OPINION OF ADVOCATE GENERAL TRSTENJAK of 16 December 2010[1]

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1. The present appeals concern the judgment of the Court of First Instance (now 'the General Court') of 28 November 2008 in Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2] ('the judgment under appeal'). In that judgment, although the General Court found the actions brought under those case numbers against Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 [3] ('the contested decision') to be admissible, it dismissed them as unfounded.

2. All the participants in the appeal proceedings are seeking to have the judgment under appeal set aside. The Commission considers that the General Court should have dismissed as inadmissible at the outset the actions in Cases T-254/00, T-270/00 and T-277/00. The other parties to the proceedings consider that the General Court should have upheld those actions and annulled the contested decision.

2 — [2008] ECR II-3269.

3 — OJ 1999 L 150, p. 50.

I — Legal framework [4]

3. Article 87(1) and (3) EC provides:

'(1) Save as otherwise provided in this Treaty, 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 production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

…

(3) The following may be considered to be compatible with the common market:

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

4 — On the basis of the terms used in the TEU and TFEU, 'European Union law' is used in this Opinion to designate Community law and European law. The various provisions of primary law cited are those which were applicable *ratione temporis*.

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

…'

4. Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.'

5. Articles 13, 14 and 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [5] provide:

'*Article 13*

Decisions of the Commission

(1) The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

…

Article 14

Recovery of aid

(1) Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to

5 — OJ 1999 L 83, p. 1.

as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

...

(3) Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.

Article 15

Limitation period

(1) The powers of the Commission to recover aid shall be subject to a limitation period of ten years.

(2) The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

(3) Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

II — Facts and administrative procedure

A — *The scheme for relief from social security contributions*

6. The Italian Ministerial Decree of 5 August 1994 laid down the allocation criteria for the relief from social security contributions provided for in Article 59 of the Decree of the President of the Italian Republic of 6 March 1978 setting up a special scheme for relief from social security contributions owed by employers to the Istituto Nazionale de la Previdenza Sociale ('INPS') (National Institute of Social Insurance) in the Mezzogiorno

for the period between 1994 and 1996. Article 1 of the Ministerial Decree of 5 August 1994 provided for a general reduction in the social security contributions owed by employers. Article 2 of the decree provided for an exemption from social security contributions for net job creation in undertakings for a period of one year from the date on which an unemployed worker is taken on.

7. Following the notification of that Ministerial Decree, by Decision 95/455/EC of 1 March 1995 on the arrangements for reducing the social security contributions paid by firms in the Mezzogiorno and for assigning to the State some of those contributions, [6] the Commission declared the scheme for relief from social security contributions to be compatible with the common market, subject to certain conditions.

8. Italian Law No 206/1995 extended the aid scheme under the Ministerial Decree for 1995 and 1996 to undertakings located in the island territory of Venice and Chioggia. Italian Law No 30/1997 extended the period of validity of the scheme for 1997.

9. The reductions in social security contributions accorded to undertakings located in the urban territory of Venice and Chioggia pursuant to Article 1 of the Ministerial Decree amounted to an average of EUR 37.7 million [7] per year, shared between 1 645 undertakings, while the exemptions accorded pursuant to Article 2 of the Ministerial Decree amounted to EUR 292 831 [8] per year shared, between 165 undertakings.

B — *The procedure before the Commission*

10. After the Italian authorities communicated Law No 30/1997 to the Commission by letter of 10 June 1997 in accordance with the provisions of Decision 95/455, [9] the Commission asked by letter of 1 July 1997, followed by a reminder dated 28 August 1997, for additional information concerning the extension of the scope of the social security reductions and exemptions to undertakings located in the island territory of Venice and Chioggia ('the social security relief').

11. The Italian authorities suspended the scheme for relief from social security contributions under consideration with effect from 1 December 1997.

12. Since it received no reply, the Commission notified the Italian Republic by letter dated 17 December 1997 of its decision to initiate the formal assessment procedure laid down in the first subparagraph of Article 88(2) EC regarding that social security relief. The decision to initiate the procedure

6 — OJ 1995 L 265, p. 23.
7 — ITL 73 billion.
8 — ITL 567 million.
9 — See above, point 7 of this Opinion.

was published in the Official Journal on 18 February 1998.

13. By letter of 17 March 1998, Comitato 'Venezia vuole vivere' ('the Committee') submitted its comments and a report, accompanied by a study carried out by the Consorzio per la ricerca e la formazione (Consortium for Research and Training) ('COSES') dated March 1998, concerning the difficulties encountered by undertakings operating in the area of the lagoon as compared with those located on the mainland.

14. By letter of 18 May 1998 the City of Venice also submitted comments, accompanied by an earlier study carried out by COSES on the same subject, dated February 1998. In its observations, the City of Venice explained that municipal undertakings providing public services of general economic interest were also beneficiaries of the scheme and that Article 86(2) EC was applicable to them. All of those comments were forwarded to the Italian Republic.

15. The Italian authorities notified their comments by letter dated 23 January 1999. In that letter, they argued that undertakings active in the building industry, commerce, the hotel sector and services of general economic interest were unlikely to engage in such trade. By letter of 10 June 1999, the Italian authorities informed the Commission that they fully supported the comments submitted by the City of Venice.

16. By decision of 23 June 1999, the Commission gave the Italian Republic notice to provide it with all the documentation, information and data necessary to enable it to determine the role of the municipal undertakings and to assess the compatibility of the social security relief at issue with the common market. The Italian authorities replied by letter of 27 July 1999.

17. The Italian authorities met with the Commission's representatives at a meeting in Brussels on 12 October 1999.

C — *The contested decision*

18. 'According to the first paragraph of Article 1 of the contested decision, except as provided by Articles 3 and 4 of that Decision, the aid which Italy has put into effect in favour of firms located in Venice and Chioggia, in the form of exemption from or reduction of social security contributions provided for by Laws Nos 30/1997 and 206/1995, which refer to Article 2 of the Ministerial Decree of 5 August 1994, is compatible with the common

market where it is granted to the following firms:

(a) SMEs within the meaning of the Community guidelines on State aid for small and medium-sized enterprises;

(b) firms that do not comply with that definition but are located in an area eligible for exemption under Article 87(3)(c) EC;

(c) any other type of firm which hires groups of workers experiencing particular difficulties entering or re-entering the labour market as referred to in the Community guidelines on aid to employment.'

19. In the second paragraph of Article 1 of the contested decision, the Commission established that such aid is incompatible with the common market where it is granted to firms which are not SMEs and are located outside areas eligible for exemption under Article 87(3)(c) EC.

20. According to Article 2 of the contested decision, except as provided by Articles 3 and 4 of that Decision, the aid which Italy has put into effect in the form of reductions in social security contributions provided for by Article 1 of the Ministerial Decree of 5 August 1994 is incompatible with the common market.

21. According to Article 3 of the contested decision, the aid measures which Italy has put into effect in favour of the companies ASPIV and Consorzio Venezia Nuova are compatible with the common market since they qualify for exemption under Article 86(2) and Article 87(3)(d) EC respectively.

22. According to Article 4 of the contested decision, the measures which Italy has put into effect in favour of the companies ACTV, Panfido SpA and AMAV do not constitute aid within the meaning of Article 87 EC.

23. Under the first paragraph of Article 5 of the contested decision, Italy is to take whatever steps are necessary to recover from the beneficiaries the incompatible aid referred to in the second paragraph of Article 1 and in Article 2 which has unlawfully been made available to them. The first sentence of the second paragraph of Article 5 of the contested decision orders that repayment is to be made in accordance with the procedures of Italian law.

III — Procedure before the General Court and the judgment under appeal

A — *Procedure before the General Court*

24. Apart from the actions that gave rise to the appeals, a further 56 actions were lodged with the General Court against the contested decision by the specified deadline.

25. By way of measures of organisation of procedure, the General Court inquired whether the Italian authorities felt obliged to recover the social security relief from the individual applicants on the basis of Article 5 of the contested decision. In so far as the Italian authorities denied this, the General Court, by orders of 10 March 2005, declared the actions to be inadmissible as there was no legitimate interest in bringing those actions. [10] One of those actions was brought by the Committee's co-applicant in Case T-274/00, Verde Sport. The Committee subsequently withdrew its action in Case T-274/00. [11]

26. With the agreement of the applicants and the other parties to the proceedings, the General Court then designated Cases T-221/00, T-254/00, T-270/00 and T-277/00 as test cases. [12] In so far as the other actions had not been dismissed as inadmissible, the General Court stayed those proceedings.

B — *The judgment under appeal*

27. The General Court found in the judgment under appeal that the actions in Joined Cases T-254/00, T-270/00 and T-277/00 were admissible. In this connection, it dismissed in particular the inadmissibility claims made by the Commission based on *lis alibi pendens* in respect of actions brought by the Committee and the applicants' lack of *locus standi*. However, the General Court dismissed the actions as unfounded. In particular, it rejected the claim that the Commission had infringed Article 87(1), Article 86(2) and Article 87(3)(b), (c), (d) and (e) EC, Articles 14 and 15 of Regulation No 659/1999, the principle of equal treatment and the duty to state reasons.

10 — See orders of the General Court of 10 March 2005 in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission* [2005] ECR II-787 and in Joined Cases T-266/00, T-269/00, T-273/00 and T-288/00 *Confartigianato Venezia and Others* v *Commission*, not published in the ECR. Some of the actions were also declared to be inadmissible in those orders owing to pending proceedings.

11 — Order of the General Court of 12 September 2005 in Case T-274/00 *Comitato 'Venezia vuole vivere'*, not published in the ECR.

12 — The action in Case T-221/00 was withdrawn, see order in Case T-221/00 *Casino municipale di Venezia* v *Commission*, not published in the ECR.

IV — Procedure before the Court of Justice

28. By act of 11 February 2009 received at the Registry of the Court of Justice on 18 February 2009, the Committee lodged an appeal against the judgment under appeal. The Committee claims that the Court should:

— allow the appeal,

— consequently set aside the judgment under appeal and annul the contested decision; failing which annul Article 5 of the contested decision in so far as it imposes an obligation to recover the amounts accounted for by the social security relief in question and provides for interest to be applied to those amounts from the date when they were made available to the beneficiaries to the date when they are actually paid back,

— order the Commission to pay the costs of the proceedings both at first instance and before the Court of Justice.

29. The case number C-71/09 P has been assigned to this appeal.

30. By act of 10 February 2009 received at the Registry of the Court of Justice on 18 February 2009, the Hotel Cipriani lodged an appeal against the judgment under appeal. It claims that the Court should:

— set aside the judgment under appeal,

— grant the form of order sought at first instance and, in particular:

— annul the contested decision,

— in the alternative, annul Article 5 of that decision in so far as the order for recovery provided for therein also covers aid which comes under the *de minimis* principle and/or annul Article 5 in so far as it provides for interest to be paid at a rate which is higher than that paid by the undertaking on its own debts.

31. The case number C-73/09 P has been assigned to this appeal.

32. By act of 16 February 2009 received at the Registry of the Court of Justice on 24 February 2009, the Società Italiana per il gas SpA ('Italgas') lodged an appeal against the judgment under appeal. It claims that the Court should:

— annul the contested decision,

— annul Articles 1 and 2 of the contested decision, in so far as they declare that the social security relief granted by Italy is incompatible with the common market, and Article 5 thereof or, in the alternative, refer the case back to the General

Court in accordance with Article 61 of the Statute of the Court of Justice,

— order the Commission to pay the costs of the proceedings both at first instance and before the Court of Justice.

33. The case number C-76/09 P has been assigned to this appeal.

34. Coopservice, the Committee's co-applicant in Case T-277/00, also lodged an appeal against the judgment under appeal. However, that appeal was dismissed as out of time. By act of 1 July 2009, received at the Registry of the Court of Justice on 14 July 2009, Coopservice thereupon submitted observations on the appeals lodged by the Committee, Hotel Cipriani and Italgas.

35. By act of 16 July 2009, received at the Registry of the Court of Justice on 23 July 2009, the Italian Republic submitted observations on the appeals lodged by the Committee, Hotel Cipriani and Italgas. It proposes in those observations that the Court should grant the forms of order sought by the appellants and set aside the judgment under appeal and, consequently, annul the contested decision.

36. By act of 10 July 2009, received at the Registry of the Court of Justice on 22 July 2009, the Commission responded to the appeals in Cases C-71/09 P, C-73/09 P and C-76/09 P and lodged a cross-appeal. It contends that the Court should:

— set aside the judgment under appeal in so far as the Court declares the actions to be admissible,

— grant the main form of order sought by the Commission at first instance,

— in the alternative, dismiss the appeals, replacing, where appropriate, the grounds of the judgment under appeal,

— in any event, order the appellants to pay the costs of the present proceedings and of the proceedings at first instance.

37. By act of 28 September 2009, received at the Registry of the Court of Justice on 6 October 2009, the Committee responded to the Commission's cross-appeal. It claims that the Court should:

— dismiss the Commission's cross-appeal.

38. By act of 9 October 2009, received at the Registry of the Court of Justice on 12 October 2009, Italgas responded to the Commission's cross-appeal. It claims that the Court should:

— dismiss the Commission's cross-appeal as manifestly unfounded by means of an order,

— in the alternative, dismiss the cross-appeal as partly serving no purpose and otherwise unfounded, or as completely unfounded,

— in any event, order the Commission to pay the additional costs arising from the cross-appeal.

39. By order of 8 April 2009, Cases C-71/09 P, C-73/09 P and C-76/09 P were joined for the purposes of the written procedure, the oral procedure and the decision.

40. On 16 September 2010, a hearing took place at which the representatives of the Committee, Hotel Cipriani and Coopservice, Italgas, the Italian Republic and the Commission participated, supplemented their written submissions and answered questions.

V — The Commission's cross-appeal

41. By its cross-appeal, the Commission is objecting to the General Court's decision to declare the actions in Cases T-254/00, T-270/00 and T-277/00 admissible. In this connection, the Commission complains, first of all, that the General Court made an error of law by rejecting the complaints on admissibility that it made in the proceedings before the General Court based on *lis pendens* (A), the lack of *locus standi* of all the applicants (B) and the lack of *locus standi* of the Committee (C). It also complains that the General Court did not sufficiently examine or wrongly assumed a legal interest on the part of the applicants in bringing the actions (D).

A — *Lis pendens*

1. Grounds of the judgment under appeal

42. The Commission's first plea in law is directed against paragraphs 43 to 46 of the judgment under appeal. There, the General Court rejected the Commission's complaint that the Committee's action in Case T-277/00 was inadmissible because of *lis alibi pendens* in respect of its actions in Cases T-231/00 and T-274/00. In this connection, the General Court found firstly that there was no *lis pendens* in respect of the action

in Case T-274/00, because the Committee had withdrawn its action in Case T-274/00. [13] It was therefore not obliged to examine the admissibility of the Committee's action in Case T-277/00, because the Committee had brought the action jointly with Coopservice. Since Coopservice's action was admissible, it was obliged to examine the substantive pleas in law in any case. [14] Finally, there was no *lis pendens* in respect of the Committee's earlier action in Case T-231/00, because the action in Case T-231/00 and the action in Case T-277/00 were not based on the same pleas in law. In fact, the Committee had raised a number of pleas only in Case T-277/00, but not in Case T-231/00. [15]

2. Main arguments of the parties

43. The *Commission* complains firstly that *lis pendens* was not removed by the withdrawal of the earlier action. The admissibility of an action should, in fact, be assessed at the time when the action is brought. It was also contrary to the principle of procedural economy for an applicant to lodge a series of identical actions and then to choose one of them retrospectively.

44. Secondly, it argues that only identity of the parties and of the forms of order sought are conditions for *lis pendens*. The pleas in law do not have to be identical. That argument is supported by Article 27 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [16] Even if identity of the pleas in law were regarded as a necessary condition for *lis pendens*, the Committee's action in Case T-277/00 would have to be dismissed as inadmissible in that the Committee had already relied on identical pleas in Case T-231/00.

45. The *Committee* considers this plea to be inadmissible in that the Commission is relying on claims which it did not submit as such in the proceedings before the General Court. It is also precluded by the definitive nature of the orders of the General Court of 10 March 2005. [17] In those orders, the General Court did not find the Committee's action in Case T-277/00 to be inadmissible.

46. The Committee also claims that the plea is unfounded. The General Court, it argues, rightly found that any *lis pendens* in respect of its earlier action in Case T-274/00 had been removed because of the withdrawal

13 — Paragraph 43 of the judgment under appeal.
14 — Idem.
15 — Paragraphs 44 to 47 of the judgment under appeal.
16 — OJ 2001 L 12, p. 1.
17 — Already referred to in point 25 of this Opinion.

of the action and that its actions in Cases T-231/00 and T-277/00 were not based on identical pleas.

48. The plea is in part well founded.

3. Legal assessment

(a) Need to examine the admissibility of the Committee's action

47. The plea is admissible. Firstly, it is not an inadmissible new plea. In fact, in an appeal, an error of law can be pleaded that arises directly from the judgment under appeal. This is the case with the error of law pleaded, as the General Court must examine of its own motion the admissibility of an action and hence also the existence of *lis pendens*. The Court of Justice may also examine on appeal, of its own motion, an error of law of that kind. [18] Secondly, the plea is not precluded by the definitive nature of the orders of the General Court of 10 March 2005. [19] In fact, the General Court did not rule in those orders on the admissibility of the action in Case T-277/00.

49. The General Court's assumption that the admissibility of the Committee's action does not need to be examined because the action of the co-applicant Coopservice is admissible does not convince me. Admittedly, the Court of Justice proceeded in the same manner in a comparable case. [20] However, in my view, that case-law cannot necessarily be transferred to an action before the General Court. First, it seems to me designed for a court of last instance. As an appeal can be brought before the Court of Justice against the General Court's judgment, the decision on the admissibility of an action can affect the further proceedings before the Court of Justice. If the Committee's action had been dismissed as inadmissible, its appeal would have had a different subject-matter. Moreover, the Commission's cross-appeal would not have arisen

18 — Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission* [2007] ECR I-170, paragraph 17 et seq., and order of 15 April 2010 in Case C-517/08 P *Makhteshim-Agan and Others* v *Commission*, not published in the ECR, paragraph 54 et seq.

19 — Already referred to in point 25 of this Opinion.

20 — Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31.

in respect of the judgment relating to the Committee. The effects on the course of the proceedings before the Court of Justice are particularly clear in the present case. In fact, here, the Court of Justice has merely to adjudicate on the Committee's action and not that of its co-applicant Coopservice. Second, that approach does not seem to me compatible with the division of tasks between the General Court and the Court of Justice. In the context of the Commission's cross-appeal, the Court of Justice must examine the complaint of *lis pendens*, since it concerns a condition of admissibility of the Committee's action before the General Court, that it must examine of its own motion. [21] As the present case shows, the General Court's approach, that it is not necessary to examine the admissibility of the Committee's action, could lead to its being done for the first time in an appeal before the Court of Justice. Thirdly, I doubt that the General Court's approach can always be justified by considerations of procedural economy. The fact that it is the Court of Justice which examines admissibility for the first time can cause problems, particularly where the Court must itself examine matters of fact in assessing admissibility. The Court has jurisdiction to carry out such an assessment of fact only where, under the first paragraph of Article 61 of the Statute, it gives final judgment in the matter. However, that is possible only where the state of the proceedings so permits. If that is not yet the case, then, under the first paragraph of Article 61, the Court must refer the case back to the General Court for judgment. Accordingly, the benefit in terms of procedural economy, which is supposed to justify the General Court's not examining admissibility, is likely, on the contrary, in certain cases, to make the proceedings last longer. For the reasons set out above, I consider, contrary to the case-law, that the General Court's approach, to the effect that, in a case such as the present, it is not necessary to examine the admissibility of the Committee's action, [22] is not permissible, even in the context of the main action. However, for the purposes of the present case, it is not necessary to determine whether the General Court erred in law since, in any event, the Court of Justice must examine the complaint of *lis pendens* of its own motion.

(b) Inapplicability of *lis pendens* upon withdrawal of the earlier action

50. Contrary to the Commission's view, the General Court rightly found that the Committee's action in Case T-277/00 is not inadmissible because of *lis alibi pendens* in respect of its action in Case T-274/00. Indeed, the Committee withdrew its action in Case T-274/00. Nevertheless, the Commission rightly observed that, in principle, the conditions for the admissibility of an action must

21 — See case-law cited in footnote 18.

22 — See order of the President in Case C-60/08 P[R] *Cheminova and Others* v *Commission* [2009] ECR I-43, paragraph 31 et seq., according to which such an approach is not permissible in interim proceedings, but is permissible in main proceedings.

be fulfilled at the time when the action is brought. [23] However, inadmissibility because of *lis pendens* may not apply where the earlier action has been declared inadmissible. [24] In my view, this must also be the case where the earlier action has been withdrawn. Inadmissibility because of *lis pendens* is, in fact, designed to prevent identical actions from being examined twice. This should, among other things, prevent contradictory decisions from being made. However, there is no longer any risk of that where the earlier action has been declared inadmissible or been withdrawn.

(c) Identity of the pleas

51. In so far as the Commission complains that the General Court should have dismissed the Committee's action in Case T-277/00 as inadmissible because of *lis alibi pendens* in respect of its action in Case T-231/00, this complaint is in part well founded.

52. The Commission's complaint that the General Court erroneously regarded identical pleas as a condition for inadmissibility because of *lis pendens* is unfounded. In fact, according to the settled case-law of the Court of Justice, inadmissibility because of *lis pendens* arises only where the earlier action involves the same parties, seeks the same form of order and is based on the same submissions. [25] Contrary to the Commission's view, that case-law cannot be understood as meaning that the Court of Justice only mentioned the condition of identical submissions *ad abundantiam*. [26] In *France* v *Parliament*, the Court of Justice fully dealt with the matter of identical submissions in two different actions, [27] which tends to refute the assumption that identity of submissions is irrelevant. Moreover, in the *Diezler* judgment, the Court of Justice found that an action was inadmissible because of *lis pendens* on the ground that, apart from the fact that the subject-matter of the two disputes was identical, the submissions made by the applicant in the two actions were essentially the same. [28] Nor, in my view can it be inferred from *Bode* [29] and *Perinciolo* [30] that *lis pendens* exists where the parties and the forms of order sought are identical. Those judgments arose from a special situation in which the applicants had brought an action firstly against an initial decision and then against a second decision substantively confirming the first one. It cannot automatically be inferred from the fact that, in that particular situation, the Court of Justice declared the

23 — Case 50/84 *Bensider and Others* v *Commission* [1984] ECR 3991, paragraph 8, and Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain* v *Council* [2002] ECR I-3439, paragraph 23.

24 — The Court of Justice ruled in Joined Cases 146/85 and 431/85 *Diezler and Others* v *WSA* [1987] ECR 4283, paragraph 12, that the plea of inadmissibility on the ground of *lis pendens* does not cover a later action where the earlier action has been declared inadmissible.

25 — Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9, *Diezler and Others* (already cited in footnote 24, paragraph 16), Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraphs 9 to 12, and Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, paragraphs 64 et seq.

26 — See also, to this effect, Hackspiel, S., in: Rengeling, H.-W., Middeke, A., Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, Beck, 2nd ed. 2003, § 23, paragraph 32.

27 — Already cited in footnote 25, paragraphs 9 to 12.

28 — Already cited in footnote 24, paragraph 16.

29 — Joined Cases 45/70 and 49/70 *Bode* v *Commission* [1971] ECR 465.

30 — Joined Cases 58/72 and 75/72 *Perinciolo* v *Council* [1973] ECR 511.

action against the second decision to be inadmissible because the applicant had merely 'reiterated' [31] the form of order sought that the Court of Justice already assumed that the action was inadmissible on account of *lis pendens* because the parties and the forms of order sought were identical. As is apparent from the observations of the parties in the two cases, the two actions were based on the same submissions.

the parties, designated Case T-277/00 as a test case. As the Commission rightly argues, the General Court must examine the admissibility of an action of its own motion, [32] which leaves no scope for considerations of procedural economy in this regard.

(d) Conclusion

53. However, the Commission rightly objects that the General Court did not take into account the fact that the submissions in Cases T-231/00 and T-277/00 were partly identical. The General Court found that the Committee submitted some of its pleas only in its later action in Case T-277/00, but not in its earlier action in Case T-231/00. The General Court should not have concluded from this that the Committee's later action in Case T-277/00 was fully admissible. Examining identical pleas twice could lead to contradictory rulings. This is not precluded by the fact that, after the judgment was delivered in Case T-277/00, the identical pleas were not examined in Case T-231/00. According to the case-law, the later action is inadmissible, not the earlier one. Nor can the General Court's approach be justified by the fact that the General Court, with the agreement of all

54. As the General Court did not examine to what extent the Committee's actions in the earlier Case T-231/00 and in the later Case T-277/00 were based on identical pleas in substance and did not in that respect dismiss the Committee's action in Case T-277/00 as inadmissible, it erred in law. To this extent, the Commission's first plea is justified. It should be rejected as to the remainder.

31 — *Bode* (already cited in footnote 29, paragraph 11) and *Perinciolo* (already cited in footnote 30, paragraph 4 et seq.) judgments.

32 — *Bode* (already cited in footnote 29, paragraph 11) and *Perinciolo* (already cited in footnote 30, paragraph 5).

B — *Individual concern to the appellants*

1. Grounds of the judgment under appeal

55. By its second plea, the Commission objects to the General Court's finding, based on paragraphs 69 to 112 of the judgment under appeal, that the contested decision concerns the applicants in Cases T-254/00, T-270/00 and T-277/00 individually.

56. There, the General Court found firstly that a Commission decision concerning an unlawful aid scheme was of general application inasmuch as it applied to objectively determined situations and involved legal effects considered in a general and abstract manner. [33] However, in certain circumstances, the provisions of a measure of general application could be of individual concern to a natural or legal person where that person was affected by reason of attributes peculiar to him or by reason of factual circumstances differentiating him from all other persons. [34]

57. The General Court then rejected the approach advocated by the Commission whereby the actual beneficiaries of the aid scheme are individually concerned only where the aid scheme has been implemented by means of individual decisions. [35] Such an approach was compatible neither with the case-law [36] nor with the system for review of State aid. [37] Finally, the General Court examined the Commission's argument that the national authorities had the power, when implementing the contested decision, to assess in each individual case whether all the conditions for the application of Article 87(1) EC had been satisfied. The General Court rejected that argument. [38]

2. Main arguments of the parties

58. The *Commission* considers that the General Court's reasoning is vitiated by errors of law. Firstly, it regards the contested decision as an act of general application. When deciding on an unlawful, multisectoral aid scheme, the Commission considers that it is not, in fact, obliged to take individual cases into account. For this reason, it did not determine in the contested decision whether the applicants were the beneficiaries of aid. This will not be clarified until the contested decision is implemented. The contested decision does not therefore concern the applicants individually.

33 — Paragraph 73 of the judgment under appeal.
34 — Paragraph 74 of the judgment under appeal.
35 — Paragraphs 76 to 99 of the judgment under appeal.
36 — Paragraphs 76 to 93 of the judgment under appeal.
37 — Paragraphs 94 to 99 of the judgment under appeal.
38 — Paragraphs 100 to 111 of the judgment under appeal.

The recovery order made in Article 5 of the contested decision changes nothing in this respect.

59. The General Court also erroneously linked the individual concern to the applicants with their obligation to repay the aid. *Locus standi* must be assessed at the time when the action is brought. However, at that time, it was still not certain whether the applicants were obliged to make repayment. It only emerged as a result of the investigations made by the national authorities in connection with the implementation of the contested decision which beneficiaries were actually obliged to make repayment. This is also supported by the fact that a firm has no legitimate interest in bringing an action where it is obvious that it is not obliged as a beneficiary to make repayment.

60. The General Court also wrongly found that the class of persons who were concerned by the contested decision was identifiable. It is identifiable only where the number or the identity of the persons can be determined fairly precisely. The mere fact that they can be determined is not sufficient. The Commission must at least be able to determine who is obliged to repay the aid, which was clearly not the case in the present proceedings. At the time when the decision was made and when the action was brought, it did not actually have the information necessary to do so.

61. The Commission also complains that there are errors in the part of the grounds of the judgment under appeal where the General Court found that the Commission's approach was not compatible with the system for the review of State aid, as well as in the part where it explained why the national authorities were not authorised to assess the existence of aid in each individual case when implementing the recovery order.

62. Italgas argues that the Commission's second plea should be rejected. Contrary to the Commission's view, the General Court did not link the individual concern to the applicants with their obligation to repay the aid, but to the fact that the contested decision had a directly adverse effect on their legal position. Moreover, only the identifiability of the class of persons is relevant, not whether the Commission could identify the class of persons. The Commission is also confusing *locus standi* with legitimate interest in bringing an action. The Commission's approach also results in the applicants' access to EU courts being controlled by the Commission. According to the Commission's approach, it could deny the individual locus standi by taking its decision in the abstract. Furthermore, there are no effective remedies against directions given by the Commission to national authorities in

the context of the execution of the contested decision.

63. Italgas argues that the Commission's complaints against the General Court's finding that the Commission's approach is incompatible with the system for the review of State aid serve no purpose, since that finding is not an essential part of the grounds. This also applies to the complaints against the General Court's finding that national authorities are not empowered to assess the existence of aid in each individual case when implementing the contested decision. In any case, the complaints made against these findings are unfounded.

64. The *Committee* also argues that the Commission's second plea should be rejected. [39] In contrast to the situation with potential beneficiaries, the contested decision is not an act of general application in the case of the actual beneficiaries, since it affects the legal position of an identifiable number of firms. The actual beneficiaries are identified as addressees of the national authorities' decision to recover payment. Their position is therefore comparable to that of a beneficiary of individual aid.

39 — Although the Committee refers in the title of its pleading to the Commission's complaints regarding legitimate interest in bringing an action, the Committee substantively refers to *locus standi*.

3. Legal assessment

65. As the General Court primarily based its reasoning on an analysis of the case-law of the Court of Justice, [40] I shall first examine the Commission's complaints in respect of that part of the General Court's statement of grounds.

66. Those complaints are unfounded. The General Court rightly found that, according to the case-law of the Court of Justice, the actual beneficiaries of the social security relief must be regarded as individually concerned (a). The objections made by the Commission against that case-law must be dismissed (b).

(a) Case-law of the Court of Justice

67. As the General Court rightly stated, [41] a decision may be of individual concern to persons other than the addressees of the decision where that decision affects them by reason of attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons and by virtue of these factors distinguishes them just as in the case

40 — Paragraphs 76 to 93 of the judgment under appeal.
41 — See paragraph 74 of the judgment under appeal.

of the person addressed (so-called Plaumann formula). [42]

68. Where the Commission, in a decision, describes a national multisectoral scheme as aid incompatible with the common market, the *potential beneficiaries* of that scheme are not, according to the Plaumann formula, individually concerned by such a decision. The potential beneficiaries of a multisectoral aid scheme are, in fact, a class of persons who are described in a general and abstract manner. [43]

69. However, in so far as the Commission orders in such a decision that the Member State should pay back the aid provided under the national scheme, the *actual beneficiaries* under that scheme are, according to the Plaumann formula, directly concerned by it. As the General Court rightly noted, [44] the actual beneficiaries are, in fact, a class of persons who can be identified at the time when the decision was made and are therefore a closed class. The contested decision also affects their legal position. They must fear that the national authorities will ask them for the return of the aid received under the scheme. [45]

(b) The Commission's objections

70. The objections that the Commission has raised against that case-law, which may now be regarded as established, especially after *Italy and Sardegna Lines* v *Commission* [46] and *Italy* v *Commission*, [47] and against the application of that case-law to the present case, are unconvincing.

(i) Link to the obligation to make repayment

71. In so far as the Commission objects firstly that the General Court makes the individual concern to the actual beneficiaries

42 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 7 and 28, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 32, Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 36, Case C-343/09 *Afton Chemical Limited* v *Secretary of State for Transport* [2010] ECR I-7027, paragraph 21.

43 — Case C-6/92 *Federmineraria and Others* v *Commission* [1993] ECR I-6357, paragraph 14, *Italy and Sardegna Lines* v *Commission* (already cited in footnote 42, paragraph 33), *Italy* v *Commission* (already cited in footnote 42, paragraph 37).

44 — Paragraph 84 of the judgment under appeal.

45 — *Italy and Sardegna Lines* v *Commission* (already cited in footnote 42, paragraph 34 et seq.), and *Italy* v *Commission* (already cited in footnote 42, paragraph 38).

46 — Already cited in footnote 42.

47 — Already cited in footnote 42.

conditional on their obligation to repay the aid received, although the obligation was not yet established at the time when the decision was made or when the action was brought, the objection cannot be upheld.

72. Contrary to the Commission's view, the actual beneficiaries are not concerned individually only where they are asked by the national authorities to make repayment. The Commission's recovery order itself, in fact, individually concerns all persons who have been actual beneficiaries under the social security relief system, unless the Commission has established in the contested decision, in respect of their case or of certain categories of case that also include them, that the social security relief is compatible with Article 87 EC. Such a decision affects the legal position of the actual beneficiaries, however that decision is understood.

73. In so far as Article 5 in conjunction with the second paragraph of Article 1 and Article 2 of the contested decision is understood as meaning that the Italian Republic is asked to recover all social security relief that is not expressly declared under the first paragraph of Article 1, Article 3 and Article 4 or in the grounds of the contested decision to be compatible with Article 87 EC, the applicants' legal position is clearly directly affected by the contested decision. According to that understanding, it is only a matter of time before the national authorities ask them to repay the aid.

74. On the other hand, the Commission's view of Article 5 in conjunction with the second paragraph of Article 1 and Article 2 of the contested decision is that recovery of the social security relief is ordered only in so far as the relief in the individual case constitutes aid within the meaning of Article 87(1) EC. This is not assessed by the national authorities until the decision is implemented. However, according to this understanding too, the contested decision concerns the actual beneficiaries individually.

75. Firstly, when implementing the contested decision, the national authorities are bound by the Commission's findings contained in it. Even where the Commission indicates that it has not examined in the individual case whether the social security relief distorts competition or affects trade between Member States, it has nevertheless made a finding in respect of other conditions of Article 87(1) EC which is also binding on the national authorities when they are examining individual cases. Thus, the Commission found in recitals 52 to 56 of the contested decision that the social security relief constitutes favourable treatment within the meaning of Article 87(1) EC even though the Italian legislature intended by it to compensate for competitive disadvantages. The contested decision therefore contains a Commission finding which is binding on the national authorities when they are implementing the recovery decision. Accordingly, it directly affects the legal position of the actual beneficiaries.

76. The concept of effective judicial protection also supports the assumption of

individual concern in such a case. Such protection would not exist where a firm that wished to take action against a finding such as that already contained in the contested decision was referred to the national courts. As the national courts, like the national authorities, are bound by the Commission's finding, all they can do is refer the matter to the Court of Justice. [48]

77. Finally, I consider that the actual beneficiaries cannot be disadvantaged by the fact that the Commission did not examine in the grounds of the contested decision the fulfilment of specific conditions laid down in Article 87(1) EC, such that it is unclear to an individual actual beneficiary whether a recovery order is directed against it.

78. Therefore the contested decision, however it is to be understood, concerns the actual beneficiaries individually.

(ii) Sufficient identifiability

79. The Commission's further objection that the actual beneficiaries of the social security relief are not sufficiently identifiable must also be dismissed. Contrary to the Commission's view, it does not matter whether the Commission knew or could have known who they were when the decision was issued or when the action was brought. According to the Plaumann formula, all that matters is that the class of actual beneficiaries can be determined. [49] Therefore the General Court rightly found in paragraphs 81 et seq. and 84 of the judgment under appeal that the actual beneficiaries were a closed and therefore identifiable class of persons. Although the General Court also stated in paragraph 91 et seq. of the judgment under appeal that the Commission was aware of the precise number of beneficiary undertakings, this is mentioned merely by way of additional information that does not call into question the accuracy of the General Court's reasoning in paragraphs 81 et seq. and 84 of the judgment under appeal.

(iii) Lack of legitimate interest in bringing proceedings

80. The Commission's statement that, as a result of the national authorities' further enquiries when implementing a Commission measure, the action of an actual beneficiary was no longer admissible, is unconvincing. In this connection, a distinction should be

48 — See, to this effect, also Grespan, D., in Mederer, W., Pesaresi, N., Van Hoof, M., *EU Competition Law*, Volume IV, State Aid, Book One, Claeys & Casteels 2008, 3366.

49 — Case C-519/07 P *Commission* v *Koninklijke Friesland Campina* [2009] ECR I-8495, paragraph 59.

drawn between *locus standi* on the one hand and legitimate interest in bringing an action on the other.

81. The individual concern to a natural or legal person, which is the condition for *locus standi* under the fourth paragraph of Article 230 EC, is determined only by the contested decision. As has been explained above, the recovery order in the contested decision directly and individually concerned all persons who had been actual beneficiaries under the social security relief system except for those persons in respect of whom the Commission had established that the social security relief was compatible with Article 87 EC. It was therefore already established when the contested decision was issued, and consequently also when the action was brought, who was individually concerned by it.

82. Where, following the adoption of the contested decision, a person individually concerned by it is not asked to repay the social security relief, this does not affect the fact that that person is individually concerned. As the General Court rightly stated in paragraph 88 et seq. of the judgment under appeal, that person may then have no legitimate interest in bringing an action against the contested decision, because he no longer has any interest in seeing the contested decision annulled.

(iv) Undesired consequences

83. The Commission also objects that the assumption that the actual beneficiaries are individually concerned would have undesired consequences for them. They could contest a Commission decision to recover aid only through an action brought under Article 230 EC; a review of the validity of such a decision following a reference for a preliminary ruling under the first alternative in letter (b) of the first paragraph of Article 234 EC would no longer be possible.

84. That objection is also unconvincing. As the General Court rightly held in paragraph 90 of the judgment under appeal, it cannot be inferred from the case-law of the Court of Justice [50] that all natural or legal persons with *locus standi* under the fourth paragraph of Article 230 EC can challenge the validity of a Commission decision only by means of an action for annulment and that they are prevented from challenging the validity of that decision within the context of a reference for a preliminary ruling.

85. Where the Commission refers to *Deggendorf*, it should be noted that there were special

50 — Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 10 to 26, Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraphs 15 and 16, and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 28 et seq.

circumstances in that case that supported the inadmissibility of a request for a preliminary ruling. Firstly, the beneficiary of the aid was expressly mentioned in the Commission decision in that case, if not by name, in such a manner that there was no doubt as to its identity. [51] Secondly, the national authorities informed it of the Commission decision and of the possibility of contesting it before the Court of Justice. [52]

86. The situation is different in the present case. Firstly, the applicants were not mentioned by name in the contested decision. Secondly, it was still unclear at the time when the decision was issued from which actual beneficiaries the national authorities would recover the social security relief. In such a case, an actual beneficiary cannot, in my view, be criticised for the fact that, even where it has *locus standi* under the fourth paragraph of Article 230 EC, it does not immediately bring an action against the contested decision but first awaits the measures taken by the national authorities.

87. Atzeni [53] also seems to me to point in this direction. Contrary to the Commission's view, the Court of Justice did not actually cast doubt on its case-law, confirmed in *Italy and Sardegna Lines* [54] and *Italy* v *Commission*, [55] on the individual concern to actual beneficiaries. In that case, it merely emphasised that where a person cannot be blamed for not taking a clear opportunity to bring an action against a Commission decision, a reference for a preliminary ruling asking the Court of Justice to determine the validity of the Commission decision is admissible. [56] Consequently the Commission's objection must be dismissed.

(v) Possibility of contradictory rulings

88. Finally, I am not convinced by the Commission's objection that the assumption of individual concern to the actual beneficiaries might lead to contradictory rulings, because firms would then be better treated merely because the Member State did not fulfil its duty of notification. The idea that a Member State should derive no advantage from the non-fulfilment of that duty might well be taken into consideration when the Commission assesses the legality of multisectoral

51 — See point 3 of the Opinion of Advocate General Jacobs of 15 September 1993 in *Textilwerke Deggendorf* (already cited in footnote 50).

52 — Idem.

53 — Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraphs 30 to 34.

54 — Already cited in footnote 42.

55 — Already cited in footnote 42.

56 — See, to this effect, also Grespan, D., cited above in footnote 48, 3 369.

aid schemes. [57] However, I do not consider it right to transpose that idea unreservedly to the *locus standi* of natural and legal persons and especially to the criteria for assessing their individual concern, which, under settled case-law, are governed by the criteria of the Plaumann formula.

(c) Conclusion

89. To conclude, it must be noted firstly that the General Court rightly followed the case-law of the Court of Justice. The General Court's finding that the applicants in Joined Cases T-254/00, T-270/00 and T-277/00 are, as actual beneficiaries of the social security relief, individually concerned by the contested decision is therefore sufficiently justified by the General Court's reference to the case-law of this Court.

90. It follows from this that the Commission's further complaints serve no purpose. [58]

57 — Reference is made in this connection to the arguments in point 150 below and the case-law cited in footnote 85.

58 — Joined Cases C-302/99 P and C-8/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 and 27, and Case C-273/05 P *HABM* v *Celltech* [2007] ECR I-2883, paragraph 56 et seq.

Neither the part of the grounds of the judgment under appeal in which the General Court stated the reasons for which the approach adopted by the Commission is incompatible with the system for review of State aid, nor the part in which the General Court explained why the national authorities, when implementing the contested decision, should not have the power to assess whether the conditions for application of Article 87(1) EC are fulfilled in each individual case, is relevant to the General Court's finding that the applicants are individually concerned by the contested decision. An error of law in those parts of the judgments would therefore not be such as to call into question the General Court's finding.

91. The Commission's second plea must therefore be rejected in full.

C — *Locus standi of the Committee*

1. Grounds of the judgment under appeal

92. The Commission's third plea challenges the General Court's finding in paragraph 114 et seq. of the judgment under appeal that the Committee, as an organisation bringing

together professional associations, has *locus standi*. There, the General Court stated firstly that there was no need to consider whether the Committee's action in Case T-277/00 was admissible, since the action of the co-applicant Coopservice was admissible. Also, the Committee, as an organisation bringing together professional associations representing undertakings which were located in Venice or Chioggia, was directly and individually concerned by the contested decision. The Committee was acting on behalf of its members, whose actions were admissible.

2. Main arguments of the parties

93. In the *Commission's* view, the General Court should have assessed the admissibility of the Committee's claim. It argues, moreover, that the case-law on the *locus standi* of professional associations is not transferable to an organisation of professional associations. There was also no evidence that the members of the professional associations would have appointed the associations to represent their interests before the General Court and that the professional associations would, in turn, have appointed the Committee to represent them for this purpose.

94. The *Committee* contends that this plea should be rejected. Under its articles of association, it is especially charged with coordinating action against the prohibition of social security relief. This includes the bringing of legal proceedings. It also took an active part in the formal investigation procedure.

3. Legal assessment

95. It should be stated, first of all, that, for the reasons already explained above, [59] the General Court should have examined the Committee's *locus standi* in Case T-277/00 even though the action of its co-applicant Coopservice in that case was admissible.

96. However, the Commission's objections to the General Court's finding in the alternative that the Committee had *locus standi* cannot, in the event, be upheld.

97. According to settled case-law, a professional association that defends the individual interests of certain of its members whilst at the same time attempting to protect those of the sector as a whole has *locus standi* if those members have *locus standi*. [60]

59 — See point 49 of this Opinion.

60 — Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60.

The Commission's doubts as to the transferability of that case-law to an organisation of professional associations carry no weight. The rationale of that case-law is that potential actions by individual undertakings can be combined in an action by a professional association. In the case of an organisation that brings together professional associations, the idea of combining actions applies even more strongly than with a professional association. This is not opposed by the fact that the Committee has been active as a co-applicant in Case T-277/00, as it cannot be ruled out that the Committee's action as a co-applicant is also aimed at protecting the interests of the sector as a whole.

98. The Commission's further complaint that the Committee's 'stepped' appointment was not sufficiently proven is admissible. The Commission is not, in fact, objecting to the General Court's assessment of the facts, but that the General Court did not have the necessary facts at its disposal to be able to consider that the Committee had been instructed in this way. Such a complaint is admissible in the appeal. [61]

99. The Commission's complaint cannot immediately be rejected by reference to the fact that the General Court's reasoning was sufficient, because it is not necessary for its judgment to include detailed reasoning on every point. That would presuppose that the General Court actually examined the existence of a 'stepped' appointment and merely kept its grounds short. However, the Committee has itself affirmed that it did not submit to the General Court the articles of association that gave rise to its appointment.

100. The Committee's *locus standi* in the present case does not seem to me to be based solely on the fact that it is representing the interests of the professional associations. According to the aforementioned case-law, it seems to me to be sufficient that the Committee is defending the interests of certain firms with *locus standi* whilst at the same time attempting to protect the interests of the sector as a whole. In the present case, it can already be inferred from the fact that the Committee brought an action jointly with firms with *locus standi* such as Coopservice that the Committee acted with the agreement of those firms. Moreover, the Committee actively participated in the formal investigation procedure.

101. I therefore propose that the Commission's third plea be rejected and that the grounds of the judgment under appeal be partly replaced.

61 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 392 to 405.

D — *Legal interest in bringing an action*

102. In its fourth plea, the *Commission* complains that the General Court did not sufficiently assess the applicants' interest in bringing an action. It argues that there was no such interest when the action was brought, as it was not certain at that time whether the applicants would be obliged to repay the social security relief. *Italgas* considers that this complaint should be rejected and that the General Court rightly stated that the interest in bringing the action arose directly from the contested decision.

103. The Commission's fourth plea is unfounded. As the General Court rightly stated in paragraph 88 et seq. of the judgment under appeal, the applicants had a legitimate interest in bringing the action, as the annulment of the contested decision would have improved their legal position. The contested decision itself directly affected the legal position of the actual beneficiaries of the social security relief. [62] This justifies not only the *locus standi* but also the legitimate interest of the actual beneficiaries in the present case, although that interest may no longer exist subsequently where it is established with sufficient certainty that the national authorities will not ask the actual beneficiaries to repay the social security relief. [63]

62 — See points 72 to 78 of this Opinion.
63 — See point 80 et seq. of this Opinion.

E — *Conclusion*

104. The Commission's first plea is well founded in that the General Court did not examine to what extent the Committee also made the submissions that it is relying on in Case T-277/00 in the earlier Case T-231/00 and the General Court did not dismiss the Committee's action in Case T-277/00 as inadmissible on account of *lis pendens* to the extent that identical submissions had been made. As to the remainder, the Commission's cross-appeal should be dismissed.

VI — The appeals of Italgas, Hotel Cipriani and the Committee

105. In the judgment under appeal, the General Court dismissed the actions in Cases T-254/00, T-270/00 and T-277/00 as unfounded. Hotel Cipriani, Italgas and the Committee, which were applicants in those cases, are essentially claiming in their appeals that the General Court made errors of law in the application of Article 87(1) EC, Article 86(2) EC and Article 87(3)(c) and (d) EC, and of Articles 14 and 15 of Regulation No 659/1999. They also claim that the General Court infringed the principle of non-discrimination and wrongly found that the Commission had sufficiently justified the contested decision. I

will examine together below the concurrent pleas in law of Hotel Cipriani, Italgas and the Committee ('the appellants'). [64]

A — *Compensatory nature of the social security relief*

1. Grounds of the judgment under appeal

106. The appellants object firstly to the General Court's finding that the social security relief must be regarded as favourable treatment for the purposes of Article 87(1) EC. The Commission found in the contested decision that the favourable nature of the social security relief was not removed because the social security relief was intended to compensate for the structural disadvantages to which firms located in Venice and Chioggia were exposed. The General Court confirmed the Commission's finding in paragraphs 179 to 198 of the judgment under appeal.

107. The General Court relied firstly on the case-law of the Court of Justice and on the fact that the rules of competition law are intended to ensure, not perfect competition, but effective or efficient competition. [65] Although the Court admitted that, in certain specific situations, favourable treatment intended to offset a disadvantage does not constitute aid within the meaning of Article 87(1) EC, such a specific situation does not apply in the present case, in which the social security relief is intended partly to compensate for the structural disadvantages of the firms associated with their location. [66]

108. The General Court relied in the alternative on the fact that there is no direct connection between the social security relief and the aim of offsetting additional costs in Venice and Chioggia. [67] Moreover, the Italian Government had used a comparison not between an undertaking located in Venice or Chioggia and an average undertaking in the Community, but only between the costs of an undertaking located in Venice or Chioggia and the costs of an Italian undertaking on the mainland. [68]

64 — The Committee's appeal is being examined in the event that the Court does not share the view held here on the partial inadmissibility of the Committee's action. Coopservice's allegations of an infringement of Article 87(2)(b) and (3)(b) EC are not being examined, as Coopservice has not lodged an appeal within the time-limit and these complaints are not being made by any of the appellants.

65 — Paragraphs 182 to 184 of the judgment under appeal.
66 — Paragraphs 185 to 188 of the judgment under appeal.
67 — Paragraphs 189 to 191 of the judgment under appeal.
68 — Paragraphs 191 to 194 of the judgment under appeal.

2. Main arguments of the parties

109. The *appellants* object firstly to the General Court's argument that the favourable nature of the social security relief is not removed because it is intended to offset structural disadvantages of the firms located in Venice and Chioggia. The Committee and the Italian Government complain in this connection that the General Court did not take the compensatory nature of the social security relief sufficiently into account. An advantage, they argue, which is merely intended to offset a competitive disadvantage is not aid. The national scheme was merely designed to maintain the competitiveness of the firms located in Venice and Chioggia. It is illogical to apply the prohibition on aid in such a manner that it leads to the removal of the firms and to the end of competition. Hotel Cipriani and Coopservice submit that the General Court did not take sufficient account of the objectives of the national legislature, which wanted to preserve the historical centre of Venice and promote employment. The Italian legislature had quantitatively and qualitatively assessed the greater burdens placed on firms located in Venice and Chioggia. That assessment is not available for detailed analysis by the Commission and the General Court. Moreover, reference cannot be made to the fact that higher costs can be offset by increasing hotel prices. Firstly, not all the benefiting firms are engaged in tourist activity. Secondly, competition should lead not to an increase but to a reduction in prices.

110. Italgas is claiming a failure to state reasons. The General Court admitted that there were specific situations in which compensating for a disadvantage could remove the favourable nature of a measure without explaining in a convincing manner why no such specific situation existed in the present case.

111. The Italian Government also claims, by comparing the Italian authorities with a private undertaking and social security contributions with insurance premiums, that a private undertaking would have reduced the insurance premiums in a case such as the present.

112. The appellants also object to the General Court's reasoning in the alternative that there is no direct connection between the social security relief and the aim of offsetting additional costs incurred in Venice and Chioggia, [69] and to the alternative reasoning that the Italian authorities had not used a comparison between an undertaking located

69 — Paragraphs 189 to 191 of the judgment under appeal.

on Venice or Chioggia on the one hand and an average undertaking in the Community on the other. [70]

113. The *Commission* considers that these complaints should be rejected. It argues firstly that the General Court rightly found that the aim of compensating for structural disadvantages does not eliminate the favourable nature of the social security relief for the purposes of Article 87(1) EC. The General Court's grounds are legally flawed and must therefore be replaced. There is actually no specific situation in which a measure ceases to be aid because of the aim of compensating for structural disadvantages of a sector or region. The grounds of the judgment under appeal should therefore be replaced. The appellants' objections to the General Court's alternative reasoning should be dismissed.

3. Legal assessment

114. It should first be examined whether the General Court wrongly found that the social security relief constitutes favourable treatment for the purposes of Article 87(1) EC even though the Italian legislature intended to compensate for the competitive disadvantages of undertakings located in Venice and Chioggia.

(a) Interpretation of the concept of favourable treatment

115. In so far as the appellants complain that the General Court did not correctly interpret the concept of favourable treatment for the purposes of Article 87(1) EC, the complaints must be rejected.

116. In fact, the General Court relied in paragraph 182 of the judgment under appeal on the settled case-law of the Court of Justice whereby a Member State's attempt to compensate for the competitive disadvantages of undertakings of a specific economic sector or a specific region by granting them favourable treatment does not remove their character as aid. [71]

117. Assessment of whether a measure constitutes aid within the meaning of Article 87(1) EC is based, in principle, not on the aims pursued by a measure but on its effects. The aims that are pursued by a measure are considered only when examining whether aid

70 — Paragraphs 191 to 194 of the judgment under appeal.

71 — Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraphs 20 and 21; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 21; *Italy* v *Commission* (already cited in footnote 42), paragraph 61.

is compatible with the common market. [72] As the General Court stated in paragraphs 185 to 187 of the judgment under appeal, this principle is not adhered to without exception in the case-law. However, for the purposes of the present case, there is no need to conduct a thorough analysis of the special cases in which the case-law deviates from this principle. The Commission rightly points out that the aim of compensating for the competitive disadvantages of firms arising from their location does not justify any deviation from this principle.

118. This is already reflected in the structure of Article 87 EC. Under Article 87(3)(a) to (d) EC, such an aim may be considered when assessing the compatibility of an aid with the common market. The structure of that provision suggests that such an aim is not already to be taken into account when applying the conditions for aid laid down in Article 87(1) EC.

119. Consideration of such an aim within the context of Article 87(1) EC would also be incompatible with the meaning and purpose of that provision. As the Commission rightly maintained in recital 53 of the contested decision and as the General Court rightly held in paragraph 184 of the judgment under appeal, Article 87(1) EC protects all forms of competition from State intervention in the form of aid. So it protects not only competition between undertakings that operate under comparable conditions but also competition between undertakings operating under dissimilar conditions. Contrary to the view of the Committee and of the Italian Government, Article 87(1) EC also protects predatory competition. However, negative effects of predatory competition may be considered under Article 87(3) EC.

(b) Failure to state reasons

120. The plea raised by Italgas, that the General Court did not sufficiently explain how the social security relief differed from the specific situations in which the aim pursued may exceptionally be considered when assessing the nature of the aid, must be rejected. The General Court rightly referred in paragraph 181 et seq. of the judgment under appeal to the settled case-law of the Court of Justice according to which a Member State's attempt to offset the competitive disadvantages of undertakings of a specific economic sector or a specific region by granting them favourable treatment does not remove the character of those measures as aid. It also rightly stated in paragraph 184 of the judgment under appeal

72 — To this effect see also Grespan, D., Santamato, S., already cited in footnote 48, 2307.

that Article 87(1) EC protects all forms of competition. It followed from this that the aim pursued with the social security relief was clearly not such as to remove its character as aid. In view of this, it was not necessary for the General Court to examine in more detail the specific situations in which the aim pursued by a measure may already be considered at the level of Article 87(1) EC. It was sufficient for the General Court to find, in paragraph 188 of the judgment under appeal, that the present case did not involve a special situation of that kind and that, in the light of the arguments put forward, it was clear that the social security relief constituted aid within the meaning of Article 87(1) EC.

(c) The private economic operator criterion

121. The Italian Government's assertion that the General Court should have applied the criterion of a private economic operator can be disregarded because the Italian Republic did not itself bring an appeal and none of the appellants is relying on this objection. In any case, comparison with a private economic operator is inapplicable, in particular because the social security relief did not pursue an aim of interest to a private operator, and the relief was granted to the undertakings in Venice and Chioggia regardless of their financial situation, which is not consistent with the principle of maximising profit that would be the aim of a private economic operator.

(d) Conclusion

122. The appellants' pleas in law against the General Court's finding that the aim of compensating for the disadvantages of undertakings located in Venice and Chioggia cannot remove the character of the social security relief as aid must therefore be rejected.

123. Contrary to the Commission's view, I do not consider it absolutely necessary to replace the grounds of the judgment. This would only be necessary if the appellants' complaints could not be rejected on the basis of the grounds contained in the judgment under appeal. As has been explained above, the complaints can be rejected on the basis of the aforementioned evidence. It was not necessary for the General Court to examine in which particular cases the aim pursued may exceptionally be considered when assessing the nature of the aid. Therefore I do not consider it necessary to replace the

General Court's grounds in paragraphs 185 to 188 of the judgment even though the General Court's statements at that point were wrong in law.

124. The appellants' other complaints against the General Court's arguments in the alternative in paragraphs 189 to 194 of the judgment under appeal must be rejected as serving no purpose. [73] The General Court's finding that the social security relief constitutes favourable treatment for the purposes of Article 87(1) EC is already justified by the fact that the aim of compensating for the competitive disadvantages of undertakings located in Venice and Chioggia cannot be considered within the context of Article 87(1) EC. An error of law in the General Court's alternative grounds would therefore not be such as to cast doubt on its finding that the social security relief constitutes aid within the meaning of Article 87(1) EC.

125. The appellants' complaints against this finding must therefore be rejected in their entirety.

73 — See, on this point, the case-law cited in footnote 58.

B — *Examination of the condition of distorting competition and affecting trade between Member States*

1. Grounds of the judgment under appeal

126. The appellants also challenge the General Court's findings that the Commission had sufficiently examined whether the social security relief scheme distorted competition and affected trade between Member States and had given sufficient reasons for this. The General Court based these findings on the grounds in paragraphs 222 to 252 of the judgment under appeal. There the General Court stated firstly that, with regard to multisectoral aid schemes, the Commission may merely study the characteristics of the scheme at issue without examining individual cases. [74] The General Court also stated that the apportionment of the burden of proof in State aid cases is subject to compliance by the Commission and the Member States and/or the third parties concerned with the procedural obligations. [75] It was for the Member State concerned and/or the third parties concerned to provide the Commission with all necessary information during the administrative procedure. [76] Consequently, in the

74 — Paragraphs 227 to 231 of the contested decision.

75 — Paragraph 232 of the contested decision.

76 — Paragraph 233 et seq. of the contested decision.

case of a multisectoral aid scheme, the Commission was merely required to examine the conditions of affecting trade between Member States and distorting competition where sufficient information for that purpose had been communicated to it during the administrative procedure. In the absence of sufficient information, the Commission could, in accordance with the case-law, rely on a presumption based on the analysis of the characteristics of the aid scheme under consideration. [77] The extent of the Commission's duty to state reasons also depended on the data and information communicated to it during the administrative procedure. [78] The lawfulness of the Commission's decision had to be assessed solely on the basis of the information available to it at the time when the decision was adopted. [79]

127. The General Court then examined whether, given these premisses, the Commission's statement of reasons was sufficient, which it confirmed, in particular because the observations and documents communicated to the Commission during the administrative procedure contained no specific fact or datum of such a nature as to draw the Commission's attention to the special situation of certain sectors and permit it in particular to establish that, in those sectors, the social security relief at issue was not likely to affect trade between Member States or competition. It was not, therefore, for the Commission to obtain additional information from the national authorities. [80]

128. The General Court then rejected the pleas alleging infringement of the principle of non-discrimination and the contradictory nature of the statement of reasons that were raised with regard to the fact that the situation of the municipal undertakings was taken into account by the Commission whereas the situation of the applicants or of certain economic sectors was not. In this connection, too, the General Court relied on the fact that the Commission had been given specific information on the municipal undertakings during the administrative procedure. [81]

129. The General Court also dismissed the complaint that the Commission should have taken greater account of the small amount of the social security relief and the local nature of the beneficiary undertakings' activities. The small amount of social security relief did not exclude the possibility that trade between Member States might be affected. Even supposing that the beneficiary undertakings had

77 — Paragraph 235 of the judgment under appeal.
78 — Paragraph 236 et seq. of the judgment under appeal.
79 — Paragraph 238 of the judgment under appeal.
80 — Paragraphs 239 to 243 of the judgment under appeal.
81 — Paragraphs 244 to 245 of the judgment under appeal.

exercised their activities solely at local level, trade between Member States could be affected and competition distorted. [82]

130. The General Court consequently found that the Commission's decision contained an adequate statement of reasons. [83]

131. Finally, the General Court also rejected the plea that the contested decision was not specific enough to enable the national authorities to implement it. It stated in this regard that the statement of reasons of the contested decision was sufficient to permit the national authorities to determine which undertakings were required to repay the aid. It was also not for those authorities, when implementing the contested decision, to ascertain in each individual case whether the conditions for the application of Article 87(1) EC were satisfied. [84]

2. Main arguments of the parties

132. Italgas claims that the General Court breached the rules on the apportionment of the burden of proof by assuming that the national authorities or third parties concerned bore the burden of proof in respect of the conditions for the application of Article 87(1) EC.

133. It also claims that the General Court erred in law in holding that the Commission's decision contained an adequate statement of reasons. Before the contested decision was adopted, the Commission had received information which called into question whether the social security relief was likely to distort competition and affect trade between Member States in respect of specific categories of undertaking or specific economic sectors. Although the Commission had asked the Italian authorities to provide all necessary information enabling the situation of the municipal undertakings to be assessed, the Commission should also have made further inquiries relating to other categories of undertaking of which it had been advised. It should at least have made clear what criteria the national authorities had to take into account when implementing the decision in order to prevent the national authorities from requesting the return of benefits that were not aid.

134. It also alleges that the General Court distorted evidence. The letter of the City of Venice of 18 May 1998, the Italian Government's communication of 23 January 1999 and the letter of the Italian authorities of 10 June 1999 did not merely contain indications that the social security relief was not such as to distort competition and affect trade between Member States in the case of

82 — Paragraphs 246 to 248 of the judgment under appeal.
83 — Paragraphs 250 to 253 of the judgment under appeal.
84 — Paragraph 251 et seq. of the judgment under appeal.

municipal undertakings but also contained information relating to other categories of undertaking.

135. It argues, finally, that the General Court's finding that the contested decision was sufficiently specific to permit its implementation by the national authorities is legally flawed. As the Commission itself admitted, the contested decision was incomplete and had to be supplemented by the Commission's letters of 29 August and 29 October 2001. The adoption of such incomplete decisions is incompatible with the system for the review of aid. Firstly, the Commission should already have indicated during the formal investigation procedure that in certain cases no aid existed or none that was incompatible with the common market, since only in this way would it have ensured that the national authorities were put in a position properly to implement the Commission decisions. Secondly, the inquiries could not be deferred to the decision implementation procedure, as there would then be no guarantee either of a proper inquiry by the Commission or of a review of the Commission decision by the Community courts.

136. Hotel Cipriani also objects to the General Court's finding that the Commission decision's statement of reasons was sufficient. Hotel and restaurant markets, it argues, have to be defined locally because tourists choose the territorial destination first and then the hotel or restaurant. As hotels in Venice are not in competition with hotels in other cities, the social security relief cannot affect trade between Member States.

137. The *Committee* argues that the General Court's finding that the Commission had not failed to comply with its procedural obligations was contrary to the principle of non-discrimination. The Commission conducted a detailed analysis only in respect of the municipal undertakings and not in respect of other categories of undertaking.

138. The *Committee* and the *Italian Government* also object to the General Court's finding that the Commission had not failed to state its reasons. They argue that, even in the case of an aid scheme with regional objectives, the Commission should not confine itself to findings of principle or rely on assumptions but must provide evidence that the conditions for application of Article 87(1) EC have been fulfilled. The Commission's reasoning was limited to the finding that the social security relief had been granted to undertakings that were heavily engaged in trade between Member States, such as undertakings in the commercial and service sectors. It did not take into account the fact that the activity of many undertakings in Chioggia and Venice was merely local, although this

was clear from the information that had been submitted to the Commission. In the Italian Government's view, the Commission should have given greater consideration to the small amount of the social security relief, the local nature of the beneficiaries' activities and the island status of Venice.

139. Finally, the Italian Government considers that the criteria for assessing individual aid should have been applied because the Commission could have identified the beneficiaries and the amount of the social security relief. After it adopted the contested decision, the Commission ruled out the existence of aid for certain firms because, in their case, trade between Member States was not affected. It should already have carried out that assessment during the formal investigation procedure.

140. The *Commission* considers that these objections should be dismissed. The General Court rightly found that the statement of reasons contained in the Commission decision was sufficient.

141. Firstly, it rightly stated that the Commission, when assessing the legality of a multisectoral aid scheme, may limit itself to a general consideration without analysing each individual economic sector. In that case, it is for the national authorities and the third parties concerned to provide the Commission with the necessary information for it to be able to assess whether, with regard to specific economic sectors, the measure was likely to distort competition or affect trade between Member States. However, the information supplied to the Commission would not have revealed any special situations affecting the hotel trade and gas supply sectors.

142. Secondly, the General Court rightly stated that even favourable treatment of purely local activities may distort competition and affect trade between Member States, as this may affect the supply of certain goods and services.

143. Thirdly, although the General Court erred in law with regard to the burden of proof, its conclusions were correct, so that that complaint should be rejected but the grounds of the judgment under appeal replaced. The Commission actually provided the evidence that the social security relief was aid. The subject of the Commission's assessment was the social security relief scheme, not the individual benefits granted under that scheme. If that scheme had been notified to the Commission beforehand, it could only have assessed that scheme in general terms without considering individual cases. It is for

the Member State to draw the Commission's attention to special situations. These principles must also apply where the Member State neglects its duty of notification. The Member States should not actually be rewarded for neglecting their duty of notification. As the judgment under appeal shows, the Commission was provided with no specific information about the applicant undertakings. The Commission points out in this respect that it asked the national authorities to submit information on repeated occasions.

144. Fourthly, the complaint that evidence was distorted must be rejected. In so far as Italgas is challenging the General Court's factual assessment, this is inadmissible within the context of an appeal. In so far as Italgas is alleging distortion of evidence, this is, in principle, admissible. However, Italgas is in substance objecting not to the distortion of evidence, but to its assessment by the General Court. In any case, the General Court rightly found that the general information in the evidence contained no specific information that would have drawn the Commission's attention to the special situation of specific sectors.

145. Fifthly, the complaint of Italgas regarding the incompleteness of the contested decision should also be dismissed. In so far as the grounds of the judgment under appeal are contradictory, this is the result of the errors of law that the General Court made when assessing *locus standi*. In any case, the Commission did not have to examine any individual cases when assessing a multisectoral aid scheme.

3. Legal assessment

146. The appellants contest the General Court's finding that the Commission sufficiently examined in the contested decision whether the social security relief distorts competition and affects trade between Member States and that it adequately stated the reasons for this. In this respect, they allege errors of law both in the part of the General Court's grounds in which it explained the assessment criterion to be applied and in the part of the grounds in which the General Court applied that criterion.

147. Firstly, I will examine the complaints regarding the General Court's and the Commission's assessment of the social security relief scheme (a). Then I will examine how these claims are to be considered in view of the fact that the Commission did not confine itself in the contested decision to assessing only the social security relief scheme but also ordered the recovery of the aid granted (b).

(a) Assessment of the social security relief scheme

(i) Assessment criterion and burden of proof

148. The appellants allege errors of law firstly in respect of the assessment criterion and the burden of proof.

— Assessment criterion

149. In so far as the appellants claim that the General Court erred in law in respect of the assessment criterion to be applied by the Commission, this complaint is unfounded.

150. As the General Court rightly found in paragraph 209 of the judgment under appeal, the assessment criterion to be applied by the Commission when reviewing aid primarily depends on the subject-matter to be reviewed. In a case where the Commission is examining the compatibility of an unlawful, multisectoral scheme with Article 87 EC, it is required in principle only to examine the provisions of the scheme. [85] It may, therefore, in principle confine itself to assessing the national scheme without examining the individual benefits granted under that scheme. This is based on the idea that a Member State should not be rewarded for failing in its duty of notification. The Commission should not therefore be placed in a worse position than in a case where the Member State has notified the scheme in advance.

151. The General Court also rightly stated in paragraph 211 et seq. of the judgment under appeal that the subject-matter to be reviewed by the Commission may also be dependent on the information notified to the Commission during the procedure. If the Commission is given specific information about a specific beneficiary or a specific sector, it may be procedurally obliged to examine the specific case. If the information is complete, the Commission must take account of that beneficiary [86] or that sector. If it is incomplete, the Commission must, as the second sentence of Article 13(1) of Regulation No 659/1999 indicates, notify the Member State that it must provide

85 — *Italy and Sardegna Lines* (already cited in footnote 42, paragraph 51), Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24, Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 91 et seq. and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 67 et seq.

86 — Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 116 et seq.

it with all necessary documents, information and data within the specified period.

152. The complaint that the General Court used an incorrect assessment criterion must therefore be dismissed as unfounded.

— Burden of proof

153. Italgas also complains that the General Court erred in law with regard to the burden of proof.

154. This complaint is well founded.

155. Contrary to the General Court's statement in paragraph 232 of the judgment under appeal, neither the Italian Republic nor the applicants bear the burden of proving in this case that the social security relief does not distort competition or affect trade between Member States. In fact, the Commission bears the burden of proving that the conditions for the application of Article 87(1) EC have been fulfilled [87] and hence also that competition has been distorted and trade affected between Member States.

156. In addition, where the General Court observed, in paragraph 233 of the judgment under appeal, that it is for the Member State concerned and interested third parties to put forward their arguments and provide the Commission with all the relevant information, that is at least misleading. The procedural obligations of the Commission, the Member States and the other parties concerned in the aid review process do not directly determine where the burden of proof rests. However, as has been explained above, they may influence the subject-matter of the assessment as well as the question of from when the evidence of fulfilment of the conditions of application of Article 87(1) EC is considered to be furnished. Accordingly, the second sentence of Article 13(1) of Regulation No 659/1999 provides that the Commission may take its decision on the basis of the information available if a Member State has failed to comply with an information injunction.

157. The General Court's reasoning therefore contains an error of law regarding the apportionment of the burden of proof. However, as paragraph 239 of the judgment under appeal indicates, the General Court, in spite of that error of law, nevertheless examined whether the Commission had adequately shown that competition had been distorted and trade between Member States affected. Therefore the error of law ultimately had no impact. For

87 — See Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 23.

this reason, the complaint of Italgas must be dismissed but the General Court's grounds replaced.

— Evidence of distortion of competition and of an effect on trade between Member States

— Interim conclusion

160. The complaint that the General Court wrongly found that the Commission had proved that there had been a distortion of competition and an effect on trade between Member States should be dismissed.

158. The complaints regarding the assessment criterion and the burden of proof cannot therefore succeed.

(ii) Application of the assessment criterion

161. As has been explained above, when assessing an unlawful, multisectoral aid scheme, the Commission does not, in principle, have to examine in individual cases whether all benefits granted under that scheme are aid within the meaning of Article 87(1) EC. The Commission may, in fact, confine itself to showing that the scheme as such is incompatible with Article 87 EC. Therefore it also does not have to examine whether all benefits granted under the scheme distort competition and affect trade between Member States.

159. The appellants also object to the part of the grounds in which the General Court applied the assessment criterion to the present case. They claim, firstly, that the Commission did not prove that, or did not adequately state why, the scheme distorted competition and affected trade between Member States. They also allege that, in the present case, the Commission should have examined all individual cases, the individual situation of Italgas and Hotel Cipriani and/or the situation of specific economic sectors. Finally, they allege infringement of the principle of non-discrimination and distortion of evidence by the General Court.

162. The General Court rightly found that the Commission provided such evidence. The requirements for evidence that the social security relief scheme as such is likely to distort competition and affect trade between Member States are not very demanding. It is sufficient to demonstrate that at least some of the benefits granted under the scheme are likely

to have this effect. This is clearly the case for social security relief granted to all undertakings in a specific region.

163. Such operating aid releases an undertaking from costs which it would normally have had to bear. It therefore distorts competition between the beneficiary undertakings and other, non-beneficiary undertakings. [88] The Italian Government's objection that this should have been examined more closely owing to the small amount of the relief is mistaken. As the General Court rightly stated in paragraph 247 of the judgment under appeal, in recital 110 of the contested decision the Commission expressly excluded from the scope of Article 87(1) EC social security relief that complies with the *de minimis* rule. The General Court also rightly pointed out that, according to settled case-law, neither the proportionately small scale of a benefit nor the proportionately small size of the beneficiary undertaking excludes the likelihood that competition will be distorted. This particularly applies where the benefit, as here, is accorded with the aim of maintaining the activity of undertakings that would otherwise withdraw from the market.

164. As regards the effect on trade between Member States, the General Court rightly held that the Commission adequately stated its reasons in the decision. In recital 49 of the contested decision, the Commission explained firstly that the social security relief applied to all undertakings in Venice and Chioggia. It went on to explain that at least some of those undertakings were engaged in trade between Member States.

165. The Commission therefore provided the evidence that the social security scheme distorted competition and affected trade between Member States, because this was the case for at least some of the benefits accorded under that scheme. For the aforementioned reasons, the Commission did not have to provide evidence that all benefits accorded under the scheme distorted competition and affected trade between Member States.

— Need to examine all individual cases

166. In so far as it is alleged that the Commission should have examined whether all social security relief was likely to distort competition and affect trade between the Member States in individual cases, this complaint must be rejected.

88 — Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30.

167. It has already been established above that, in principle, the Commission is not obliged to provide such proof. Nevertheless, the question remains whether the fact that the Commission was provided with information during the administrative procedure that could have enabled it to determine the identity and the number of undertakings concerned establishes a procedural obligation on the part of the Commission to examine the individual situation of those undertakings.

168. A distinction must be made in this connection between incomplete evidence and information, on the one hand, and insufficiently specific evidence and information, on the other. Specific evidence can oblige the Commission to take into account certain situations. Where the evidence and information are sufficiently specific but incomplete, under the second sentence of Article 13(1) of Regulation No 659/1999 the Commission can be obliged to ask the Member States for information. On the other hand, unspecific, insufficiently substantiated evidence does not give rise to any corresponding procedural obligation on the part of the Commission. Otherwise, the principle that a Member State should not be rewarded for failing in its duty of notification and that the Commission should therefore confine itself in principle to examining the aid scheme as such could be too easily undermined. As the General Court found in paragraphs 240 and 242 et seq. of the judgment under appeal, the information given to the Commission on the individual undertakings was not specific enough to impose a procedural obligation on it.

— Need to investigate the individual situations of Italgas and Hotel Cipriani

169. The complaint that the Commission should have taken the individual situations of Italgas and Hotel Cipriani into account is unfounded. As the General Court rightly held in paragraphs 214 and 241 of the judgment under appeal, the Commission was not provided with any specific information during the procedure in this regard that might have established a procedural obligation to take account of the applicants' individual situations.

— Need to investigate specific economic sectors

170. The appellants also argue that the Commission's statement of reasons was inadequate in respect of the building industry, commerce and hotel sectors and complain that the General Court should have made a finding to that effect.

171. This complaint is also unfounded. As the General Court rightly stated, no specific information was supplied to the Commission during the administrative procedure in this regard that could have established a procedural obligation on its part. Paragraph 240 of the judgment under appeal does indicate that the Italian authorities argued in their letter of 23 January 1999 during the formal investigation procedure that the undertakings in the building industry, commerce, the hotel sector and performing services of general economic interest were unlikely to engage in such trade. However, the General Court pointed out that that claim was not supported by any argument of law or fact. Moreover, the documents attached to that letter contained no information which made it possible to establish the strictly local nature of the markets, in particular, in the sectors referred to by the Italian authorities in the abovementioned letter.

172. As no specific information was available, the Commission was under no procedural obligation. Therefore, this complaint is also unfounded.

— Principle of non-discrimination

173. In so far as the appellants object that the principle of non-discrimination has been infringed, this complaint is also unfounded. The Commission is required to conduct a diligent and impartial examination when reviewing aid. [89] It must therefore respect the principle of equal treatment and hence treat comparable situations equally. As the General Court rightly found in paragraph 244 et seq. of the judgment under appeal, the situation of the municipal undertakings differs from that of the other beneficiaries in that specific, if not complete, information was available on the municipal undertakings. That specific information established a procedural obligation on the part of the Commission which it fulfilled by issuing its information injunction.

— Distortion of evidence

174. In so far as Italgas objects that the General Court distorted evidence, this claim is to be rejected. Italgas is not claiming in this complaint that the General Court distorted the content of specific documents. Instead, Italgas is arguing that the General Court should have concluded from the indications given by specific documents that the Commission had a procedural obligation to take that information into account. However,

89 — Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62.

Italgas itself admits that the information in question was general in nature and therefore not specific. The complaint of Italgas must therefore be rejected in the light of the above.

(iii) Interim conclusion

175. The complaints against the part of the General Court's grounds in which it examined the application to the present case of the assessment criterion on which the Court and the Commission relied must therefore be rejected.

(b) Recovery order

176. The appellants claim that the Commission should not have issued the recovery order contained in Article 5 of the contested decision without assessing beforehand whether the social security relief fulfilled the conditions for application of Article 87(1) EC in individual cases. On that basis, they object to the General Court's finding that the Commission's statement of reasons was sufficient. The Commission considers that this complaint should be rejected but that the General Court's grounds should be replaced.

177. The present case is distinguished by the fact that the General Court and the Commission do not interpret in the same way the recovery order in the contested decision. Since the General Court's interpretation is based on an incorrect view, the appellants' complaint is well founded (i), but it must be rejected and the grounds of the judgment under appeal replaced (ii).

(i) Errors of law in the General Court's reasoning

178. The appellants allege that the General Court was wrong in holding that the assessment made by the Commission was a sufficient basis for ordering the recovery of all the social security relief provided.

179. To assess the validity of this complaint, it must first be examined whether the General Court made such a finding. It must then be examined whether such a finding is wrong in law.

— The General Court's grounds

180. The General Court found firstly in the judgment under appeal that, by requesting

the return of aid in Article 5 of the contested decision, the Commission ordered the return *of all social security relief* that it had not expressly declared in that decision to be compatible with Article 87 EC.

181. That this was the General Court's understanding is shown by paragraph 251 et seq. and paragraphs 100 to 111 of the judgment under appeal. In paragraph 251 of the judgment under appeal, the General Court found that it was not for the national authorities, when implementing the contested decision, to ascertain in each individual case whether the conditions for the application of Article 87(1) EC were satisfied. The General Court referred in this connection to its statements in paragraph 100 to 111 of the judgment under appeal. There, the General Court stated in particular that there is nothing in the contested decision to enable benefits under the social security relief scheme, other than those excluded under the *de minimis* rule, to be excluded from the recovery obligation on the ground that they do not constitute State aid within the meaning of Article 87(1) EC. [90] The General Court also stated the reasons why an approach whereby the national authorities, when implementing the contested decision, could examine in individual cases whether the conditions for the application of Article 87(1) had been fulfilled, must be rejected. It was not for the national authority, when implementing the contested decision, to examine in each individual case whether the conditions for the application of Article 87(1) EC had been fulfilled.

182. This is confirmed by the grounds in paragraph 15 of the judgment under appeal. There, the General Court reproduced Article 2 of the contested decision to the effect that the *social security reductions* granted under Article 1 of the Ministerial Decree of 5 August 1994 to undertakings located in the urban area of Venice and Chioggia constitute aid which is incompatible with the common market.

— Legally flawed nature of that interpretation

183. Secondly, the General Court considered the Commission's reasons for the recovery order to be sufficient. The Court's finding in that regard is wrong in law.

184. According to the General Court's approach, the Commission should, firstly, have the power to order the full recovery of benefits granted under a multisectoral aid scheme without having to assess beforehand whether those benefits fulfil the conditions for application of Article 87(1) EC in individual cases. Secondly, the national authorities, when implementing such a decision, should not have the power to examine whether the conditions for application of Article 87(1) EC have been fulfilled.

90 — See the last sentence in paragraph 103 of the judgment under appeal.

185. Such an approach is not compatible either with Article 87(1) EC or with the procedure for reviewing aid. The Commission may order the recovery of an accorded benefit only where it has made an assessment and come to the conclusion that the benefit is incompatible with Article 87 EC, in other words, that it is aid within the meaning of Article 87(1) EC which is incompatible with the common market.

186. In my view, the General Court's approach cannot be justified by the fact that the Member State failed in its duty of notification, since, as has been explained above, [91] it merely leads to a situation where the Commission, when assessing a multisectoral scheme, can in principle confine itself to examining the provisions of that scheme. However, this does not mean that the Commission can rely on reasoning that merely supports the finding that the multisectoral scheme as such is incompatible with Article 87 EC, in order also to order the recovery of all benefits granted under that scheme. The mere fact that such benefits were provided under a scheme that accorded aid which is partly incompatible with the common market does not seem to me to be sufficient justification for such a comprehensive recovery order.

91 — See points 149 to 152 of this Opinion.

— Interim conclusion

187. The General Court's grounds are therefore incorrect in law.

(ii) Replacement of the grounds

188. The Commission contends that the appellant's claim should be rejected but that the General Court's grounds should be replaced. It argues, in essence, that, in Article 5 of the contested decision, it ordered the recovery of social security relief only in so far as it constituted aid in individual cases within the meaning of Article 87(1) EC. The national authorities must clarify when implementing the contested decision whether the conditions for the application of Article 87(1) EC have been fulfilled.

189. This request that the grounds be replaced should be upheld. In Article 5 of the contested decision, the Commission indeed ordered the recovery only in so far as the benefits constituted aid in individual cases within the meaning of Article 87(1) EC. I consider that such an approach is also compatible with the system for reviewing aid, provided that certain conditions are met.

— Content of the recovery order

190. Clearly, the General Court incorrectly interpreted the recovery order in Article 5 of the contested decision. As the Commission states, it primarily examined in the contested decision whether the social security relief scheme as such is compatible with Article 87 EC. It did not therefore carry out a comprehensive assessment of all the social security relief granted.

191. This follows both from the statement of reasons and from the operative part of the contested decision. In recital 49 of the contested decision, relating to distortion of competition and effect on trade between Member States, the Commission merely found that the national scheme affects competition and trade between Member States in that all companies benefit from relief, *including* those operating in areas where there is trade between Member States. The Commission's statement that companies engaged in trade between Member States are 'included' clearly shows that the Commission did not assess whether all social security relief fulfilled the conditions for application of Article 87(1) EC.

192. This is also borne out by the operative part of the contested decision. Contrary to the presentation of Article 2 of the contested decision in paragraph 15 of the judgment under appeal, the Commission did not find in that article that the *social security relief* granted under Article 1 of the Ministerial Decree of 5 August 1994 to undertakings located in the urban area of Venice and Chioggia constitutes aid which is incompatible with the common market. In fact, it limited itself in that article and also in the second paragraph of Article 1of the contested decision to the finding that the *aid* provided under the social security relief scheme is incompatible with the common market. The social security relief is only incompatible with the common market under the second paragraph of Article 1 and Article 2 of the contested decision in so far as the national authorities establish in individual cases that social security relief covered by those provisions of the contested decision is aid within the meaning of Article 87(1) EC. Article 5 of the contested decision orders the recovery of the benefit only in such cases.

— Compatibility of such an approach with Article 87 EC and the system for reviewing aid

193. It must also be clarified whether such an approach is compatible with Article 87 EC and the system for reviewing aid. This was

found to be the case by the Court of Justice in *Italy* v *Commission*. [92] The argument for that approach is that the Commission would otherwise be faced with a choice between two unsatisfactory alternatives. Either it would have to examine all individual cases before ordering recovery, although this would undermine the principle that the Commission, when assessing a multisectoral scheme, may confine itself to examining the characteristics of the programme in question, or the Commission would have to find only that the scheme is incompatible with Article 87 EC. This would be unsatisfactory because a recovery order is the logical consequence of the finding that aid is incompatible with the common market. [93]

194. Moreover, I am not convinced by the objections to this approach.

195. Firstly, this approach does not result in the national authorities and courts encroaching upon the Commission's powers. In contrast to the conditions for application of Article 87(2) and (3) EC, the national authorities may themselves examine whether the conditions for application of Article 87(1) EC have been fulfilled. [94] However, it must be borne in mind that the national authorities and courts are empowered to examine whether the conditions for application of Article 87(1) EC have been fulfilled only in so far as they are not already bound by a finding in a Commission decision.

196. The second objection is that such an approach would give rise to legal uncertainty over the scope of the national authorities' power of assessment. This objection does not convince me either. As has been explained above, the national authorities have a power of assessment only in so far as the contested Commission decision does not contain any conclusive finding regarding the fulfilment of the conditions for application of Article 87(1) EC. The Commission must therefore make clear in the contested decision to what extent its findings in the contested decision are confined to the assessment of the scheme as such, to what extent they also apply in detail to the individual benefits to be examined by the national authorities and courts and to what extent it went beyond assessment of the scheme to examine specific economic sectors or individual benefits.

197. The contested decision appears to me to fulfil these requirements. The Commission clearly limited itself to assessing the social

92 — Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 90 et seq.

93 — Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 113.

94 — Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 8.

security relief scheme as such when assessing the likelihood that the social security relief would distort competition and affect trade between Member States. The contested decision therefore contains no conclusive finding by the Commission in this respect. To that extent, the national courts and authorities have the power in individual cases to assess whether the social security relief granted distorts competition and affects trade between Member States.

198. On the other hand, the Commission's finding that the nature of the social security relief as aid was not removed by the aim to compensate for the structural disadvantages of undertakings in Venice and Chioggia seems to me to apply not only to the assessment of the social security relief scheme as such but to all individual benefits granted under the social security relief scheme. To that extent, the Commission made a conclusive finding which is binding on the national authorities and courts.

199. If the national authorities are uncertain about the scope of the findings, they may turn to the Commission which, under the principle of genuine cooperation, is required to cooperate in good faith with them. [95]

95 — Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraph 45; Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 42.

200. The third objection is that such an approach is incompatible with the system for reviewing aid. In the event of a dispute over the implementation of such a decision, the Commission would have to go against the system by both initiating the procedure provided for in the first subparagraph of Article 88(2) EC and bringing an action for failure to fulfil obligations before the Court of Justice under the second subparagraph of Article 88(2) EC.

201. That objection is not convincing either. A distinction should be drawn between situations in which the Commission must initiate a fresh formal investigation procedure under the first subparagraph of Article 88(2) EC and situations in which it may bring an action directly before the Court of Justice under the second subparagraph of Article 88(2) EC.

202. Where there are disputes regarding the scheme as such, because, for example, the Commission considers that the Member State did not abolish or sufficiently alter the scheme to ensure its compatibility with Article 87 EC, the Commission can bring an action directly under the second subparagraph of Article 88(2) EC. There is in fact a Commission decision on the aid scheme. In my view, that applies also where the Commission takes the view that the Member State has in general not taken any adequate measures in order to recover the aid granted under the scheme.

203. By contrast, where the disputes relate to the recovery of individual benefits granted

under the scheme, a distinction should be made. In the case of benefits which the Commission has not assessed in each individual case with regard to the conditions for application of Article 87(1) EC, and where the dispute concerns the fulfilment of a condition of Article 87(1) EC about which the Commission made no conclusive finding in its decision, then the Commission must initiate a new administrative procedure. However, this does not imply a re-opening of the administrative procedure, but the initiation of an administrative procedure with a new subject-matter, namely the assessment of the individual measure in question. In the case of benefits, on the other hand, that the Commission has already comprehensively assessed in the decision with regard to Article 87(1) EC, it can bring an action directly under the second subparagraph of Article 88(2) EC.

204. The approach does not therefore run contrary to the system as a result of the initiation of an administrative procedure under the first subparagraph of Article 88(2) EC and the bringing of an action under the second subparagraph of Article 88(2) EC in respect of the same measure.

205. It may therefore be stated by way of an interim conclusion that the Commission, in a decision in which it is primarily examining the compatibility of an unlawful multisectoral aid scheme with Article 87 EC, may also order the recovery of the aid granted under that scheme without having to examine beforehand whether the benefits individually accorded under that scheme constitute aid within the meaning of Article 87(1) EC.

(iii) Interim conclusion

206. As a result, the complaints that the Commission did not sufficiently justify the recovery order in Article 5 of the contested decision must be rejected in their entirety.

(c) Conclusion

207. It must therefore be concluded that the objections to the General Court's finding that the Commission sufficiently examined and justified the contested decision with regard to distortion of competition and the effect on trade between Member States must be rejected in their entirety.

C — *Services of general economic interest*

1. Grounds of the judgment under appeal

208. The Committee and Italgas also object to the General Court's finding that the Commission neither infringed Article 86(2) nor provided a contradictory justification in this respect. The General Court based its finding on paragraphs 203 to 221 of the judgment under appeal. There, the General Court found that the Commission had not erred in law by examining the application of Article 86(2) EC merely in respect of the municipal undertakings and not in respect of Italgas. The Commission was not obliged, when assessing a multisectoral aid scheme, to examine individual cases. It was also for the national authorities and the third parties concerned to submit arguments to the Commission during the procedure for the application of Article 86(2) EC. However, no information on Italgas was submitted.

2. Main arguments of the parties

209. The *Committee*, *Italgas* and *Coopservice* complain that the General Court infringed Article 86(2) EC. In the Committee's view, the General Court should have found that the Commission infringed Article 86(2) EC and the principle of non-discrimination in that it did not closely examine to which undertakings that provision was applicable. Italgas and Coopservice are alleging this specifically in respect of their situation, since their activity might be understood as being a service of general economic interest.

210. The *Commission* considers that this complaint should be dismissed. In its submission, the General Court rightly stated that it is for the Member State and the third party concerned to explain to the Commission during the procedure why the State measures are compatible with the common market. The Commission is also not obliged, when assessing an aid scheme, to examine individual cases. The Italian authorities have referred in the present case to the special situation of the municipal undertakings. However, neither the Italian authorities nor concerned third parties have given specific information about Italgas.

3. Legal assessment

211. The complaints that Article 86(2) EC and the principle of non-discrimination have been infringed must be rejected. The General

Court rightly found that, in principle, when assessing an aid scheme the Commission does not need to examine any individual cases. Nor can it be claimed that the Commission failed to fulfil its procedural obligations. After the Italian authorities drew the Commission's attention, in particular, to the special situation of the services of general economic interest, the Commission asked those authorities to supply further information on the undertakings in question. However, the Italian authorities did not supply any information on Italgas.

D — *Application of Article 87(3)(c) EC*

1. Grounds of the judgment under appeal

212. The appellants also object to the General Court's finding that the Commission did not err in law when applying Article 87(3)(c) EC. The General Court based this finding on paragraphs 280 to 314 of the judgment under appeal. There, it dealt in particular with the question whether the Commission should have taken account of the structural problems linked to island status directly under Article 87(3)(c) EC. [96] The General Court found in this connection that the Commission was entitled to take account of special situations not covered by its communications and guidelines by means of an *ad hoc* application of Article 87(3)(c). In so doing, the Commission had to weigh the beneficial effects of aid against its adverse effects on trading conditions and the maintenance of undistorted competition. [97]

213. However, the Commission did not err in law when applying Article 87(3)(c) EC in the present case. The Commission did not exceed the limits of its discretion by refusing to apply that provision in the present case on the ground that the social security relief in question was not operating aid connected with an investment. [98]

214. The Commission decision also contained an adequate statement of reasons. It explained in recital 74 of the contested decision why it did not intend to adapt, in the present case, the method of application of Article 87(3)(c) EC. Although the Commission referred there to the fact that it had partially amended its method with regard to the accession of Sweden and Finland in order to be able to take account of new special geographical factors in those Member States, it

96 — Paragraphs 306 to 311 of the judgment under appeal.
97 — Paragraph 307 of the judgment under appeal.
98 — Paragraph 308 et seq. of the judgment under appeal.

did not consider it to be necessary to amend its method with regard to the undertakings in Venice and Chioggia since, firstly, Venice's situation had not changed, secondly, the social security relief, being operating aid, was likely to disturb the system and, thirdly, the aid was granted in an area with no grave problems of economic and social cohesion. [99]

2. Main arguments of the parties

215. Hotel Cipriani, the *Committee*, *Coopservice* and the *Italian Government* essentially complain that both the Commission and the General Court wrongly confined themselves to assessing whether there were any new factors in the present case that might have justified amending the Commission's existing communications and guidelines on Article 87(3)(c) EC. The Commission and the General Court should have considered whether, in view of the special and unique situation of Venice and Chioggia, an *ad hoc* application of that provision would have been appropriate.

99 — Paragraph 311 of the judgment under appeal.

216. The *Commission* considers that these claims should be rejected. The Committee's claim is inadmissible because it is mainly directed against the contested Commission decision. The claims of Hotel Cipriani, the Committee and the Italian Government are in any case unfounded.

3. Legal assessment

217. Contrary to the Commission's view, the Committee's claim is admissible. Even though the Committee's appeal largely concerns the contested decision, there is no doubt that it is objecting to an error of law by the General Court in that the Court did not find that the Commission had erred in law over the application of Article 87(3)(c) EC. Such a complaint is admissible in the appeal proceedings.

218. However, the complaints are unfounded. The General Court did, in fact, consider the question of an *ad hoc* application of Article 87(3)(c) EC. In paragraph 307 of the judgment under appeal, the General Court expressly mentioned that that provision may be applied *ad hoc*, outside the scope of the Commission's communications and guidelines.

219. In so far as the General Court found that the Commission refused *ad hoc* application

of that provision without erring in law and that the refusal was adequately justified, the General Court did not, in my view, err in law. The General Court rightly pointed out that the Commission has broad discretion in this area, that the relief in question was operating aid which was highly likely to have a disturbing effect on competition and that the urban area of Venice and Chioggia was a region with no grave problems of economic and social cohesion.

220. The General Court's finding that the Commission adequately stated the reasons for its decision is also error-free. In so far as the Commission stated the reasons for not adapting its existing communications and guidelines in recital 73 et seq. of the contested decision, it was, in essence, relying on reasons why application of Article 87(3)(c) is not in principle justified in the present case. Therefore they are reasons not only for not adapting the Commission's communications and guidelines on that provision, but also for not applying it *ad hoc*.

221. Accordingly, the complaints based on infringement of Article 87(3) EC must be dismissed.

E — *Application of Article 87(3)(d) EC*

1. Grounds of the judgment under appeal

222. The appellants also complain that the General Court erred in law regarding the application of Article 87(3)(d) EC. In paragraphs 322 to 329 of the judgment under appeal, the General Court rejected the pleas in law that the Commission had wrongly refused to apply the cultural derogation under Article 87(3)(d) EC. In so doing, the General Court relied firstly on the fact that evidence was not supplied to the Commission during the administrative procedure that the undertakings that received the social security relief also bore additional costs connected with heritage conservation. [100] Secondly, the method of implementing the social security relief did not make it possible to ensure that it was proportional to the objective of the cultural derogation. [101] Thirdly, the Commission did not infringe the principle of non-discrimination because it applied the cultural derogation to Consorzio Venezia Nuova and not to Hotel Cipriani. No information on the particular situation of Hotel Cipriani was put before the Commission during the administrative

100 — Paragraphs 322 to 324 of the judgment under appeal.
101 — Paragraph 325 of the judgment under appeal.

procedure. Consorzio Venezia Nuova, on the other hand, was one of the municipal undertakings on which the Italian authorities had provided detailed information. [102]

2. Main arguments of the parties

223. The *Committee, Hotel Cipriani* and *Coopservice* object, firstly, to the General Court's finding that not all the undertakings own buildings and therefore not all the undertakings would have to bear the additional costs of restoration and maintenance work. The Committee argues that it was proved that all the undertakings had to carry out maintenance work, which cost more in the urban area of Venice and Chioggia. Therefore the social security relief that had been assigned only to activities in that area had, firstly, reduced the cost of the maintenance work and, secondly, allowed the undertakings in question in that region to invest more in maintenance work. Hotel Cipriani states that the measures benefited undertakings that were subject to special burdens because of the particular situation in Venice. The Committee and Hotel Cipriani also consider the distinction drawn between individual buildings in the area of Venice and Chioggia to be erroneous and that the City of Venice is, as such, part of the cultural heritage.

224. They also claim that the General Court erred in law by wrongly classifying Consorzio Venezia Nuova as a municipal undertaking.

225. Finally, Hotel Cipriani complains that it cannot be blamed for not participating in the administrative procedure and that the Commission should have invited it to do so.

226. The *Commission* considers that these complaints should be rejected.

3. Legal assessment

227. The complaints of the Committee and Hotel Cipriani are unconvincing. The General Court's finding that there was no justification for applying Article 87(3)(d) EC because no connection had been established between the social security relief and cultural heritage conservation is not vitiated by any error of law.

102 — Paragraphs 326 to 328 of the judgment under appeal.

228. Firstly, the argument that, in a city that is part of the world cultural heritage, maintenance measures on any building, irrespective of its cultural, historical or architectural significance, may be justified under the cultural derogation is incorrect. It cannot be assumed that the same significance for the cultural heritage can be attached to the maintenance of every individual building.

229. Secondly, I can identify no error of law in the General Court's finding that the method of implementing the social security relief did not make it possible to ensure that it was proportional to the objective of the cultural derogation.

230. Firstly, the argument that evidence was provided in the proceedings before the General Court that all the beneficiary undertakings bear additional costs for maintenance work must be rejected as inadmissible. The General Court's findings of fact cannot, in principle, be challenged in appeal proceedings confined to points of law.

231. Contrary to the view of Hotel Cipriani, it is not sufficient for the application of Article 87(3)(d) EC that the social security relief is compensating for a special burden on undertakings located in Venice and Chioggia. That provision may be applied only where there is a proven connection between the benefits in the form of social security relief and the contribution to safeguarding the cultural, historical or architectural heritage. As the General Court rightly established, the social security relief scheme does not provide for such a connection. The cost of maintaining buildings of cultural, historical or architectural significance can vary enormously depending on the nature and number of the buildings in question. As the Commission and the General Court rightly found, the social security relief scheme establishes no clear connection between those maintenance costs and the amount of social security relief.

232. Thirdly, the complaint that the principle of non-discrimination has been infringed must therefore be rejected. As the General Court rightly found in paragraphs 326 to 328 of the judgment under appeal, the application of the cultural derogation to Consorzio Venezia Nuova is justified because the Italian authorities provided the Commission with detailed information on that consortium during the administrative procedure which enabled the Commission to conclude that its duty had been to carry out measures decided on by the Italian State for the purpose of safeguarding the historic, artistic and architectural heritage of Venice. Contrary to the claim of the Committee and Hotel Cipriani, the accuracy of that conclusion is not called into question by any erroneous classification of the consortium as a municipal undertaking. The General Court's reasoning is not based on the fact that the consortium is a municipal undertaking

but on the fact that it was assigned to carry out measures for the purpose of safeguarding the historic, artistic and architectural heritage of Venice.

233. Fourthly, the complaint of Hotel Cipriani that the Commission should have invited it to participate in the administrative procedure must be rejected. Interested third parties were invited to submit their observations on the aid scheme under consideration by means of a notice published in the *Official Journal of the European Communities* of 18 February 1998. The Commission is not obliged to invite third parties to the procedure individually beyond the issuing of that notice.

234. The complaints based on infringement of Article 87(3)(d) EC must therefore be rejected in their entirety.

F — *Application of Article 15 of Regulation No 659/1999*

235. The applicants argued before the General Court that the social security relief scheme was introduced by Laws Nos 206/1995 and 30/1997. The Commission had failed to recognise in the contested decision that the limitation period of ten years from the introduction of the scheme had expired and that it was therefore to be categorised as existing aid under Article 15 of Regulation No 659/1999. The General Court found that the Commission had not infringed Article 15 of Regulation No 659/1999 and rejected that plea. The appellants are now objecting to the reasoning in paragraphs 357 to 367 of the judgment under appeal on which the General Court based that rejection.

1. Grounds of the judgment under appeal

236. There, the General Court found, firstly, that the measures in question were new aid, since Law No 206/1995 introduced a new scheme applicable to the area of Venice and Chioggia and Law No 30/1997 extended its period of validity.[103] It also stated that the scheme introduced by those laws could not be regarded as an extension of an already existing scheme. Firstly, the relief provided for under Laws Nos 590/1971 and 463/1972 had not been granted since 1 July 1973.[104] Secondly, Law No 206/1995 expressly established a new scheme for relief from social security contributions in the Mezzogiorno. That new scheme was extended by Law No 301/1997 to undertakings in Venice and Chioggia. That conceptually severable extension of the

103 — Paragraph 359 of the judgment under appeal.
104 — Paragraph 360 of the judgment under appeal.

scheme provided for under Law No 206/1995 constituted new aid. [105] In any case, the ten-year period for aid granted between 1995 and 1997 had not expired, as the limitation period laid down in Article 15 of Regulation No 659/1999 did not begin until the date on which the unlawful aid was paid out. [106] Finally, the General Court pointed out that neither the Italian Government nor other parties to the proceedings challenged the Commission's decision that the aid was new aid. [107]

2. Main arguments of the parties

237. Hotel Cipriani and *Coopservice* complain that the General Court did not correctly interpret or correctly apply the concept of existing aid within the meaning of Article 15(3) of Regulation No 659/1999. It alleges that the General Court did not adequately deal with the matter of when the social security relief scheme was introduced and that the relief had already been introduced by Law No 463/1972. Subsequently, Special Law No 171/1973, which provided for the decision of principle to reduce social security contributions, was applied to Venice. The precise extent of that reduction was determined by reference to the schemes established for the Mezzogiorno. However, the decision of principle in Special Law No 171/1973 was never abolished.

238. The *Committee* also points out that there is continuity between Law No 171/1973 and Laws Nos 206/1995 and 30/1997 and that it is therefore a matter of determining whether Laws Nos 206/1995 and 30/1997 substantively altered the existing scheme laid down by Law No 171/1973. This was not the case, since only the number and amount of the benefits provided for had been reduced.

239. The *Commission* considers that these complaints should be rejected.

240. It argues, firstly, that the complaints are inadmissible in so far as they are directed against the contested decision and not the judgment under appeal. Moreover, in so far as the appellants claim that the reduction in social security contributions had already been introduced earlier, it is a finding of fact that can no longer be challenged at the appeal stage. The argument that there is continuity between Law No 171/1973 and Laws Nos 206/1995 and 30/1997 is also a new factual submission.

241. The Commission contends that the complaints are, in any case, unfounded. Firstly, the General Court rightly found that the national

105 — Paragraphs 361 to 363 of the judgment under appeal.
106 — Paragraph 364 et seq. of the judgment under appeal.
107 — Paragraph 366 of the judgment under appeal.

scheme introduced by Law No 206/1995 was new aid because the Law substantively altered the existing aid schemes for the area of Venice and Chioggia. Law No 206/1995 introduced new calculation criteria, a limitation on reductions and a reduction in rates. In any event, the General Court was rightly guided by the fact that, at the very least, the aid was new in that the scope of an existing aid scheme had been extended to new cases. Secondly, the Commission argues that there is no continuity between Law No 463/1972 and Laws Nos 206/1995 and 30/1997, as the benefits were paid out under Law No 463/1972 only until 30 June 1973.

243. However, the complaints are unfounded.

244. In so far as the continuity claimed is between the scheme laid down by Law No 463/1972 and the scheme laid down by Laws Nos 206/1995 and 30/1997, the General Court rightly ruled out any continuity because the benefits were granted under the scheme laid down by Law No 463/1972 only until 30 June 1973.

3. Legal assessment

242. The complaint is admissible. Although appeals directed not against the judgment under appeal but against the Commission decision contested at first instance are inadmissible, Hotel Cipriani and the Committee are clearly objecting to the grounds of the judgment under appeal in so far as the General Court confirmed the view held by the Commission in the contested decision. Hotel Cipriani and the Committee have also already relied in the proceedings before the General Court on the fact that there is continuity between the earlier schemes and Laws Nos 206/1995 and 30/1997. Accordingly, the complaint is not inadmissible on the ground that it is a new submission.

245. The complaint relying on a continuity between the scheme laid down by Law No 171/1973 and the scheme laid down by Laws Nos 206/1995 and 30/1997 is also unconvincing. It should again be remembered in this connection that the Commission may base its decision on the information supplied to it by the Member State and third parties concerned during the administrative procedure. As the General Court found, the information available to the Commission indicated, firstly, that, by Ministerial Decree of 5 August 1994, a new social security relief scheme had been adopted in the Mezzogiorno. Secondly, it was clear from Law No 206/1995 that the new scheme had been extended to undertakings in Venice and Chioggia. The General Court rightly found that the Commission had to assume from that information that the scheme referred to in both the Ministerial Decree of 5 August 1994 and Law No 206/1995 was a new scheme. It might have been otherwise if the Commission had been informed during the administrative

procedure of the continuity between that extension and an existing scheme. However, the General Court found that neither the Italian Government nor any other party to the proceedings referred to any such continuity, although the Commission had expressly stated in the notice initiating the formal investigation procedure that it arose from a new scheme. In this respect, the General Court's finding that the Commission rightly considered that the aid was new aid is error-free. The complaints of Hotel Cipriani and the Committee must therefore be rejected as unfounded.

G — *Application of Article 14 of Regulation No 659/1999*

1. Grounds of the judgment under appeal

246. The applicants had argued in the proceedings before the General Court that the Commission had infringed Article 14 of Regulation No 659/1999. In paragraphs 385 to 399 of the judgment under appeal, the General Court rejected any infringement. Hotel Cipriani and the Committee are objecting to that part of the grounds of the judgment under appeal. The General Court stated there firstly that, under Article 14 of Regulation No 659/1999 and according to the case-law, the Commission is obliged, as a general rule, where it establishes the incompatibility of aid with the common market, to order the recovery of that aid. [108] In the present case, the recovery order does not infringe a general principle of Community law. The General Court stated in particular that, even if most of the beneficiary undertakings had exercised their activities at local level, which had not been established, this would not, in any event, have eliminated from the outset all effects of the social security exemptions at issue on trade and competition. [109]

2. Main arguments of the parties

247. Hotel Cipriani, Coopservice and the *Committee* consider that the General Court should have found that the general principles of Community law had been infringed. Even the Commission admits that not all the social security relief is aid within the meaning of Article 87(1) EC. Therefore, the recovery of all the social security relief is not proportional and also infringes the protection of the beneficiaries' legitimate expectations.

108 — Paragraphs 385 to 389 of the judgment under appeal.
109 — Paragraph 390 of the judgment under appeal.

248. The *Commission* contends that these complaints should be rejected as unfounded. It does not have to state any special reasons for the recovery as it is the natural consequence of finding that aid is incompatible with the common market. Also, the principles of proportionality and equal treatment have not been infringed.

3. Legal assessment

249. The complaint that Article 14 of Regulation No 659/1999 has been infringed must be rejected as unfounded, but the grounds of the judgment under appeal replaced. Contrary to the views of Hotel Cipriani, the Committee and also the General Court, in Article 5 of the contested decision the Commission did not, in fact, order the recovery of all social security relief granted but, as has been explained above, merely ordered its recovery to the extent that it fulfils the conditions for application of Article 87(1) EC and is incompatible with the common market under the second paragraph of Article 1 and Article 2 of the contested decision. The complaint that the recovery of the social security relief is disproportionate therefore fails although it is not made clear whether the relief fulfils the conditions for application of Article 87(1) EC.

VII — Summary

250. The above findings may be summarised as follows.

251. The General Court incorrectly failed to examine to what extent the Committee also raised the submissions on which it is relying in Case T-277/00 in the earlier Case T-231/00 and therefore erred in failing to dismiss the Committee's action in Case T-277/00 as inadmissible because of *lis pendens* to the extent that identical submissions had been raised. To this extent, the Commission's cross-appeal is well founded and the judgment under appeal must be set aside. As to the remainder, the Commission's cross-appeal must be dismissed.

252. Under the first paragraph of Article 61 of the Statute, the Court of Justice may give final judgment in a case where the state of the proceedings so permits. As a result, it is appropriate to examine the extent to which, in its action, the Committee relied already in Case T-231/00 on pleas which are identical to those put forward in its action in Case T-277/00. This is merely to ascertain whether the pleas are identical in substance, [110] which can be so even where all the arguments put forward to support the plea are not exactly the same. Comparison of Cases T-231/00 and T-277/00 shows that the pleas alleging

110 — *Diezler* (cited in footnote 24, paragraph 16), and *France* v *Parliament* (cited in footnote 25, paragraphs 9 to 11).

breach and misapplication of Article 87(1) EC (point 2 of the application) and breach of Article 87(3)(c) EC (point 3 of the application), in Case T-277/00, are identical in substance to those relied on by the Committee in its earlier action. To that extent, the Committee's action should be dismissed on the ground of *lis pendens*.

253. In the light of the foregoing considerations, the Committee's grounds of appeal alleging breach of Article 87(1) and (3)(c) EC must be rejected at the outset as irrelevant. The other grounds of appeal must be rejected for the reasons set out in Section VI of this Opinion.

254. The appeals of Hotel Cipriani and Italgas must be dismissed for the reasons set out in Section VI of this Opinion.

VIII — Conclusion

255. On that basis, I propose that the Court of Justice:

(1) set aside the judgment of the Court of First Instance of the European Communities of 28 November 2008 in Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* in so far as it declared admissible the action of the Comitato 'Venezia vuole vivere' in Case T-277/00 in respect of the pleas alleging misinterpretation and misapplication of Article 87(1) EC and misinterpretation and misapplication of Article 87(3)(c) EC; in respect of those pleas, dismiss as inadmissible on the ground of *lis pendens* the action brought by the Comitato 'Venezia vuole vivere' in Case T-277/00;

(2) as to the remainder, dismiss the appeals.