges that the Commission breached the principle of equal treatment in the contested decision, since, in order to combat the unfair Korean competition, the undertakings which were deprived of the benefit of the aid scheme covered by that decision had concluded their respective sales contracts in the same economic and legislative context — that is to say, prior to 31 March 2005 — as the undertakings which benefited from the aid scheme following the 2004 approval decision. The only difference between those operators was that, for budgetary reasons, the Italian Government carried out a refinancing of the 2004 scheme after 31 March 2005.

23 The Commission also breached the principle of the protection of legitimate expectations by arbitrarily assuming that the measure notified had been notified out of time. Since Regulation No 1177/2002 does not set any deadline by which aid measures must be notified and in the light of the fact that the applicant had concluded prior to 31 March 2005 contracts fulfilling the substantive conditions laid down in that regulation, the Commission could not, without infringing the applicant's legitimate expectations, refuse to approve the measure notified.

24 The applicant also claims that the Commission did not show how meeting the objectives of Regulation No 1177/2002 could be reconciled with the fact that it was physically impossible for the Italian Government to notify on 31 March 2005 — the day on which the regulation expired — the aid connected with contracts, when it did not know if and when such contracts would be concluded and, consequently, given

that Regulation No 1177/2002 laid down a right to conclude contracts until 31 March 2005, had no way of being aware of them.

25 Moreover, the applicant maintains that neither the system for the review of State aid laid down in the Treaty nor Regulation No 1177/2002 sets a deadline by which aid measures must be notified under Article 88(3) EC.

26 In accordance with the principle of subsidiarity, it is for the Italian authorities alone to choose the date of notification of an aid measure on the basis of their knowledge of the budget required for the application of Regulation No 1177/2002, and in the light of the budgetary procedures normally provided for. It is apparent that the Commission made a manifest error by confusing the date of expiry of Regulation No 1177/2002 — 31 March 2005 — with the deadline by which the Member States must provide for the financing of an aid scheme, taking these to be the same day.

27 The Commission contends that the plea should be rejected.

Findings of the Court

28 As regards, first of all, the complaint that recital 34 of the contested decision is vitiated by a failure to state reasons, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or

other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 230 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Joined Cases C-341/06 P and C-342/06 P *Chronopost* v *UFEX and Others* [2008] ECR I-4777, paragraph 88 and the case-law cited).

29 In the present case, in recitals 33 and 34 of the contested decision, the Commission explained its reasons for finding that the case-law invoked by the Italian Government was not relevant for deciding whether the Italian Government had a legitimate expectation that the measure notified is compatible with the common market.

30 The alleged failure to state reasons relates to recitals 11, 25 and 26 of the contested decision, which set out the reason for the Commission's finding that Regulation No 1177/2002 was not applicable to the measure notified, namely the fact that that regulation was no longer in force.

31 Next, with regard to merits of the Commission's approach, it is not disputed that the Commission found in the contested decision that Regulation No 1177/2002 could not serve as a legal basis for the assessment of the measure notified, since that regulation had expired on 31 March 2005 (recitals 11, 25 and 26 of the contested decision).

32 With regard to the temporal application of a rule of law, in the absence of transitional provisions, it is necessary to distinguish, in each case, rules governing competence from substantive rules.

33 With regard to the rules governing the competence of the European Union ('EU') institutions, it is apparent from the case-law that the provision constituting the legal basis for a measure and empowering the EU institution to adopt the measure in question must be in force at the time when that measure is adopted (see, to that effect, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 45).

34 In the present case, it is Article 88 EC which constitutes the legal basis conferring on the Commission competence to adopt decisions concerning State aid and which has empowered the Commission, on an ongoing basis since 1968, to rule on the compatibility of State aid with the common market, in the light of Article 87 EC.

35 The substantive rules, on the other hand, govern, from their entry into force, all the future effects of situations which came about during the period of validity of the earlier legislation. Consequently, the substantive rules do not apply to the effects established prior to their entry into force, unless the exceptional conditions for retroactive application are satisfied (see, to that effect, Case 68/69 *Brock* [1970] ECR 171, paragraph 6; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 119; Case T-435/04 *Simões Dos Santos* v *OHIM* [2007] ECR II-A-2-427, paragraph 100; and Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 70).

36 With regard to aid which has been notified but not paid, under the EU system for the review of State aid, the date on which the effects of the planned aid becomes established is the same as that on which the Commission adopts the decision ruling on the compatibility of that aid with the common market. The rules, principles and criteria for assessing the compatibility of State aid which are in force at the date on which the Commission takes its decision may generally be regarded as those best adapted to the conditions of competition (Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraphs 50 to 53). That is because the aid in question would not cre-

ate real advantages or disadvantages in the common market until, at the earliest, the date on which the Commission decides whether or not to authorise it.

37 On the other hand, in the case of aid which has been paid unlawfully without prior notification, the applicable substantive rules are those in force at the time when the aid was paid, where the advantages and disadvantages created by such aid arose during the period in which the aid in question was paid (Case T-348/04 *SIDE* v *Commission* [2008] ECR II-625, paragraphs 58 to 60).

38 It follows that, in the present case, the Commission cannot be criticised for not applying Regulation No 1177/2002, since the planned aid had been notified but not paid. The actual advantages and disadvantages in the common market of the measure notified were not likely to arise before the adoption of the contested decision, which was taken after the date of expiry of Regulation No 1177/2002, that is to say, after 31 March 2005.

39 The argument that, under Article 4 of Regulation No 1177/2002, that regulation was to apply to contracts concluded prior to 31 March 2005 does not cast doubt on the finding that Regulation No 1177/2002 was not applicable to the measure notified. Article 4 of Regulation No 1177/2002, like Article 2 of that regulation, sets out the substantive conditions which must be satisfied if the Commission is to be able, under that regulation, to take a decision declaring the aid at issue compatible with the common market. However, the temporal application of Regulation No 1177/2002 is governed by Article 5 of that regulation and by the principles set out in paragraphs 33 to 36 above.

40 Admittedly, the fact that — given that the aid was notified but not paid — the date establishing the applicable substantive legal rules is the same as the date on which the Commission adopted a decision on the compatibility of that aid means that the Commission can, by varying the duration of the assessment of the aid measure notified, trigger the application of a substantive legal rule which has entered into force

after that measure was notified to the Commission. However, that situation — which, moreover, did not arise in the present case, since the measure notified was notified after the expiry of Regulation No 1177/2002 — cannot justify a derogation from the principle that new substantive legal rules govern, with effect from their entry into force, all the future effects of situations which came about under the old rules.

41 In that regard, it should be noted that the possibility open to the Commission of choosing to apply either the new rule or the old rule is limited and offset, first, by the fact that the Member States have a discretion with regard to the date on which they notify the aid measures and, secondly, by the fact that Article 4 of Regulation No 659/1999 enjoins the Commission, in accordance with the principle of sound administration, to act diligently (see, to that effect and by analogy, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 62 and the case-law cited).

42 The fact that, in order to benefit from the application of Regulation No 1177/2002, the Member States were required to notify the planned aid measures before the expiry of that regulation and before all the eligible aid contracts were signed cannot call into question the application to the EU system for the review of State aid of the principles governing the temporal application of substantive rules. It is inherent in the system of prior review of State aid measures that notifications must of necessity include estimates concerning the total amounts of the aid planned. That is particularly the case with regard to measures covering operational aid, such as the aid at issue in the present case.

43 Nor does the claim that the Commission applied Regulation No 1177/2002 after 31 March 2005 in order to approve an application to extend the supply period cast doubt on the finding that Regulation No 1177/2002 was not applicable to the measure notified. First, it should be noted that the interpretation and application by the Commission of a rule of law can in no case bind the General Court. Secondly, the decision

referred to by the applicant (see paragraph 21 above) concerns, in contrast to that at issue in the present case, a situation whose legal framework was definitively established before 31 March 2005, by means of the 2004 approval decision.

44 As for the argument alleging breach of the principle of equal treatment, this is clearly unfounded. The fact that Regulation No 1177/2002 does not apply to the measure notified is not the consequence of the exercise of discretion. Accordingly, the reason why the contracts covered by the measure notified do not benefit from aid under Regulation No 1177/2002 relates only to the temporary character of that regulation and to the fact that the Italian Republic did not notify the measure at issue so that a decision could be taken by the Commission before the regulation expired.

45 With regard to the applicant's claim that the Commission breached the principle of the protection of legitimate expectations, it should be noted that Regulation No 1177/2002 does not contain provisions relieving the Member States of their obligation to notify under Article 88(3) EC or provisions altering the definition of the concepts relevant to that obligation, such as the concept of alterations to existing aid. On the contrary, that regulation makes its application subject to compliance with Article 88 EC and Regulation No 659/1999. Accordingly, the 2004 approval decision, which is based on Regulation No 1177/2002, could in no way create legitimate expectations above and beyond what was expressly set out in that decision, that is to say, above and beyond the authorisation for the Italian Republic to grant aid of a total amount of EUR 10 million.

46 In the light of all the foregoing and in the absence of transitional provisions extending the temporal scope of Regulation No 1177/2002, the first plea must be rejected in its entirety.

The second plea: erroneous assessment of the measure notified

Arguments of the parties

47 The applicant claims, first, that the Commission has no competence to examine the compatibility of the measure notified with the common market, since that compatibility requirement is outside the scope of Regulation No 1177/2002. According to the applicant, that regulation came about because of an urgent situation on the market, which falls within the exclusive competence of the Council, under Article 87(3) EC.

48 In that regard, it claims that the Commission's role, for the purposes of the assessment of the compatibility of aid measures from the point of view of the derogation established by the Council under Article 87(3)(e) EC, is limited to ensuring compliance with the conditions set out by the Council, which has been established in the present case.

49 Secondly, the applicant alleges that the Commission was wrong to base its finding that the measure notified was new aid on Article 4(2) of Regulation No 794/2004. In that regard, it claims that Regulation No 1177/2002 was a higher-ranking legal norm than Regulation No 794/2004. Accordingly, the latter cannot limit the application of Regulation No 1177/2002. On the contrary, Regulation No 794/2004 should be interpreted in the light of the aim of Regulation No 1177/2002, namely to support European shipyards facing unfair Korean competition.

50 Thirdly, the applicant challenges the soundness of the reason set out in recital 23 of the contested decision, according to which 'increases in the budget of an approved

scheme (other than marginal ones of less than 20 %) are bound to have an impact on competition as they allow the Member State to provide more aid than originally approved'. According to the applicant, the measure notified could not have an impact on competition, since any such impact would have taken place earlier, when, following the adoption of Regulation No 1177/2002, the economic operators concluded shipbuilding contracts until 2005.

51 According to the applicant, the fact that the Korean shipyards could have suffered harm is not a relevant factor, because it is precisely what Regulation No 1177/2002 sought to achieve. Moreover, the measure notified did not involve a real increase in the budget of 'existing aid', since the contracts affected by the measure notified never benefited from the aid scheme at issue.

52 Fourthly, the applicant states that it is necessary to consider the refinancing carried out by the Italian Government, that is to say, the measure notified, as the direct consequence of Regulation No 502/2004, which extended the application of Regulation No 1177/2002 and gave rise to a need to refinance. It would be wrong, therefore, to consider the measure notified as a new scheme different from that covered by the 2004 approval decision.

53 The Commission contests the applicant's arguments.

54 The Commission contends that the applicant's argument that the measure notified could not have any impact on competition is inadmissible. According to the Commission, the complaint set out in the application initiating the proceedings is that Article 4(2)(a) of Regulation No 794/2004 had been infringed, whereas the complaint in the reply is that there is no likelihood of an impact on competition and, accordingly, that one of the requirements under Article 87(1) EC has not been met. That consti-

tutes, therefore, a new plea, which does not comply with the combined provisions of Article 44(1)(c) and Article 48(2) of the Rules of Procedure.

Findings of the Court

55 First of all, the plea of inadmissibility put forward by the Commission must be rejected. Although, in the application initiating the proceedings, the applicant principally argued in support of the present plea that it followed from the hierarchy of the norms at issue that Article 4(2) of Regulation No 794/2004 could not apply to the measure notified, it also put forward the argument that the measure notified could not alter the conditions of competition.

56 It follows that all the arguments raised by the applicant in the context of the present plea must be declared admissible.

57 With regard to the merits of the plea, it is necessary to reject at the outset the argument that Regulation No 1177/2002 had the effect of depriving the Commission of competence to examine the compatibility of the measure notified with the common market.

58 First, the Commission's competence in that regard is enshrined in the EC Treaty and cannot be undermined by a regulation.

59 Secondly, as was noted in the context of the examination of the first plea, Regulation No 1177/2002 does not apply to the measure notified.

60 Thirdly, even supposing that Regulation No 1177/2002 were applicable to the measure notified, Regulation No 1177/2002 is based on Article 87(3)(e) EC. Consequently, the aid covered by that regulation is only one category of aid which 'may be considered to be compatible with the common market'. Article 2(1) of Regulation No 1177/2002, moreover, closely mirrors that wording.

61 Thus, although it is possible for such aid to be considered to be compatible with the common market, it does not follow that it is necessarily so (see, to that effect, Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraphs 26 to 28).

62 It is for the Commission to establish, under Article 88(3) EC, whether that aid fulfills all the conditions governing compatibility with the common market. That fact is alluded to in Article 3 of Regulation No 1177/2002, which expressly provides that Article 88 EC and Regulation No 659/1999 apply to the aid at issue.

63 It follows from all of the foregoing with regard to the Commission's competence that, contrary to the assertions made by the applicant, the Commission was competent in this case to assess the compatibility of the measure notified with the common market and that no rule prevented it from relying on Regulation No 794/2002.

64 With regard to the challenge to the categorisation of the measure notified as new aid, it should be noted that the scope of the concept of amendment of existing aid is defined with reference to the legal basis establishing the existing aid scheme (Case

169/82 *Commission* v *Italy* [1984] ECR 1603, paragraphs 9 and 10, and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraphs 61 and 62).

65 In the present case, Law 350/2003, which states that the initial budget for the aid scheme amounted to EUR 10 million, was among the evidence that the Italian Republic had placed before the Commission for examination in the context of the procedure leading to the 2004 approval decision. It follows that the adoption of Law 244/2007, which provided that another EUR 10 million was to be put towards the 2004 scheme, effectively caused the measure notified to be categorised as new aid within the meaning of the case-law.

66 For the sake of completeness, it should be borne in mind that the premiss on which the applicant's complaint is based — that competition could not be distorted at the time when the aid was granted, because the impact on competition had already taken place at the time when the contracts were concluded in 2005 (see paragraph 50 above) — is incorrect, as has already been stated in paragraphs 36 to 38 above.

67 Lastly, the applicant's argument that the measure notified cannot be considered to be new aid, since it is the direct consequence of Regulation No 502/2004, which extended the application of Regulation No 1177/2002 and gave rise to a need to refinance the 2004 scheme, is irrelevant. Although Regulation No 502/2004 extended the application of Regulation No 1177/2002, it did not introduce any exceptions to the obligation to notify amendments to aid, as provided for in Article 88(3) EC and Article 3 of Regulation No 1177/2002.

68 It follows from all of the above that the second plea must also be rejected as unfounded.

The third plea: irrelevance of the DSB recommendation of 20 June 2005

Arguments of the parties

69 The applicant claims, in essence, that the contested decision is vitiated in so far as it incorrectly declared that the DSB recommendation of 20 June 2005 precluded approval of the measure notified. The position taken by the Commission in the contested decision amounts to applying the DSB recommendation of 20 June 2005 retrospectively to the contracts signed before 31 March 2005, the signatories of which had a legitimate expectation that Regulation No 1177/2002 would be applied to them. On the contrary, the DSB recommendation should not have played any part in the Commission's examination of the measure notified.

70 The Commission contends that the plea should be rejected.

Findings of the Court

71 It follows from recital 26 of the contested decision that the Commission considered that the measure notified was incompatible with the common market in the light, first, of the fact that Regulation No 1177/2002 had expired and, secondly, the fact that there was no other legal basis for a compatibility decision.

72 In recital 37 of the contested decision, the Commission stated, in response to the Italian Republic's argument set out in recital 35, that the Community had informed the WTO on 20 July 2005 of the fact that Regulation No 1177/2002 had expired on

31 March 2005 and that the Member States could therefore no longer grant aid under that regulation. The Commission found in that regard that that communication constituted a commitment by the Community to the WTO no longer to apply Regulation No 1177/2002.

73 Accordingly, recitals 26 and 37 of the contested decision, read together, indicate that the Commission found in that decision that approval of the measure notified would have been both incompatible with the common market and in conflict with the Community's commitments to the WTO, as the finding relating to the incompatibility of the measure notified with the common market is an assessment which is distinct and independent from, and prior to, the assessment relating to the Community's responsibilities to the WTO.

74 It follows that the applicant's third plea cannot succeed.

The fourth plea: inadequacy of the reasons stated, or failure to state reasons

Arguments of the parties

75 By its fourth plea, the applicant claims, first, that recital 25 of the contested decision is vitiated by failure to state reasons, since it 'invokes, in general terms, the lack of a

legal basis enabling [the measure notified] to be authorised by merely referring to the expiry of Regulation [No 1177/2002], which took effect on 31 March 2005'. According to the applicant, that insufficient statement of reasons is combined with a failure to state reasons, in so far as the contested decision fails to examine the relationship between Regulation No 1177/2002 and Regulation No 794/2004 from the point of view both of the aims pursued by the Council and of the hierarchy of legal norms.

76 In its reply, the applicant asserts that recitals 19 to 24 of the contested decision are vitiated by a failure to state reasons, since they fail to explain either the relationship between the measure notified and Regulation No 1177/2002 or the relation between the grant of the aid and its impact on competition in 2005.

77 The applicant also claims that no reasons were given for the Commission's assertions that: (i) Regulation No 1177/2002 does not constitute a valid legal basis for the examination of the measure notified; (ii) the Italian Government had not notified the measure at issue when Regulation No 1177/2002 was in force; and (iii) approval of the measure notified would constitute an infringement of the Community's international commitments.

78 The Commission contends that the reasons for the contested decision are sufficient and appropriate for the purposes of clearly disclosing the reasoning followed in the assessment of the measure notified. Moreover, it considers that the arguments put forward by the applicant in its reply are inadmissible, since they refer to the Commission's finding that the measure notified constitutes new aid and the applicant did not criticise that element of the contested decision in its application.

Findings of the Court

79 First of all, the plea of inadmissibility put forward by the Commission should be rejected since, in its application, the applicant expressly challenged the categorisation of the measure notified as new aid. All the arguments put forward by the applicant in the context of this plea must therefore be regarded as admissible.

80 The complaint directed at recital 25 of the contested decision should be rejected as unfounded. The Commission's reasoning with regard to the legal framework applicable to the measure notified and its incompatibility with the common market is sufficiently clear from recitals 11 and 25 to 35 of the contested decision.

81 Furthermore, it is necessary to reject as wholly unfounded the arguments that the contested decision does not address the relationship between Regulation No 1177/2002, on the one hand, and the measure notified and Regulation No 794/2004, on the other. As was stated above, the Commission found in the contested decision that Regulation No 1177/2002 was no longer applicable and was irrelevant for the purposes of its examination of the measure notified. Accordingly, and in the light of the case-law cited in paragraph 28 above, the Commission cannot be required also to explain how it envisaged the relationship between a regulation that it considers inapplicable to the present case and the rules it intended to apply.

82 With regard to the complaint concerning the alleged inadequacy of the reasons given concerning the relationship between the grant of aid and its impact on competition in 2005, it should be noted that the applicant thereby in reality challenges only the Commission's categorisation of the measure notified as new aid. As was stated in paragraphs 63 to 66 above, that complaint cannot be upheld.

83 Lastly, with regard to the three complaints set out in paragraph 77 above, it should be noted that, in the light of recitals 26 and 34 of the contested decision, the first two are manifestly unfounded and the third inherently ineffective.

84 In recitals 26 to 34 of the contested decision, the Commission explains that Regulation No 1177/2002 was no longer in force at the time when the contested decision was adopted and that the case-law cited by the Italian Government in recital 33 of the contested decision was not relevant for the purposes of the question whether the Italian authorities had legitimate expectations.

85 With regard to the last complaint, it should be noted that Article 1 of the contested decision states that the measure notified cannot be implemented since it is not compatible with the common market. As follows from recital 26 of the contested decision, in reaching the conclusion that the measure notified was incompatible with the common market, the Commission in no way relied upon the Community's international commitments. It follows that a possible failure to state reasons with regard to a conflict between the Community's international commitments and the measure notified has no impact on the enacting terms of the contested decision and that, in consequence, that complaint must be declared inherently ineffective.

86 It follows from all of the foregoing that the fourth plea must be rejected in its entirety.

The fifth plea: breach of the principles of due process, the right to be heard and the rights of the defence

Arguments of the parties

87 The applicant claims that, by failing to take into account its comments during the administrative procedure (see paragraph 11 above), the Commission breached the principles of due process, the right to be heard and the rights of the defence.

88 The Commission contends that the plea should be rejected.

Findings of the Court

89 The Court considers that the Commission complied with its procedural obligations towards the applicant by publishing, in June 2008, in the *Official Journal*, its decision to initiate the procedure laid down in Article 88(2) EC, and by requesting the interested parties to submit their comments on the measure notified within one month (see, to that effect, *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 35 above, paragraphs 80 to 84). Accordingly, and in the light of its principal duty, which was to adopt a decision within a reasonable period vis-à-vis the Italian Republic, the Commission cannot be criticised for not taking into account comments submitted by the applicant more than three months after the expiry of that period.

90 It must therefore be concluded that the fifth plea is also unfounded.

91 In consequence, the action must be dismissed in its entirety.

Costs

92 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Cantiere Navale De Poli SpA to pay the costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 3 February 2011.

[Signatures]