Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 March 2025*

(References for a preliminary ruling – Aid granted by a Member State – Concept of 'aid' – National legislation providing for the grant of a measure in favour of undertakings active in the steel foundries sector in the event of the partial or total closure of their production sites – Financial contribution – Advantage)

In Joined Cases C-746/23 and C-747/23,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 29 November 2023, received at the Court on 5 December 2023, in the proceedings

Cividale SpA,

Flag Srl (C-746/23),

Duferco Italia Holding SpA,

Duferco Sertubi SpA (C-747/23)

v

Ministero dello Sviluppo economico,

Direzione generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo economico,

Dipartimento per lo Sviluppo e la Coesione economica del Ministero dello Sviluppo economico,

Direzione generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo economico-Divisione X,

intervening party:

Fonderia di Torbole SpA,

THE COURT (Third Chamber),

* Language of the case: Italian.

composed of C. Lycourgos, President of the Chamber, S. Rodin (Rapporteur), N. Piçarra, O. Spineanu-Matei and N. Fenger, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Cividale SpA and Flag Srl, by S. Grassani and S. Mendolia, avvocati,

– Duferco Italia Holding SpA and Duferco Sertubi SpA, by S. Grassani and S. Mendolia, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the European Commission, by D. Recchia and B. Stromsky, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 107 and 108 TFEU and of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [89 EC] (OJ 1999 L 83, p. 1).

2 The requests have been made in two sets of proceedings between Cividale SpA and Flag Srl, in Case C-746/23, and Duferco Italia Holding SpA and Duferco Sertubi SpA, in Case C-747/23, respectively, and the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy) ('the MISE') and the Direzione generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo economico (Directorate-General responsible for incentives for MISE undertakings, Italy), the Dipartimento per lo Sviluppo e la Coesione economica del Ministero dello Sviluppo economico (Department of Development and Economic Cohesion of MISE, Italy) and the Direzione generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo economico-Divisione X (Directorate-General responsible for incentives for MISE companies – Division X, Italy) concerning the lawfulness of the decisions by which the MISE authorised, in favour of Flag and Duferco Sertubi, the payment of financial contributions linked to their participation in a programme for the rationalisation of the foundry sector, in an amount lower than had previously and provisionally been fixed.

Legal context

European Union law

3 Regulation No 659/1999 has been replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9). However, in view of the date of the facts which gave rise to the disputes in the main proceedings, the provisions of Regulation No 659/1999 remain applicable to those disputes.

4 Under Article 2 of Regulation No 659/1999:

‘1. Save as otherwise provided in regulations made pursuant to Article [89 EC] or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission [of the European Communities] in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification.

2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (“complete notification”).’

5 Article 3 of that regulation provided:

‘Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.’

6 Article 8(1) of that regulation provides that:

‘The Member State concerned may withdraw the notification within the meaning of Article 2 in due time before the Commission has taken a decision pursuant to Article 4 or 7.’

Italian law

Law No 273/2002

7 Article 12 of legge n. 273 – Misure per favorire l’iniziativa privata e lo sviluppo della concorrenza (Law No 273 on measures to encourage private initiative and the development of competition) of 12 December 2002 (GURI No 293 of 14 December 2002, Ordinary Supplement No 230), in the version applicable to the disputes in the main proceedings (‘Law No 273/2002’), provides in paragraphs 1 and 2 thereof:

‘1. Credits in the amount of EUR 11 900 000 for 2002 and EUR 13 500 000 for each of 2003 and 2004 are authorised for the purpose of implementing a programme for the rationalisation of the iron and steel foundries sector.

2. The programme referred to in paragraph 1 seeks, in compliance with Community rules on State aid, to pursue the following objectives:

(a) promoting higher quality in production, including reorganisation of production capacity and the development of conditions conducive to its concentration in undertakings which differentiate themselves by their higher level of competitiveness;

…'

Ministerial Decree No 73/2004

8 Article 2 of decreto n. 73 – Regolamento recante norme di attuazione dell'articolo 12 della legge 12 dicembre 2002, n. 273, concernente il sostegno del programma nazionale di razionalizzazione del comparto delle fonderie di ghisa e di acciaio (Ministerial Decree No 73 – regulation laying down provisions for the application of Article 12 of Law No 273/2002 on support for the national programme for the rationalisation of the iron and steel foundries sector) of 13 January 2004 (GURI No 69 of 23 March 2004), in the version applicable to the disputes in the main proceedings ('Ministerial Decree No 73/2004'), provides:

'1. For the purposes of the reorganisation of the [iron and steel foundries] sector, since the production system is characterised by excess production capacity, incentives shall support programmes for the physical destruction of facilities and machinery making up the production cycle, leading to the closure of the production site concerned. …

2. The amount of the financial contribution is determined on the basis of the highest of the two values provided for in the Communication from the European Union C(2002) 315 of 7 March 2002, namely the "fixed cost contribution margin" and the "residual value of facilities to be scrapped", and corresponds to

(a) 100% of the highest of those two values where the reduction in production capacity is the result of a merger between undertakings or agreements between foundry undertakings providing for, inter alia, an appropriate solution to the employment problems. In particular, the foundry acquiring the production facilities which have been taken out of operation must prove that, according to the average of the last three approved balance sheets, it has obtained positive ROS ("return on sales") values. Proof must be adduced by providing a certification drawn up by a firm of auditors. It shall also be necessary to prove, by means of an expert report drawn up by a technical expert in the sector, that it is in a position, using its own facilities, to deliver production equivalent to that of the foundry which is ceasing to be active;

(b) 60% of the highest of those two values in the event of a simple reduction in production capacity.

3. The values mentioned above shall be determined as follows:

…

(b) residual book value of facilities to be scrapped, minus depreciations implemented at 31 December 2002.

…

5. Undertakings requesting a financial contribution shall also be required to:

(a) undertake a reclassification of the financial statements using firms of auditors, in accordance with the template set out in Annex D;

(b) set out, in programmes for destruction of facilities, an appropriate solution to the resulting employment problems;

(c) to carry out the destruction of the facilities concerned by the incentive within one year of the publication of the present ministerial decree in the *Gazzetta ufficiale della Repubblica italiana*;

(d) in order to receive the financial contribution at the rate of 100%, submit the agreement concluded with the undertaking which is capable of ensuring production equivalent to that which was scrapped, which includes the information required in paragraph 2(a) of the present article.

6. The destruction of production facilities shall consist of removing the parts of the facilities listed in Annex C. The costs of such operations shall be deducted from the proceeds of the sale of the waste resulting from the destruction.

…

8. The proceeds from the sale of the waste resulting from the destruction obtained by the undertakings which have submitted an application for a financial contribution, after deduction of the costs incurred for the flame-cutting and demolition operations in respect of the facilities concerned, shall be paid into the State budget, in any event after receipt of the full amount of the financial contribution due in respect of the destruction of those facilities. …'

9 Article 9 of that ministerial decree provides:

'1. Undertakings receiving financial contributions shall be prohibited from reinstating the production capacity which was removed within five years of the date of payment.

2. In the event of non-compliance with the provisions of paragraph 1, the undertakings concerned shall lose the right to financial contributions up to the amount of the reinstated production capacity and shall, accordingly, be required to repay the corresponding financial contribution, which shall also include statutory interest and revaluation.

3. In the event of non-compliance with the agreement between undertakings referred to in Article 2(2)(a) of the present ministerial decree, the undertaking concerned shall forfeit the right to receive the higher financial contribution.

4. In accordance with the legislation in force, the provisions of the preceding paragraphs shall apply to parent companies, subsidiaries or, in any event, companies affiliated with the undertakings receiving such financial contributions.

…'

The Ministerial Decree of 6 February 2006

10 Article 2 of the decreto – Definizione dei criteri applicativi del regolamento attuativo 13 gennaio 2004, n. 73, per l'attribuzione dei benefici previsti in favore del comparto delle fonderie di ghisa e di acciaio, previsto dall'articolo 12 della legge 12 dicembre 2002, n. 273 (decree concerning the definitions of criteria for the application of Ministerial Decree No 73/2004 for granting the advantages provided for in favour of the iron and steel foundries sector, provided for in Article 12 of Law No 273/2002) of 6 February 2006 (GURI No 36 of 13 February 2006), in the version applicable to the disputes in the main proceedings ('the Ministerial Decree of 6 February 2006'), provides:

'The compensation referred to in Article 1 shall be paid after the undertaking concerned has been removed from the commercial register in accordance with Article 2495 of the Codice civile (Civil Code) or, in the case of undertakings consisting of a number of business divisions, after the transfer of the foundry business division to another newly created undertaking which, after having completed the operations and obligations relating to the physical destruction of the facilities concerned, ceases to carry on the business in question. In any event, such compensation may not be paid if those facilities are not destroyed within one year of the publication of the present ministerial decree in the *Gazzetta ufficiale della Repubblica italiana*.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-746/23

11 Flag, a company active in the iron and steel foundries sector and wholly owned by Cividale, was the owner of a foundry establishment in Marcon (Italy), which was made up of two separate production units.

12 After having concluded an agreement with Cividale which contained a solution to the employment problems, Flag submitted an application to the MISE on 18 June 2004 seeking to obtain the financial contribution allocated by the Italian authorities for the destruction of one of its production units, pursuant to the provisions of Article 12(2)(a) of Law No 273/2000 together with the provisions of Article 2(2)(a) of Ministerial Decree No 73/2004.

13 By a note of 14 September 2006, the MISE, following an investigation to determine the value of the facility to be dismantled, provisionally set the financial contribution to be paid to Flag at approximately EUR 1 645 000. Payment of that financial contribution was subject, first, to an ad hoc ministerial committee verifying that that facility had been destroyed and, second, to the transfer of the division of the business concerned to another company, set up exclusively to ensure that destruction.

14 By a document of 28 December 2006, Flag transferred that business division to Flag Fonderia Acciaio Marcon Srl, a company formed for the purpose of destroying that facility, selling the scrap metal resulting from that destruction and entering the proceeds of that sale in the State budget. The latter company was subsequently put into liquidation and removed from the commercial register.

15 By decision of its director dated 17 April 2009, the Direzione generale per la politica industriale e la competitività del Ministero dello Sviluppo economico (Directorate-General for Industrial Policy and Competitiveness of the MISE, Italy) confirmed that the amount of the financial contribution to be paid to Flag had to be determined in accordance with the criteria laid down in Article 2(2) and (3) of Ministerial Decree No 73/2004.

16 However, by decision dated 29 May 2013, the MISE authorised only the payment of EUR 200 000 to Flag, pursuant to the EU rules on '*de minimis*' State aid.

17 Cividale and Flag brought an action against that decision, submitting, inter alia, infringement of Articles 107 and 108 TFEU and of Regulation No 659/1999. According to those two companies, the financial contribution at issue in the main proceedings is not State aid, but merely compensation which confers no economic advantage.

18 The Tribunale amministrativo regionale per il Veneto (Regional Administrative Court, Veneto, Italy) dismissed that action, on the ground that the financial contribution initially envisaged could not have been granted where there had been no prior notification to the Commission, in accordance with Article 108 TFEU.

19 That court noted that the MISE had 'attempted', on 24 September 2003, to notify the rationalisation programme provided for by Law No 273/2002 and Ministerial Decree No 73/2004, as planned aid, to the Commission, in accordance with the detailed rules laid down in Regulation No 659/1999. However, that notification was withdrawn following a communication from the Commission, dated 21 November 2003, in which additional information was requested. The exchanges with the Commission resulted in the MISE taking the view that the decision on whether that programme was compatible with EU State aid rules would in any event be negative. For that reason, the MISE did not complete the notification procedure.

20 Cividale and Flag appealed against the judgment of the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court, Veneto) before the Consiglio di Stato (Council of State, Italy), which is the referring court. They maintain, in particular, that the financial contribution at issue in the main proceedings cannot be classified as State aid, since it confers no significant advantage and is not such as to affect trade between Member States or to distort competition in the internal market, and thereby does not satisfy the conditions laid down in Article 107 TFEU. In support of that line of argument, they submit, first of all, that payment of that financial contribution is subject to the production facilities concerned being definitively destroyed and to the entity which owns them ceasing its business. Next, that financial contribution is merely compensation for the loss of production capacity of that entity. Finally, the amount of that financial contribution, determined in accordance with the calculation criteria laid down in Ministerial Decrees No 73/2004 and of 6 February 2006, is considerably lower than the value of the facilities destroyed, having regard to their production capacity.

21 The referring court is uncertain whether the financial contribution at issue in the main proceedings must be regarded as State aid within the meaning of EU law. In its opinion, it is difficult to determine the economic advantage obtained by the undertaking from such a financial contribution, particularly where, as in the present case, that contribution is not the same as the market value of the dismantled facility or of its ability to generate income.

22 The referring court makes reference to a number of factors in that regard. The concept of State aid, within the meaning of EU law, appears to assume that the recipient undertaking continues to exist. However, a financial contribution such as that at issue in the main proceedings is paid by way of consideration for the physical destruction of production facilities and for the simultaneous cessation of the business or division of the business concerned of the undertaking owning those facilities and receiving that financial contribution. The latter therefore takes the form of a measure facilitating the cessation of the business of that undertaking or of one of the divisions of its business.

23 In addition, the referring court states that the national legislation precludes that financial contribution from being paid to an undertaking which, after having concluded an agreement with the undertaking which is to dismantle the facilities concerned, undertakes to take over the production capacity and staff. Furthermore, that legislation provides that the entity receiving such a financial contribution cannot restore the production capacity concerned during the five years following its payment.

24 The referring court also states that the amount of the financial contribution at issue in the main proceedings is calculated on the basis of the book value of the facilities concerned, after deduction of depreciation already implemented, or, if it is higher than the previous book value, on the current value of the contribution margin of the output of those facilities, for the years 2000 to 2002. In those circumstances, that financial contribution, which is determined not by taking into account the overall value of the investment and the ability to generate income, but only in the light of one or other of those elements, does not represent the value which the production facilities could have after negotiation.

25 By contrast, the agreements concluded with another undertaking to continue production and preserve employment, which make possible a right to a financial contribution at the rate of 100%, under Article 2(2)(a) of Ministerial Decree No 73/2004, also make it possible to redirect the customers and turnover of the undertaking carrying out the dismantling to a single other undertaking, which derives a benefit from it. Such agreements, a fortiori if they are connected with genuine merger transactions, could constitute concentrations between undertakings, which are, in principle, capable of affecting competition. However, the legislation relating to rationalising the foundries sector contains no provisions preserving the application of the national and EU rules on concentrations. Thus, according to the referring court, that legislation could result even in concentrations of importance for the European Union going unnoticed.

26 Lastly, the referring court concludes that it is possible to draw a distinction between the measure provided for in Article 2(2)(a) of Ministerial Decree No 73/2004 and that provided for in Article 2(2)(b) of that ministerial decree, since the latter provision provides for a financial contribution at the rate of 60%. The latter provision provides for the payment of a financial contribution limited to 60% of one of the two values referred to in Article 2(2) to the undertaking which dismantles the facilities concerned and ceases its activities without entering into an agreement with another operator to continue production and take on staff, the previous customers of that undertaking being allocated freely between the undertakings in the sector concerned.

Case C-747/23

27 Duferco Sertubi applied to participate in the programme at issue in the main proceedings without concluding an agreement with another undertaking, as provided for in Article 2(2)(a) of Ministerial Decree No 73/2004. It therefore requested the financial contribution at the rate of 60% provided for in Article 2(2)(b) of that ministerial decree. Apart from that circumstance, the facts referred to and the reasoning set out in the request for a preliminary ruling in Case C-747/23 are comparable to those mentioned in the request for a preliminary ruling in Case C-746/23.

28 In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following questions, which are identical in Cases C-746/23 and C-747/23:

‘(1) Can a measure such as that governed by the national legislation … and in particular the measure provided for in Article 2(2)(a) of Ministerial Decree No 73/2004, be classified as “aid” within the meaning and for the purposes of Articles 107 and 108 TFEU and [Regulation No 659/1999]?

(2) Can a measure such as that governed by the national legislation … and in particular the measure provided for in Article 2(2)(b) of Ministerial Decree No 73/2004, be classified as “aid” within the meaning and for the purposes of Articles 107 and 108 TFEU and [Regulation No 659/1999]?’

Consideration of the questions referred

29 By its two questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 107(1) TFEU must be interpreted as meaning that the financial contributions provided for in the context of a rationalisation programme from which undertakings in the iron and steel foundries sector may benefit, amounting to either 100% of the book value of the production facilities dismantled by the applicant undertaking, after deduction of depreciation already implemented, or of the current value of the fixed cost contribution margin of the output of those facilities for a period prior to the adoption of that programme, if the latter value is higher, where the reduction in production capacity is accompanied by a merger or agreements between undertakings in that sector, one of which is that applicant undertaking, providing, inter alia, for an appropriate solution to the employment problems, or 60% of the highest of those two values in the event of the simple dismantling of the applicant’s production facilities, constitute ‘State aid’.

30 As a preliminary point, it must be observed that, as mentioned in paragraph 27 of the present judgment, it is clear from the order for reference in Case C-747/23 that Duferco Sertubi’s application for the financial contribution at issue in the main proceedings in that case was made on the basis of Article 2(2)(b) of Ministerial Decree No 73/2004. It follows that, contrary to the Italian Government’s assertions, the second question referred for a preliminary ruling is not hypothetical and is, therefore, admissible.

31 In the light of that clarification, it must be recalled that the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission

each measure intended to grant new aid or alter aid within the meaning of Article 107(1) TFEU and, second, not to implement such a measure, in accordance with Article 108(3) TFEU, until that EU institution has taken a final decision on the measure (see, to that effect, judgments of 24 November 2020, *Viasat Broadcasting UK*, C-445/19, EU:C:2020:952, paragraph 19 and the case-law cited, and of 28 October 2021, *Eco Fox and Others*, C-915/19 to C-917/19, EU:C:2021:887, paragraph 37 and the case-law cited).

32 Since the Court has jurisdiction to give the national courts or tribunals full guidance on the interpretation of EU law in order to enable them to determine the issue of compatibility of a national scheme or measure with that law for the purposes of deciding the cases before them, it may provide them with guidance on interpretation in order to enable them to determine whether a national scheme or measure may be classified as 'State aid' under EU law. However, while such a classification must be accepted, the assessment of the compatibility of that scheme or measure with the internal market falls within the exclusive competence of the Commission, subject to review by the Court (see, to that effect, judgment of 7 March 2024, *Fallimento Esperia and GSE*, C-558/22, EU:C:2024:209, paragraph 60 and the case-law cited).

33 The classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, that measure must constitute an intervention by the State or through State resources. Second, that intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition (judgment of 19 September 2024, *United Kingdom and Others* v *Commission (Taxation of profits of CFCs)*, C-555/22 P, C-556/22 P and C-564/22 P, EU:C:2024:763, paragraph 91 and the case-law cited).

34 It is apparent from the requests for a preliminary ruling that it is necessary, more specifically, to examine whether the financial contributions at issue in the main proceedings are capable of constituting for those who receive them an advantage which distorts or threatens to distort competition and trade between Member States, bearing in mind that the referring court has full jurisdiction to examine whether all the conditions referred to in the preceding paragraph of the present judgment are satisfied.

35 In the first place, it follows from paragraph 33 of the present judgment that it is not necessary for an aid measure to have a real effect on trade between Member States or to create an actual distortion of competition. It is sufficient that that measure is liable to affect such trade and distort competition (judgment of 7 March 2024, *Fallimento Esperia and GSE*, C-558/22, EU:C:2024:209, paragraph 64 and the case-law cited). In addition, an intervention by the State or through State resources is liable to affect trade between Member States and to distort or threaten to distort competition where, at the time of entry into force of an aid measure, there is a situation of effective competition on the relevant market (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 51 and the case-law cited), there being no need for the recipient undertakings themselves to be involved in trade between Member States (see, to that effect, judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67 and the case-law cited).

36 There is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 68 and the case-law cited).

37 In the present case, it is common ground that the iron and steel foundries sector was open to competition and was the subject of cross-border trade at the time when the programme providing for the financial contributions at issue in the main proceedings was implemented.

38 It follows that, subject to verification by the referring court, it is apparent from the file before the Court that the payment of the financial contributions at issue in the main proceedings was liable to affect trade between Member States and competition.

39 In the second place, it is apparent from the requests for a preliminary ruling that the referring court is uncertain whether the financial contributions at issue in the main proceedings constitute an advantage, given that they are linked to the reduction, or even the disappearance, of the production capacity of the recipient undertakings, and do not correspond to the value which the production facilities to be destroyed could have after negotiation.

40 In that regard, it must be recalled that any State measure which, whatever its form or objectives, is likely to favour one or more undertakings directly or indirectly, or which confers an advantage on them which they would not have been able to obtain under normal market conditions, constitutes an advantage within the meaning of the case-law referred to in paragraph 33 of the present judgment (judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 107 and the case-law cited).

41 Accordingly, the agreed benefits may include positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (judgment of 27 January 2022, *Sātiņi-S*, C-238/20, EU:C:2022:57, paragraph 42 and the case-law cited).

42 By contrast, the concept of 'aid', within the meaning of Article 107(1) TFEU, cannot cover a measure granted in favour of an undertaking through State resources where that undertaking could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions in which such an advantage has been granted is, in principle, carried out by applying the market economy operator principle, unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because, for example, that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create, or the State acted in its capacity as a public authority (judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 108 and the case-law cited). In other words, the applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking. As the Court has already had occasion to point out, the nature and subject matter of the measure at issue, its context, the objective pursued and the rules to which it is subject may, in particular, be relevant (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 81 and 86, and of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 73).

43 It is on the basis of those factors that the referring court, which alone has jurisdiction to establish and assess the facts of the dispute in the main proceedings and to assess the exact scope of the national provisions, will be called upon to determine whether the financial contributions at issue in the main proceedings are liable to confer an advantage on the undertakings to which they are addressed. That said, the Court remains competent to provide the referring court with guidance

having regard to the documents relating to the main proceedings and the written observations which have been submitted to it, in order to enable that court to give judgment (see, to that effect, judgment of 28 November 2024, *Bayerische Ärzteversorgung and Others*, C-758/22 and C-759/22, EU:C:2024:989, paragraphs 47 and 48). In that context, it is appropriate to provide the referring court with the following guidance with a view to enabling it effectively to give judgment in the disputes before it.

44 First, it is in no way apparent from the file before the Court that the decisions to grant the financial contributions at issue in the main proceedings were taken by the Italian State as a private economic operator. Consequently, subject to verification by the referring court, it does not appear possible, in the present case, to apply the private operator test in order to determine whether those contributions constitute a selective advantage.

45 Second, it appears to follow from the objectives set out in Article 12(2)(a) of Law No 273/2002, namely improving the quality of production, in particular by reorganising production capacity and developing conditions conducive to its concentration, that the financial contributions at issue in the main proceedings seek to reduce, at least in part, the burdens associated with ceasing production in a sector characterised by a certain production overcapacity. Such charges form part of the charges which are normally included in the budget of an undertaking, as provided for in paragraph 41 of the present judgment.

46 Third, it should be noted that, according to the referring court, the financial contributions at issue in the main proceedings are calculated on the basis of the book value of the production facilities dismantled by the applicant undertaking, after deduction of depreciation already implemented, or, if higher than the previous book value, the current value of the fixed cost contribution margin of the output of those facilities for a period prior to the adoption of the programme establishing those financial contributions.

47 The referring court appears to infer therefrom that the financial contributions at issue in the main proceedings are of an amount lower than the inherent value of the dismantled units, since that value has to be calculated, under normal market conditions, by cumulating the value of the investment which the dismantled production unit comprises and the value resulting from the capacity of that unit to generate income.

48 However, such a circumstance is not sufficient, in the present case, to rule out there being an advantage, within the meaning of Article 107 TFEU. It is hard to conceive that a production unit could be sold at a price which reflects its inherent value where the market concerned is characterised, as in the present case, by overproduction. Accordingly, it appears likely that the financial contributions paid in the context of a programme which, as is the case for the programme at issue in the main proceedings, is intended to encourage undertakings to dismantle certain production units present on a market characterised by overproduction would be economically more advantageous than the consideration which those undertakings could have obtained, in the conditions specific to such a market, for discarding those units.

49 Therefore, it must be concluded, subject to verification by the referring court, that the financial contributions at issue in the main proceedings constitute an economic advantage which the recipient undertakings would not have been able to obtain under normal market conditions, in accordance with the case-law referred to in paragraph 40 of the present judgment.

50 Fourth, subject to verification by the referring court, it is also not apparent from the file before the Court that the beneficiaries of the financial contributions at issue in the main proceedings are not 'undertakings', within the meaning of Article 107(1) TFEU, whose business is the only one referred to in that provision (judgment of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 27).

51 Indeed, it appears from Article 2 of the Ministerial Decree of 6 February 2006 that an applicant undertaking may confine itself to transferring the foundry business division to another newly created undertaking which, after having carried out the operations and obligations relating to the physical destruction of the facilities concerned, ceases to carry on the business in question. In the present case, it also appears from the documents before the Court that the applicants in the main proceedings were able to confine themselves to transferring one of their production units to such a new undertaking in order to satisfy the requirements laid down in Article 2.

52 Consequently, the answer to the questions referred is that Article 107(1) TFEU must be interpreted as meaning that the financial contributions provided for in the context of a rationalisation programme from which undertakings in the iron and steel foundries sector may benefit, which amount to either 100% of the book value of the production facilities dismantled by the applicant undertaking, after deduction of depreciation already implemented, or of the current value of the fixed cost contribution margin of the output of those facilities for a period prior to the adoption of that programme, if that latter value is higher, where the reduction in production capacity is accompanied by a merger or agreements between undertakings in that sector, one of which is that applicant undertaking, providing, inter alia, for an appropriate solution to the employment problems, or 60% of the highest of those two values in the event of the simple dismantling of the production facilities of that applicant undertaking, confer an advantage which is liable to affect trade between Member States and competition, provided that it is established, first, that the same undertaking would not have been able to obtain the same advantage in circumstances corresponding to the normal conditions of the market concerned and, second, that there is effective competition on that market.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 107(1) TFEU must be interpreted as meaning that the financial contributions provided for in the context of a rationalisation programme from which undertakings in the iron and steel foundries sector may benefit, which amount to either 100% of the book value of the production facilities dismantled by the applicant undertaking, after deduction of depreciation already implemented, or of the current value of the fixed cost contribution margin of the output of those facilities for a period prior to the adoption of that programme, if that latter value is higher, where the reduction in production capacity is accompanied by a merger or agreements between undertakings in that sector, one of which is that applicant undertaking, providing, inter alia, for an appropriate solution to the employment problems, or 60% of the highest of those two values in the event of the simple dismantling of the production facilities of that applicant undertaking, confer an advantage

which is liable to affect trade between Member States and competition, provided that it is established, first, that the same undertaking would not have been able to obtain the same advantage in circumstances corresponding to the normal conditions of the market concerned and, second, that there is effective competition on that market.

[Signatures]