JUDGMENT OF THE COURT OF FIRST INSTANCE
(Eighth Chamber, Extended Composition)

11 June 2009 *

In Case T-297/02,

ACEA SpA, established in Rome (Italy), represented by A. Giardina, L. Radicati di Brozolo and V. Puca, lawyers,

applicant,

supported by

ACSM Como SpA, established in Como (Italy), represented by L. Radicati di Brozolo and M. Merola, lawyers,

and

* Language of the case: Italian.

AEM — Azienda Energetica Metropolitana Torino SpA, established in Turin (Italy), represented by M. Merola and L. Radicati di Brozolo, lawyers,

interveners,

v

Commission of the European Communities, represented by V. Di Bucci, acting as Agent,

defendant,

APPLICATION for annulment of Articles 2 and 3 of Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ 2003 L 77, p. 21),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber, Extended Composition),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 April 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, ACEA SpA, is a capital company 51% owned by the municipality of Rome (Italy). It was established in 1997 following the restructuring of the municipal undertaking bearing the same name. In the same way as that undertaking, it operates in both the electricity sector, providing street lighting services and services for the production, transport, distribution and sale of energy, and in the water sector, providing services for the abstraction, supply and distribution of drinking water and the collection and treatment of waste water.

National legal context

2 Legge n. 142 ordinamento delle autonomie locali (Law No 142 on the organisation of local authorities of 8 June 1990, GURI No 135 of 12 June 1990) ('Law No 142/90') brought about a reform in Italy of the legal arrangements available to municipalities for the management of public services, in particular in the water, gas and electricity distribution sectors and in the transport sector. Under Article 22 of that law, as amended, municipalities can set up companies in a variety of legal forms to provide public services. Those include joint stock companies and limited liability companies

with a majority public shareholding ('companies set up under Law No 142/90'). The applicant is a company set up under Law No 142/90.

3 In that context, under Article 9a of legge n. 488 di conversione in legge, con modificazioni, del decreto legge 1° luglio 1986, n. 318, recante provvedimenti urgenti per la finanza locale (Law No 488 of 9 August 1986 converting and amending Decree-Law No 318 of 1 July 1986 and introducing urgent provisions for financing local authorities, GURI No 190 of 18 August 1986), loans were granted between 1994 and 1998 at a preferential rate of interest by the Cassa Depositi e Prestiti ('the CDDPP') to companies set up under Law No 142/90 providing public services ('the CDDPP loans').

4 Moreover, under Article 3(69) and (70) of legge n. 549 (su) misure di razionalizzazione della finanza pubblica (Law No 549 on measures to rationalise public finances of 28 December 1995, Ordinary Supplement to GURI No 302 of 29 December 1995) ('Law No 549/95'), in conjunction with decreto legge n. 331 (su) armonizzazione delle disposizioni in materia di imposte sugli oli minerali, sull'alcole, sulle bevande alcoliche, sui tabacchi lavorati e in materia di IVA con quelle recate da direttive CEE e modificazioni conseguenti a detta armonizzazione, nonché disposizioni concernenti la disciplina dei centri autorizzati di assistenza fiscale, le procedure dei rimborsi di imposta, l'esclusione dall'ILOR dei redditi di impresa fino all'ammontare corrispondente al contributo diretto lavorativo, l'istituzione per il 1993 di un'imposta erariale straordinaria su taluni beni ed altre disposizioni tributarie (Decree-Law No 331 harmonising tax provisions in various fields of 30 August 1993, GURI No 203 of 30 August 1993) ('Decree-Law No 331/93'), the following measures were introduced for the benefit of companies set up under Law No 142/90:

— exemption from all transfer taxes in connection with the conversion of special and municipal undertakings into companies set up under Law No 142/90 ('the transfer tax exemption');

— a three-year income tax exemption, namely in respect of the tax on the incomes of legal persons and local income tax, up to the tax year 1999 ('the three-year income tax exemption').

Administrative procedure

5 After receiving a complaint concerning those measures, the Commission asked the Italian authorities for information in that regard by letters of 12 May, 16 June and 21 November 1997.

6 By letter of 17 December 1997, the Italian authorities provided some of the information requested. A meeting was then held at the request of the Italian authorities on 19 January 1998.

7 By letter of 17 May 1999, the Commission informed the Italian authorities that it had decided to initiate the procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 1999 C 220, p. 14).

8 After receiving comments from interested parties and the Italian authorities, the Commission asked the latter for additional information on a number of occasions. Meetings were also held between the Commission and, respectively, the Italian authorities and the interested parties involved.

9 Certain companies set up under Law No 142/90, including the applicant and AEM SpA and Azienda Mediterranea Gas e Acqua SpA (AMGA), which also instigated proceedings for the annulment of the decision at issue in this case (Cases T-301/02 and T-300/02 respectively), argued in particular that the three types of measure in question did not constitute State aid.

10 The Italian authorities and the Confederazione Nazionale dei Servizi (Confservizi), a confederation of, inter alia, companies set up under Law No 142/90 and special municipal undertakings in Italy, essentially supported that position.

11 On the other hand, the Bundesverband der deutschen Industrie eV (BDI), a German association for industry and suppliers of related services, was of the view that the measures in question could bring about distortions of competition not only in Italy but also in Germany.

12 Similarly, Gas-it, an Italian association of private operators in the gas distribution sector, stated that the measures in question, in particular the three-year income tax exemption, constituted State aid.

13 On 5 June 2002, the Commission adopted Decision 2003/193/EC on State aid granted by Italy in the form of tax exemptions and subsidised loans to companies set up under Law No 142/90 (OJ 2003 L 77, p. 21) ('the contested decision').

The contested decision

14 The Commission points out, first of all, that its analysis concerns only the aid schemes of general application introduced by the contested measures and not individual grants of aid to particular undertakings and its analysis in the contested decision is therefore general and abstract. It states that the Italian Republic 'did not grant the tax advantages on an individual basis or notify any individual cases to [it], together with all the information necessary for the Commission to assess it'. The Commission states that it therefore considered itself bound to carry out a general and abstract examination of the schemes in question in order to determine both whether they constituted State aid and whether such aid was compatible with the common market (recitals 42 to 45 in the preamble to the contested decision).

15 According to the Commission, the CDDPP loans and the three-year income tax exemption (together, 'the ontested measures') are State aid. The effect of such advantages being conferred through State resources on companies set up under Law No 142/90 is to strengthen their competitive position by comparison with that of all other undertakings wishing to supply the same services (recitals 48 to 75 in the preamble to the contested decision). The contested measures are incompatible with the common market because they meet the requirements of neither Article 87(2) and (3) EC nor Article 86(2) EC and, furthermore, infringe Article 43 EC (recitals 94 to 122 in the preamble to the contested decision).

16 On the other hand, according to the Commission, the transfer tax exemption does not constitute State aid within the meaning of Article 87(1) EC, since such taxes are payable on the creation of a new economic entity or the transfer of assets between different economic entities. Municipal undertakings and the companies set up under Law No 142/90 are, substantially, the same economic entities. Exemption from those taxes for such companies is therefore justified by the nature or general scheme of the system (recitals 76 to 81 in the preamble to the contested decision).

17 The enacting terms of the contested decision are worded as follows:

'*Article 1*

The exemption from transfer tax … does not constitute aid within the meaning of Article 87(1) [EC].

Article 2

The three-year exemption from income tax … and the advantages resulting from [CDDPP] loans constitute State aid within the meaning of Article 87(1) [EC].

Such aid is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the [contested] decision.

The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

…'

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 30 September 2002, the applicant brought the present action.

19 By documents lodged at the Registry of the Court of First Instance on 29 November and 2 December 2002 respectively, ACSM Como SpA and AEM — Azienda Energetica Metropolitana Torino SpA applied for leave to intervene in the proceedings in support of the form of order sought by the applicant. By order of 12 May 2003, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance (former composition) granted those applications. The interveners submitted their statements in intervention and the other parties their observations thereon within the prescribed time-limits.

20 By separate document lodged at the Registry of the Court of First Instance on 6 January 2003, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

21 On 14 March 2003, the applicant submitted its observations on the plea of inadmissibility.

22 On 8 August 2002, the Italian Republic also brought an action for annulment of the contested decision before the Court of Justice, which was registered as Case C-290/02. The Court of Justice considered that that action and those in Cases T-292/02, T-297/02, T-300/02, T-301/02 and T-309/02 concerned the same subject-matter, namely the annulment of the contested decision, and were connected, since the pleas put forward in each of the cases overlapped to a very large extent. By order of 10 June 2003, the Court of Justice stayed the proceedings in Case C-290/02, in accordance with the third paragraph of Article 54 of its Statute, pending the final decision of the Court of First Instance in Cases T-292/02, T-297/02, T-300/02, T-301/02 and T-309/02.

23 By order of 8 June 2004, the Court of Justice decided to refer Case C-290/02 to the Court of First Instance, upon which jurisdiction has been conferred to adjudicate on actions brought by Member States against the Commission, in accordance with Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5). That case was registered at the Registry of the Court of First Instance under reference T-222/04.

24 By order of 5 August 2004, the Court of First Instance decided to reserve its decision on the plea of inadmissibility raised by the Commission until the judgment in the main proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber, Extended Composition) decided to open the oral procedure and, by way of

measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the parties, to which they replied within the prescribed period.

26 By order of the President of the Eighth Chamber, Extended Composition, of the Court of First Instance of 13 March 2008, Cases T-292/02, T-297/02, T-300/02, T-301/02, T-309/02, T-189/03 and T-222/04 were joined for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

27 The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 16 April 2008.

28 The applicant, supported by the interveners, claims that the Court should:

— declare the action admissible;

— annul Articles 2 and 3 of the contested decision;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant and the interveners to pay the costs.

Admissibility

Arguments of the parties

30 First, the Commission maintains that the applicant has no legal interest in bringing proceedings in so far as its action seeks the annulment of Article 2 of the contested decision as regards the CDDPP loans. The applicant did not in fact benefit from such loans.

31 Next, the Commission contests the *locus standi* of the applicant on the ground that the contested decision is not of individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC.

32 The Commission submits, in essence, that the contested decision is to be regarded as a measure of general application since it concerns an aid scheme and, therefore, an indeterminate and indeterminable number of undertakings defined by reference to a general criterion, such as the fact that they belong to a particular category of undertakings. In its view, the general applicability, and thus the legislative nature, of a measure are not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose.

33 According to the Commission, in order for a person to be individually affected by a measure of general application, that measure must adversely affect that person's specific rights or the institution which adopted the measure must be under an obligation to take account of the effects of the measure on that person's situation. However, the Commission is of the view that that is not the case here. The contested decision has had an impact on the situation of all the undertakings which benefited from the contested measures. Consequently, the decision has not infringed rights which are specific to certain undertakings that can be distinguished from any other undertaking which benefited from the measures in question. Moreover, in adopting the contested decision, the Commission neither should nor could have taken account of the effects of its decision on the situation of a particular undertaking. Neither the declaration of incompatibility nor the order for recovery in the contested decision referred to the situation of individual beneficiaries.

34 According to the Commission, its analysis is confirmed by the existing case-law on State aid, which establishes that the fact that an undertaking has received State aid that has been declared incompatible with the common market is not sufficient to demonstrate that the undertaking is individually concerned for the purpose of the fourth paragraph of Article 230 EC.

35 A number of more recent cases do not call into question the established case-law. According to the Commission, the approach adopted in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855 ('the judgment in *Sardegna Lines*') cannot be applied to all actions brought by recipients of an aid scheme

that has been declared unlawful and incompatible and in respect of which an order for recovery has been made. That is the inevitable conclusion in particular where, as in the present case, the aid scheme in question has been analysed in an abstract manner. Furthermore, in the case which gave rise to the judgment in *Sardegna Lines*, the applicant was an actual beneficiary of individual aid since an advantage was conferred on it by virtue of a measure adopted on the basis of a regional law which allowed for a wide margin of discretion. Moreover, that situation was closely scrutinised in the course of the formal investigation procedure.

36 The facts of the case also differ from those which gave rise to the judgment in Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087 ('the judgment in *Alzetta*') in so far as, in the present case, the Commission was unaware of either the exact number or the identity of the beneficiaries of the aid in question, did not have available to it all the relevant information and was unaware of the amount of aid granted in each case. Moreover, in the present case, the three-year income tax exemption applied automatically, whereas the aid in question in the case which gave rise to the judgment in *Alzetta* was granted under a later measure.

37 Contrary to the applicant's submissions, what matters for the purpose of examining admissibility is not knowledge of the identity of an undertaking but the fact that the Commission's attention has been drawn to specific features of the case which justify individual scrutiny. The Commission stated in the contested decision that it had not been provided with any information to demonstrate that, as regards the applicant, the contested measures did not constitute aid or constituted existing aid or aid compatible with the common market.

38 In any event, neither the fact that it participated in the formal investigation procedure laid down in Article 88(2) EC nor the order for recovery in the contested decision is sufficient, in the Commission's view, to distinguish the applicant individually. Given that actions brought by potential beneficiaries of a notified aid scheme are inadmissible for the purpose of Article 230 EC, the same should apply to actions brought by beneficiaries of an unnotified aid scheme.

39 Lastly, the Commission maintains that, if the action brought by the applicant in the present case were to be declared inadmissible, that would not infringe the principle of effective judicial protection, since the remedies provided for in Articles 241 EC and 234 EC would be sufficient (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677).

40 With regard to its *locus standi*, the applicant states, in essence, that the contested decision is of individual concern to it in so far as it is a company set up under Law No 142/90 and is therefore an undertaking covered by the aid scheme that is the subject of the contested decision.

Findings of the Court

41 According to the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him.

42 According to established case-law, natural or legal persons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 7 and 28).

43 Accordingly, the Court of Justice has held that an undertaking cannot, as a general rule, bring an action for the annulment of a Commission decision prohibiting a sectoral aid

scheme if it is concerned by that decision solely by virtue of the fact that it belongs to the sector in question and is a potential beneficiary of the scheme. Such a decision is, vis-à-vis the applicant undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15, and the judgment in *Alzetta*, paragraph 36 above, paragraph 37 and the case-law cited).

44 However, the Court of Justice also held, at paragraphs 34 and 35 of the judgment in *Sardegna Lines*, paragraph 35 above, that, since the undertaking Sardegna Lines was concerned by the decision at issue in that case not only as an undertaking in the shipping sector in Sardinia and a potential beneficiary of the aid scheme for Sardinian shipowners but also as an actual recipient of individual aid granted under that scheme, recovery of which had been ordered by the Commission, it was individually concerned by the decision and the action which it brought against it was admissible (see also, to that effect, the judgment in *Alzetta*, paragraph 36 above, paragraph 39).

45 Accordingly, it is appropriate to determine whether the applicant is an actual recipient of individual aid granted under a sectoral aid scheme, recovery of which has been ordered by the Commission (see, to that effect, Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 70).

46 It should be pointed out, first, that it is apparent from the applicant's answer to the written questions put by the Court on this subject that it is an actual recipient of individual aid granted under the aid scheme in question. In fact, the applicant confirms that, during the years 1998 and 1999, it benefited from the three-year income tax exemption. The Italian Republic has not contradicted that statement.

47 Second, it is apparent from Article 3 of the contested decision that the Commission ordered the recovery of the aid in question.

48 It follows from the foregoing that the applicant is individually concerned by the contested decision in so far as concerns the three-year income tax exemption.

49 As to whether the applicant is directly affected, since Article 3 of the contested decision requires the Italian Republic to take all necessary measures to recover from the beneficiaries the aid referred to in Article 2 of the decision and unlawfully made available to them and the applicant received aid and is obliged to reimburse it, it must be regarded as being directly concerned by the decision (see, to that effect, *Salvat père & fils and Others* v *Commission*, paragraph 45 above, paragraph 75).

50 On the other hand, as is apparent from the application initiating the proceedings and the applicant's answer to the questions put by the Court, the latter did not benefit from CDDPP loans during the period in question.

51 The applicant cannot therefore be regarded as being individually concerned by the contested decision in so far as concerns the CDDPP loans.

52 It follows from all the foregoing considerations that the present action is admissible in so far as concerns the part of the contested decision which has regard to the three-year income tax exemption.

Substance

53 In support of its action, the applicant puts forward five pleas in law, alleging, respectively:

— infringement of Article 88 EC, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) and the obligation to state reasons, on account of the failure to carry out an accurate and specific examination taking account of individual circumstances;

— infringement of Article 87(1) EC and failure to state reasons as regards the classification of the three-year income tax exemption as State aid;

— infringement of Article 88(1) EC on the basis that the contested measure was classified as new aid and, accordingly, infringement of procedural rules, and failure to state reasons;

— infringement of Article 87(3)(c) EC and failure to state reasons;

— the unlawfulness of the recovery order and infringement of the principles of the protection of legitimate expectations and proportionality.

The first plea, alleging infringement of Article 88 EC, Regulation No 659/1999 and the obligation to state reasons, on account of the failure to carry out an accurate and specific examination taking account of individual circumstances

Arguments of the parties

54 In this plea, the applicant alleges in particular infringement of Article 88 EC and Regulation No 659/1999. It is of the view that the Commission conducted an abstract and incomplete investigation in that it confined itself to a 'general and abstract examination' of the contested measure and did not carry out any specific assessment of the individual situations. No adequate reasons are therefore given in the contested decision in this regard.

55 According to the applicant, the contested measure in fact covers a range of situations that are extremely varied, from both a legal and factual point of view, and applies to undertakings of greatly varying sizes. The applicant states that those undertakings operated in a variety of economic sectors and were subject to different regulations and to widely differentiated market conditions from the point of view of competition.

56 The applicant acknowledges that the Commission has the power to examine an aid scheme without being obliged to analyse the aid granted in individual cases under the scheme. However, the applicant considers that, in the absence of a more thorough examination, the Commission was not in a position to conclude that the measure at issue gave 'an appreciable advantage to beneficiaries as compared with their competitors'. In order for a measure to be classified as State aid, it is essential to demonstrate that the recipient enjoys an advantage (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671 ('*Maribel bis/ter*'), paragraph 48).

57 The applicant considers that, in the defence, the Commission made a specific assessment of the various sectors in question with the object of remedying the serious deficiencies in the investigation of the case and the reasoning in the contested decision. According to the applicant, the Court should reject that belated assessment.

58 In the applicant's view, the Commission acknowledges that its examination was inadequate. First, at recitals 72, 85 and 126 in the preamble to the contested decision, it mentioned the possibility that individual aid might be regarded as compatible with the common market under the *de minimis* rule or because it was existing aid or aid regarded as compatible with the common market on grounds specific to the individual case. Second, the Commission stated that the Italian authorities had not provided sufficient information to enable an individual examination of the beneficiaries' situations to be carried out. The applicant disputes that assertion. Even if it were conceded that insufficient information was provided, the Commission was required, according to the applicant, to make additional requests for information before adopting the contested decision, especially since the investigation preceding that adoption was very lengthy, namely five years.

59 The interveners agree with the applicant's position and arguments regarding the plea under consideration.

60 The Commission submits, first, that due to the general and abstract nature of the contested measures, the heterogeneous nature of the situations covered by the measures and the lack of full and reliable information on individual beneficiaries, it had been obliged to confine itself to a general examination of the contested measures and to defer its assessment of individual cases until the stage at which the contested decision was implemented. In any event, in answer to the applicant's argument relating to the length of the investigation, the Commission is of the view that there was no reason for it to request additional information and thus further delay the procedure.

Findings of the Court

61 It must be pointed out, first of all, that what is at issue in this case is an aid scheme of general application and not individual aid.

62 In the case of an aid scheme, the Commission may confine itself to examining the general and abstract characteristics of the scheme in question without being required to examine each particular case in which it applies in order to determine whether the scheme comprises elements of aid (see Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 67 and the case-law cited).

63 In the present case, it should be stated, first, that the aid scheme in question covers a specific category of undertakings, namely companies set up under Law No 142/90. The only requirement to be met in order to be able to benefit from that scheme was to be such a company.

64 Next, the scheme providing for the three-year income tax exemption was not confined to particular services. Indeed, as the applicant acknowledges, the undertakings covered by the scheme operate in widely varying economic sectors. What is at issue in the present case is a single aid scheme encompassing a whole range of sectors and not a number of aid schemes classified according to the activity or the market in question. The Commission was therefore not required to take account of each type of activity or market for the purpose of assessing the effects of the three-year income tax exemption (see, to that effect, Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18; *Maribel bis/ter*, paragraph 56 above, paragraph 48; and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraphs 88 to 91).

65 It also follows from the case-law cited above that the Commission is not obliged to examine an aid scheme and at the same time assess the individual cases to which it applies, especially since such an obligation could diminish the effectiveness of its powers of review in matters of State aid. It follows that the Commission was not required to request information of its own motion concerning specific cases to which the scheme in question applied. The plea under consideration must therefore be rejected.

66 Finally, adequate reasons are given in the contested decision on this point. The Commission made it clear in the contested decision that its examination related only to the aid schemes established by the contested measures and not individual aid granted to various undertakings. Moreover, it follows from the foregoing that the Commission is entitled to confine itself to analysing the general and abstract characteristics of an aid scheme in order to determine whether the scheme comprises State aid and whether that aid is compatible with the common market.

67 It follows from all of the foregoing that the first plea in law must be rejected.

The second plea, alleging infringement of Article 87(1) EC and failure to state reasons as regards the classification of the three-year income tax exemption as State aid

Arguments of the parties

68 In this plea, the applicant maintains that the three-year income tax exemption does not constitute State aid within the meaning of Article 87(1) EC and that the Commission infringed the obligation to state reasons in that regard.

69 This plea can be divided into two parts.

70 In the first part, the applicant points out that the prerequisite for finding that an aid scheme distorts competition within the meaning of Article 87 EC is that the undertakings receiving the aid actually operate in a competitive market.

71 The applicant argues, in essence, that when the three-year income tax exemption was in force, and even subsequently, the supply of various public utilities was not open to competition. The electricity sales sector, in which all energy-producing companies were under an obligation to sell to the monopoly holder, was liberalised only in 1999, as a result of the transposition of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). The distribution of gas was not liberalised in Italy until 2000, as a result of the transposition of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1). Furthermore, the distribution of electricity, the district heating sector and water services market were removed from competition. It therefore follows from all those factors that the public utilities sectors in question were liberalised only after the period during which the three-year income tax exemption was applicable.

72 Moreover, during the period in which the three-year income tax exemption was applicable, opportunities for competing for the supply of local public utilities were extremely limited.

73 The applicant also submits that the undertakings which benefited from the three-year income tax exemption were able to take part only very rarely, and never in the electricity

sector, in tendering procedures for the management of services outside the geographical area in which they normally operated. For example, contracts awarded in the water sector were few and far between, for very small amounts and did not entail the award of contracts for the supply of services as such.

74 According to the applicant, the three-year income tax exemption was not liable to distort competition for the following three reasons: first, the companies set up under Law No 142/90 were not free of themselves to determine prices under the statutory provisions governing the sectors in question; second, they were awarded long-term concessions or contracts which did not expire during the period in which the three-year income tax exemption was applicable; third, their income was essentially intended to support the revenue of the controlling municipalities and was distributed to the shareholders.

75 According to the applicant, it is therefore impossible to state that the markets affected by the three-year income tax exemption were competitive as regards the sectors in which it operates.

76 In the second part of the plea, the applicant submits, in essence, that, since it has demonstrated that there was no competition on the markets in question, the issue of whether trade between Member States might have been affected does not arise.

77 In that connection, it considers the Commission's assertion at recital 68 in the preamble to the contested decision that 'the market for concessions for local public utilities is open to Community competition' to be self-evident and abstract.

78 Moreover, the applicant considers that, in view of the lack of any evidence of a restriction on intra-Community trade, the Commission has failed to comply with its obligation to give a full statement of reasons for its classification of the three-year income tax exemption as State aid. In the contested decision, the Commission considered, in a purely abstract and hypothetical manner, the risk for competition that might arise as a result of the companies set up under Law No 142/90 extending their activities to areas other than those of public concessions or as a result of the tax advantages which those companies enjoyed, without carrying out any investigation as to the facts or a correct analysis of the various economic sectors involved.

79 The interveners agree with the applicant's position and arguments.

80 The Commission disputes all the arguments put forward and considers that adequate reasons are stated in the contested decision.

Findings of the Court

81 As a preliminary point, it should be noted that classification as aid within the meaning of Article 87(1) EC requires all the conditions set out in that provision to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('the judgment in *Altmark*'), paragraphs 74 and 75 and the case-law cited, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27).

82 In the circumstances, the applicant submits that the conditions relating to the effect on intra-Community trade and the effect on competition are not met.

83 In its assessment of those two conditions, the Commission is required not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see *Unicredito Italiano*, paragraph 62 above, paragraph 54 and the case-law cited).

84 It should also be noted that, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the grounds of its decision, whether, by reason of the terms of that scheme, it is likely to benefit in particular undertakings engaged in trade between Member States (*Italy* v *Commission*, paragraph 64 above).

85 A further point to be made is that any grant of aid to an undertaking pursuing its activities in the Community market is liable to cause distortion of competition and affect trade between Member States (see Joined Cases T-92/00 and T-103/92 *Diputación Foral de Álava* v *Commission* [2002] ECR II-1385, paragraph 72 and the case-law cited).

86 Moreover, there is no threshold or percentage below which trade between Member States can be said not to be 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 (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42; and the judgment in *Altmark*, paragraph 81 above, paragraph 81).

87 Furthermore, the Court of Justice stated that it was not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States within the meaning of Article 87(1) EC. Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (the judgment in *Altmark*, paragraph 81 above, paragraphs 77 and 78).

88 In the present case, with regard to the condition concerning the effect on competition, while it is true that the applicant maintains that the companies set up under Law No 142/90 did not operate in competitive markets, with reference in particular to the sectors in which it itself operated, it has failed to adduce any valid evidence to support its claim that the local public utilities sectors were not open to competition during the period in question. It must be borne in mind that what is at issue in the present case is an aid scheme encompassing a whole range of sectors and not a number of aid schemes each of which relates to a specific sector.

89 The fact that the aid scheme at issue was applicable only to companies set up under Law No 142/90, irrespective of their activities, and that those undertakings actually operated in different sectors of the economy, including those open to competition, is sufficient for it to be concluded that the contested measure is, of itself, liable to influence competition and trade between Member States.

90 As the Commission stated at recitals 73 and 84 in the preamble to the contested decision, there was a certain amount of competition in some of the sectors concerned, such as the pharmaceutical products, waste, gas, electricity and water sectors, when the contested measures were put into effect.

91 Furthermore, in the sectors in which the companies set up under Law No 142/90 operate, undertakings compete for the award of concessions to provide local public services in the various municipalities and the market for those concessions is open to competition (recitals 67 and 68 in the preamble to the contested decision).

92 The argument based on the claim that there is no competition and therefore no effect on inter-State trade because contracts for the services in question are in fact directly awarded to companies set up under Law No 142/90 must be rejected. First, the fact that contracts are awarded directly does not affect the finding made in the preceding paragraphs that there was, at the very least, a certain amount of competition on the market in question. Second, that argument serves, rather, to demonstrate the restrictive effects of the contested measures on competition and not the absence of competition on that market. As the Commission stated at recital 71 in the preamble to the contested decision, it cannot be ruled out that the very existence of the aid for companies set up under Law No 142/90 encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure.

93 With regard, in particular, to whether the contested measures distorted or threatened to distort the level of competition on the market, it must be noted that those measures strengthened the competitive position of the companies set up under Law No 142/90 by comparison with that of any other Italian or foreign undertaking operating on that market. As the Commission correctly pointed out at recital 62 in the preamble to the contested decision, undertakings that are not joint stock companies and a majority of whose shares are not held by local authorities find themselves in a disadvantaged position if they intend to compete for the granting of a licence to provide a particular service in a given territory.

94 Moreover, the activities of companies set up under Law No 142/90 are not confined to the local public services sector. The measure in question can therefore facilitate the

expansion of those companies in other markets which are open to competition and thus distort competition even in sectors other than local public services sectors. It is apparent from Law No 142/90, as interpreted by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) in Judgment No 4989 of 6 May 1995 and by the Consiglio di Stato (Council of State, Italy) in Judgment No 4586 of 3 September 2001, that it is permissible for companies set up under Law No 142/90 to operate in other geographical areas both within Italy and abroad and in fields other than that of public utilities stipulated in their articles of association, unless that deprives them to a significant extent of resources and means and is liable adversely to affect the controlling local authorities.

95 It follows from the foregoing that the measure in question distorts or threatens to distort competition within the meaning of Article 87(1) EC.

96 As regards the condition relating to the effect on inter-State trade, it should be pointed out, first of all, that the fact that companies set up under Law No 142/90 operate only on their national market or in their territory of origin is not decisive. Inter-State trade is affected by the measure concerned when undertakings established in other Member States have less chance of providing their services in the Italian market (see paragraph 87 above).

97 Accordingly, the Commission was correct in stating at recital 70 in the preamble to the contested decision that the contested measure could create an obstacle for foreign firms wishing to establish themselves or sell their services in Italy and therefore affect trade between Member States within the meaning of Article 87(1) EC.

98 First, the contested measure adversely affects foreign companies bidding for local public services concessions in Italy, since the public undertakings benefiting from the

scheme in question can bid at more competitive prices than national or Community competitors not benefiting from it. Second, the measure in question makes it less attractive for companies from other Member States to invest in the utilities sector in Italy (for example, by acquiring majority holdings), since any companies acquired would not be entitled to (or may lose) the benefit of the measure because of the nature of their new shareholders (see recital 69 in the preamble to the contested decision).

99 It follows from the foregoing that the Commission did not err in taking the view that the conditions relating to the effect on trade between Member States and the distortion of competition were met in the present case.

100 As regards the allegation that sufficient reasons are not given in the contested decision regarding those two conditions, the Commission explained, succinctly but clearly, at recitals 62 to 64, 69, 73 and 74 respectively in the preamble, the reasons for which it considered that the three-year income tax exemption was liable to distort competition and affect trade between Member States. Moreover, as already stated, the Commission is not required to demonstrate the real effect of aid which has already been granted (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

101 It follows from all the foregoing that the second plea in law must be rejected.

The third plea, alleging infringement of Article 88(1) EC on the basis that the contested measure was classified as new aid and, accordingly, infringement of procedural rules, and failure to state reasons

Arguments of the parties

102 In this plea, the applicant submits, in the alternative, that the measure in question is existing aid and, accordingly, the Commission infringed Article 88 EC and Article (1)(b)(i) and (v) of Regulation No 659/1999. It also argues that the contested decision does not contain an adequate statement of reasons in that regard.

103 The plea can be divided into two parts.

104 In the first part, the applicant considers that the contested aid is existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999, since the markets in question were closed to competition during the reference period. The companies set up under Law No 142/90 were permitted to operate only in the territory in which they normally operated and to do so to the exclusion of all other activities. It follows that, in any event, the measure in question became State aid at the latest following the alleged opening-up of the sectors in question to competition.

105 In the second part of the plea, based on Article 1(b)(i) of Regulation No 659/1999, the applicant submits that the provision under a monopoly arrangement of services in the public interest by municipalities and municipal undertakings has been exempt from tax since the beginning of the last century.

106 According to the applicant, there was continuity between, on the one hand, the tax system from which municipalities and municipal undertakings benefited in operating local public utilities and, on the other, the three-year income tax exemption enjoyed by companies set up under Law No 142/90. In fact, municipal undertakings and companies set up under Law No 142/90 embody, in essence, the same entity.

107 The Commission therefore failed in its obligation to demonstrate that the new measure affected 'the actual substance of the original scheme', which is a fundamental condition for existing aid to be classified as new aid within the meaning of Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309. The tax advantages in question were not altered and the class of beneficiaries was not extended.

108 The temporary distinction which the Commission made between the regime governing municipal undertakings and that governing companies set up under Law No 142/90 cannot be accepted because municipal undertakings continued to be treated under the former tax regime until they were converted into companies set up under Law No 142/09, which occurred only when the new tax regime was instituted. At no time between 1990 and 1993 were companies set up under Law No 142/90 therefore liable to income tax.

109 The applicant is of the view that the Commission's reasoning is contradictory in that it accepts that companies set up under Law No 142/90 and the former municipal undertakings are the same in substantive and economic terms for the purpose of the transfer tax exemption but then disregards that fact when it comes to analysing the three-year income tax exemption.

110 According to the applicant, neither the wording of Article 22(3) of Law No 142/90 nor the domestic case-law cited by the Commission lend any weight to the idea that companies set up under Law No 142/90 and municipal or special undertakings can be differentiated in terms of their material or territorial scope.

111 The interveners agree with the applicant's position and arguments.

112 The Commission takes the view that the plea under consideration must be rejected.

Findings of the Court

113 In Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, the Court of Justice held that it is clear from both the terms and purposes of Article 88 EC that aid which existed before the entry into force of the EC Treaty and aid which could be properly put into effect in accordance with the conditions laid down in Article 88(3) EC, including those arising from the interpretation of that article given by the Court in its judgment in Case 120/73 *Lorenz* [1973] ECR 1471, paragraphs 4 to 6, is to be regarded as existing aid within the meaning of Article 88(1) EC, while, on the other hand, measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 88(3) EC.

114 As regards existing aid, Article 1(b) of Regulation No 659/1999 reproduced and affirmed the rules established in the case-law.

115 According to that provision, existing aid means:

(i) all aid which existed prior to the entry into force of the EC Treaty in the respective Member States;

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

(iii) all aid deemed to have been authorised without the Commission adopting a decision within a period of two months, in principle beginning on the day following the receipt of a complete notification of that aid, being the time available to the Commission for the purposes of carrying out a preliminary examination;

(iv) all aid in respect of which the 10-year limitation period for recovery has expired;

(v) all aid deemed to be existing aid because it can be established that, although it did not constitute aid at the time it was put into effect, it subsequently — without being altered by the Member State — became aid owing to the evolution of the common market. Where certain measures become aid following the liberalisation of an activity by Community law, such measures are not to be considered as existing aid after the date fixed for liberalisation.

116 Next, under Article 1(c) of that regulation, any existing aid that is altered is to be regarded as new aid.

117 Essentially, measures intended to grant aid or alter existing aid constitute new aid. In particular, where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme. However, there can be no question of such a

substantive alteration where the new element is clearly severable from the initial scheme (*Government of Gibraltar* v *Commission*, paragraph 107 above, paragraphs 109 to 111).

118 In the present case, it is accepted that the three-year income tax exemption does not fall within the second, third or fourth situations set out in Article 1(b) of Regulation No 659/1999, under which an aid measure may be regarded as existing aid. Furthermore, the applicant has not claimed that those situations are applicable.

119 It is appropriate to consider, first of all, the second part of the plea under consideration.

120 As regards the first of the situations referred to in Article 1(b) of Regulation No 659/1999, it should be noted, first of all, that the three-year income tax exemption was introduced by Decree-Law No 331/93 and Law No 549/95. In 1990, when Law No 142/90 reformed the legal arrangements available to municipalities for the purpose of managing local public utilities, which included the possibility of setting up limited liability companies with a majority public shareholding, no exemption from income tax was envisaged for such companies.

121 In fact, all companies set up under Law No 142/90 which were created between 1990 and the entry into force on 30 August 1993 of Article 66 of Decree-Law No 331/93 were liable to income tax.

122 Therefore, as the Commission correctly stated at recital 91 in the preamble to the contested decision, in order to extend to companies set up under Law No 142/90 the same tax treatment as that for local authorities, the Italian legislature had to enact new legislation several decades after the entry into force of the EC Treaty.

123 Moreover, even if it is accepted that the income tax exemption for municipal undertakings was introduced before the entry into force of the EC Treaty and remained in force until 1995, the fact remains that the companies set up under Law No 142/90 are substantially different from municipal undertakings. The extension of existing tax advantages enjoyed by municipal and special undertakings to a new class of beneficiaries, such as companies set up under Law No 142/90, constitutes an alteration that is severable from the initial scheme. As stated in Judgment No 4586 of the Consiglio di Stato of 3 September 2001, there are statutory differences between companies set up under Law No 142/90 and municipal undertakings on account of the fact, in particular, that the former are not subject to the strict limitations as to geographical area imposed on the latter and the former's sphere of activity is much wider. Accordingly, as already stated at paragraph 94 above, companies set up under Law No 142/90 can operate outside their reference territory, both in Italy and abroad, and in fields other than that of public utilities stipulated in their articles of association, unless that deprives them to a significant extent of resources and means and is liable adversely to affect the controlling local authorities.

124 Consequently, as the Commission explained at recital 92 in the preamble to the contested decision, even though companies set up under Law No 142/90 assumed the rights and obligations of municipal undertakings, the legislation which defined their substantive sphere of activity and the geographical area in which they could operate changed substantially.

125 It must therefore be concluded that the three-year income tax exemption introduced by Article 3(70) of Law No 549/95 in conjunction with Article 66(14) of Decree-Law No 331/93 does not fall within Article 1(b)(i) of Regulation No 659/1999.

126 As regards the first part of the plea under consideration, based on Article 1(b)(v) of Regulation No 659/1999, that provision can apply only to measures which did not constitute aid at the time they were implemented. It is sufficient to state, as explained by the Commission at recitals 83 to 85 in the preamble to the contested decision, that the aid was introduced at a time when the markets were in any event, albeit almost certainly

to differing degrees, open to competition. The three-year income tax exemption cannot therefore be regarded as falling within Article 1(b)(v) of Regulation No 659/1999.

127 That conclusion is not affected by the applicant's assertion that energy production was liberalised only in 1999. It should be pointed out that, in the present case, what is at issue is an aid scheme which applies to a specific class of undertakings encompassing several sectors. Accordingly, the Commission cannot be required to carry out an examination on the basis of individual sectors. That does not rule out the possibility that certain particular cases may be regarded as existing aid. That is the reason for which the Commission took that possibility into account in the contested decision (recital 85 in the preamble).

128 It cannot therefore be concluded that there is a failure to state reasons in this connection.

129 Lastly, as regards the alleged contradiction between the analysis of the transfer tax exemption and the analysis of the three-year income tax exemption as to whether municipal undertakings and companies set up under Law No 142/90 can be regarded as economically and substantially distinct entities, it should be observed that the Commission indicated in the contested decision, on the basis of information provided by the Italian Government, that it considered the transfer tax exemption to be justified by the nature and the general scheme of the system in question. Without there being any need to decide on whether that assessment is well founded, it should be pointed out that the fact that the Commission might have made an error as regards the transfer tax exemption does not mean that it is necessary to set aside another part of the contested decision.

130 In the light of the foregoing, the third plea in law must be rejected.

The fourth plea, alleging infringement of Article 87(3)(c) EC and failure to state reasons

Arguments of the parties

131 In this plea, the applicant submits that the Commission erred in stating that the measure in question was not State aid that is compatible with the common market under Article 87(3)(c) EC. According to the applicant, the measure in question was compatible with the common market under that provision since it made possible the conversion of municipal undertakings and the changeover to a competitive market. The Commission therefore made an incorrect assessment of the situation in the contested decision.

132 Moreover, the Commission's analysis in the contested decision is contradictory in that it did not consider to be relevant the precedents referred to by the undertakings which participated in the administrative procedure, such as the Commission's decision of 10 November 1999 concerning the transitional rules to abolish the exemption from corporation tax for municipal transport undertakings (OJ 1999 C 379, p. 11) and Commission Decision 2000/410/EC of 22 December 1999 on the aid scheme which France is planning to implement in favour of the French port sector (OJ 2000 L 155, p. 52). As in the present case, the tax measures at issue in both those decisions were intended to ensure the transition from a monopoly system to a liberalised system.

133 The applicant maintains that, if the measure in question had not been adopted, the conversion of municipal undertakings into joint stock companies would never have been accomplished. That measure was essential for the purpose of promoting the opening-up of local public utilities to competition by guaranteeing transparency in the financial relations between public authorities and suppliers of services. The measure in question fulfilled the essential requirement of ensuring that a transition period was provided for the restructuring of those undertakings, without jeopardising continuity in the provision of public services. The applicant also claims that no adequate reasons were given in that regard.

134 The interveners agree with the applicant's position and arguments.

135 The Commission considers the plea under consideration to be invalid. The measure in question was declared incompatible with the common market since it infringed Article 43 EC and this has not been challenged by the applicant. In the alternative, the Commission disputes the merits of the present plea.

Findings of the Court

136 First of all, the Commission enjoys wide discretion as regards Article 87(3) EC (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18). Any review by the Community judicature is therefore necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.

137 Next, according to established case-law, in order to be declared compatible with the common market under Article 87(3)(c) EC, aid to undertakings in difficulty must be linked to a comprehensive restructuring plan, which must be submitted in all relevant detail to the Commission (Case C-17/99 *France* v C*ommission* [2001] ECR I-2481, paragraph 45).

138 In the present case, as regards the reasons given in the contested decision, it is apparent from the decision that the Commission established whether the aid could be regarded as compatible with the common market under Article 87(3)(c) EC, first, in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) and, second, independently of those guidelines. It set out the

reasons for which it had reached the conclusion that the aid was incompatible (recital 97 et seq. in the preamble to the contested decision).

139 Next, it is evident from the documents before the Court that the conditions under which the three-year income tax exemption may have been eligible for the derogation provided for in Article 87(3)(c) EC were not satisfied. The three-year income tax exemption was not intended to restore the beneficiaries to viability and was not restricted to undertakings in difficulty. Even if that had been the case, no restructuring plan was submitted, or any measures designed to offset the distortions of competition that may have arisen as a result of the grant of the aid in question. According to case-law, in order to be declared compatible with the common market under Article 87(3)(c) EC, aid to undertakings in difficulty must be linked to a comprehensive restructuring plan, which must be submitted in all relevant detail to the Commission (*France* v *Commission*, paragraph 137 above, paragraph 45).

140 As regards the argument that the measure in question facilitated the transition from a monopolistic market economy to a competitive one, the applicant has failed to show how the measure would have led to more vigorous competition. As already stated, there was already a certain amount of competition on the markets in question and, therefore, the measure at issue could have distorted competition.

141 With regard to the alleged contradiction between the approach adopted in the present case and that followed in other Commission decisions, it is evident from both the decisions to which the applicant refers that the situations in question are not comparable to that in the present case. As regards the decision of 10 November 1999, as the Commission correctly pointed out, the beneficiaries of the tax exemption in that case were prohibited from participating in tendering procedures outside their reference territory until their own domestic markets were opened up. The aid at issue in Decision 2000/410 was to be granted subject to investments being made for the transfer and replacement of existing equipment.

142 The fourth plea in law must therefore be rejected.

The fifth plea, alleging the unlawfulness of the recovery order and infringement of the principles of the protection of legitimate expectations and proportionality

143 In this plea, the applicant claims that the order addressed to the Italian Republic to recover from the beneficiaries the aid that had been granted under the schemes declared incompatible with the common market was unlawful and that the principles of the protection of legitimate expectations and proportionality were infringed. This plea can be divided into two parts.

Arguments of the parties

— The first part of the plea, alleging that the recovery order was unlawful in the light of the abstract assessment of the measure in question

144 According to the applicant, Article 3 of the contested decision instructs the Italian Republic to recover all the aid received by companies set up under Law No 142/90, even though the Commission, albeit without identifying it, acknowledged that certain aid might not be incompatible with the common market. In the applicant's view, the Italian Republic thus finds itself under an obligation to carry out a highly complex factual analysis, the necessary discretion for which far exceeds its powers, and faces the risk of recovering measures which do not constitute aid, constitute existing aid or aid that is capable of being compatible or declared compatible in a subsequent Commission decision.

145 According to the applicant, in view of the fact that the Commission's order for recovery does not lay down any procedural framework, the Commission should either itself examine in detail the different cases in respect of which the recovery order could in fact be made or simply assess the scheme in an abstract manner. In the latter case, it should dispense with an order for recovery of the aid granted.

146 The applicant submits that the Commission's argument is contradictory in that it states, on the one hand, that it is possible for national authorities to regard individual aid as compatible with the common market (recital 126 in the preamble to the contested decision) and, on the other, that the assessment of the compatibility of State aid with the common market falls within the Commission's exclusive competence.

147 The applicant does not object to the reference to the judgment in *Italy* v *Commission*, paragraph 64 above, but maintains that it is necessary to determine the point at which the specific analysis of individual cases must be carried out: that point should be the one at which the Commission adopted its decision.

148 The applicant also claims that the case-law cited by the Commission is relevant only to cases in which it was impossible, unlike in the present case, to distinguish the contested aid according to the various individual situations of the beneficiaries. The Court of Justice expressly found fault with the Commission in two cases for having failed to distinguish the aid under examination in the light of the facts (Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487).

149 The interveners agree with the applicant's position and arguments.

150 The Commission contests all the arguments put forward by the applicant.

— The second part of the plea, alleging infringement of the principles of the protection of legitimate expectations and proportionality

151 The applicant submits that the recovery order in Article 3 of the contested decision is void because the Commission infringed the general principles of the protection of legitimate expectations and proportionality.

152 It considers that a number of factors caused it genuinely to believe that the measure in question was lawful, namely its conviction that the two successive tax regimes were fundamentally the same, the conduct of the Italian authorities and, lastly, the conduct of the Commission in that it initiated the formal investigation procedure only four years after the measure in question had been adopted and did not, in the course of that procedure, reply to the applicant's arguments or use the information injunction power conferred on it by Articles 10 and 11 of Regulation No 659/1999 during the three-year period of the investigation.

153 In any event, given that the Italian legislature adopted the three-year income tax exemption, the applicant could not have paid income tax for the period from 1997 to 1999, since undertakings are not required to pay taxes for which no provision is made in national legislation.

154 Finally, the applicant argues that, because of the fundamental change in market conditions and the situation of undertakings, the recovery of the aid clearly could not bring about a return to the *status quo ante* and cannot, therefore, be justified. Moreover, the three-year income tax exemption benefited Community shareholders, not companies set up under Law No 142/90.

155 The interveners agree with the applicant's position and arguments regarding this part of the plea.

156 The Commission disputes all the applicant's arguments.

Findings of the Court

157 As stated at paragraph 62 above, according to established case-law, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question.

158 It is also evident from the case-law that there is no need for a negative decision concerning an aid scheme to provide an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (*Italy* v *Commission*, paragraph 64 above, paragraph 91).

159 Next, according to settled case-law, abolishing unlawful aid by means of recovery, along with interest accruing thereon, is the logical consequence of a finding that it is incompatible with the common market (*Tubemeuse*, paragraph 86 above, paragraph 66; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47; and Case C-110/02 *Commission* v *Council* [2004] ECR I-6333, paragraph 41).

160 It should also be noted that that case-law applies to both individual aid and aid paid as part of an aid scheme.

161 However, where an aid scheme has been analysed in a general and abstract manner, the possibility cannot be ruled out that, in an individual case, the amount granted under the scheme escapes the prohibition laid down in Article 87(1) EC, for example, because the grant of individual aid is covered by the *de minimis* rules. That explains the reservations expressed at recitals 72, 85 and 126 in the preamble to the contested decision.

162 Undoubtedly, where the Commission takes a decision declaring aid incompatible with the common market, the role of the national authorities is confined to implementing that decision and they do not enjoy any discretion in that regard (Case 78/76 *Steinicke & Weinlig* [1977] ECR 595, paragraph 10). That does not, however, prevent the national authorities, when implementing that decision, from taking such reservations into account. Therefore, contrary to applicant's submissions, the Commission is simply required to order recovery of aid within the meaning of Article 87 EC and not of amounts which, while paid under the scheme in question, do not constitute aid or constitute existing aid or aid that is compatible with the common market under a block exemption regulation or another Commission decision.

163 As regards the claim that the contested decision is unlawful on the basis that the Italian Republic would be obliged to determine which specific measures constitute aid, such an

analysis would be carried out, if necessary, in consultation with the Commission, in accordance with Article 10 EC. Moreover, aid is a legal concept which must be interpreted on the basis of objective factors. Furthermore, the national court has jurisdiction to interpret the concepts of aid and existing aid and can adjudicate on any particular circumstances in which they may apply, where necessary by referring a question to the Court of Justice for a preliminary ruling.

164 Moreover, to accept the applicant's argument that an abstract assessment of an aid scheme which does not entail a detailed examination of the individual instances of application cannot give rise to a recovery order would amount to automatically excluding the possibility of recovering unlawfully paid aid and thus depriving Articles 87 EC and 88 EC of any meaning. In such a case, it would be impossible for the Commission, which alone has competence to determine whether aid is compatible with the common market, to examine the numerous cases in which aid schemes apply.

165 As regards the complaint alleging infringement of the principle of the protection of legitimate expectations, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in accordance with the procedure laid down in Article 88 EC. A diligent operator should normally be able to determine whether that procedure has been followed (*Spain* v *Commission*, paragraph 159 above, paragraph 51). However, the possibility cannot be excluded that the recipient of illegally granted aid can, in exceptional circumstances, legitimately assume the aid to be lawful (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16).

166 In the present case, the aid scheme at issue was not notified to the Commission, in breach of Article 88 EC, and the applicant has not pleaded any exceptional circumstances which could justify the legitimate expectation claimed. In particular, the argument concerning its conviction that the two successive tax regimes were

fundamentally the same has already been rejected as unfounded (see paragraph 123 above) and does not, in any event, constitute an exceptional circumstance such as to justify no order being made for the recovery of the aid in question. Next, any apparent failure to act on the part of the Commission, which is not established in the present case, is irrelevant when an aid scheme has not been notified to it (Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 52). Lastly, as regards the argument based on Articles 10 and 11 of Regulation No 659/1999, the Commission is not obliged automatically to require the Member State concerned to suspend payment of aid that has not been notified.

167 It follows from all the foregoing that the fifth plea in law must also be rejected.

168 In the light of all the foregoing considerations, the action must be dismissed.

Costs

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

170 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the interveners must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber, Extended Composition)

hereby:

1. **Dismisses the action as inadmissible in so far as it relates to the Cassa Depositi e Prestiti loans;**

2. **Dismisses the remainder of the action as unfounded;**

3. **Orders ACEA SpA to bear its own costs as well as those incurred by the Commission;**

4. **Orders ACSM Como SpA and AEM — Azienda Energetica Metropolitana Torino SpA to bear their own costs.**

Martins Ribeiro Šváby Papasavvas

Wahl Dittrich

Delivered in open court in Luxembourg on 11 June 2009.

[Signatures]