JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

1 July 2010 *

In Case T-62/08,

ThyssenKrupp Acciai Speciali Terni SpA, established in Terni (Italy), represented by T. Salonico, G. Pellegrino, G. Pellegrino and G. Barone, lawyers,

applicant,

v

European Commission, represented by C. Giolito and G. Conte, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2008/408/EC of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy

* Language of the case: Italian.

in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche (OJ 2008 L 144, p. 37),

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 July 2009,

gives the following

Judgment

Facts

1 The Italian Republic nationalised the electricity sector by Law No 1643 of 6 December 1962 setting up the Ente Nazionale per l'Energia Elettrica (ENEL) and transferring to it undertakings operating in the electricity industry (GURI No 316 of 12 December

1962, p. 5007; 'Law No 1643/62'). By that law, the Italian Republic granted ENEL a monopoly within Italy in respect of the production, importation and exportation, transmission, transformation, distribution and sale of electricity, produced from whatever source. That monopoly was subject, however, to certain exceptions.

2 Thus, under Article 4(6) of Law No 1643/62, undertakings which produced electricity primarily for self-consumption ('self-producers') were excluded from the nationalisation of the electricity sector.

3 At that time, Terni — a company in which the State was the majority shareholder — was active in the steel, chemicals and cement sectors. It also owned and operated a hydroelectric plant, most of the electricity produced being used to power the company's manufacturing processes.

4 Given its strategic importance for the country's energy supply, Terni's hydroelectricity assets were nationalised despite the fact that Terni was a self-producer.

5 By Presidential Decree No 1165 of 21 August 1963 transferring to ENEL assets used for the activities referred to in the first paragraph of Article 1 of Law No 1643/62, which were pursued by 'Terni: Società per l'Industria e l'Elettricità SpA' (Ordinary Supplement to GURI No 230 of 31 August 1963, p. 58; 'Decree No 1165/63'), the Italian Republic compensated Terni for the transfer of its assets by granting it a preferential electricity tariff ('the Terni tariff') which was to apply from 1963 to 1992.

6 In 1964, Terni was split up into three companies: Terni Acciai Speciali, a steel producer; Nuova Terni Industrie Chimiche, a chemicals manufacturer; and Cementir, a cement manufacturer ('the Terni companies'). Those companies were later privatised, and acquired by ThyssenKrupp, Norsk Hydro and Caltagirone, respectively, which led to the creation of ThyssenKrupp Acciai Speciali Terni SpA, Nuova Terni Industrie Chimiche SpA and Cementir SpA, respectively. The Terni tariff continued to be applied to those companies.

7 By Law No 9 of 9 January 1991 for the implementation of the new national energy plan: institutional aspects, hydroelectric plants and power line networks, hydrocarbons and geothermal energy, self-production and fiscal provisions (Ordinary Supplement to GURI No 13 of 16 January 1991, p. 3; 'Law No 9/91'), the Italian Republic renewed until 31 December 2001 the existing hydroelectric concessions, on the basis of which companies which use public water resources for the production of electricity operate.

8 Under Article 20(4) of Law No 9/91, the Italian Republic also prolonged the application of the Terni tariff until 31 December 2001. Additionally, provision was made for the volume of subsidised electricity supplied to the Terni companies to be gradually reduced over the following six years (2002 to 2007), so that by the end of 2007 the tariff advantage would have been phased out.

9 The Italian authorities notified Law No 9/91 to the Commission, which adopted a decision on 6 August 1991 not to raise objections (the decision concerning State aid NN 52/91; 'the decision of 6 August 1991').

10 By Legislative Decree No 79 of 16 March 1999 concerning Directive 96/92/EC concerning common rules for the internal market in electricity (GURI No 75 of 31 March 1999, p. 8; 'Decree No 79/99'), the Italian Republic extended the existing hydroelectric concessions. Article 12(7) and (8) of that decree provided as follows:

'7. The validity of concessions which have expired or which are due to expire before 31 December 2010 shall be renewed until that date and the concession-holders concerned shall continue to pursue the activity by informing the granting authorities accordingly within 90 days of the entry into force of the present Decree, no administrative act being required …

8. The expiry conditions laid down in the concession certificate shall apply to concessions which are due to expire after 31 December 2010.'

11 Under Article 11(11) of Decree-Law No 35 of 14 March 2005 laying down urgent provisions relating to the action plan for economic, social and territorial development (GURI No 62 of 16 March 2005, p. 4), converted into Law No 80 of 14 May 2005 ('Law No 80/05'), the Italian Republic once again prolonged the application of the Terni tariff, this time until the end of 2010, the measure being applicable as from 1 January 2005 ('the disputed measure'). Law No 80/05 provides that, until 2010, the treatment terms of the Terni companies are to be the same as those applicable on 31 December 2004 in terms of the volume of electricity supplied (926 GWh overall for the three Terni companies) and prices (1.32 eurocents/kWh). Shortly afterwards, Law No 266 of 23 December 2005 granted a general renewal of the hydroelectric concessions until 2020.

12 Having learned of that temporal extension measure in the course of investigating another case, the Commission asked the Italian authorities for information by letter of 23 December 2005. The Italian authorities sent the information by letter of 24 February 2006, and two other letters of 2 March 2006 and 27 April 2006 respectively.

13 By letter dated 19 July 2006, the Commission informed the Italian Republic 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 Union* (OJ 2006 C 214, p. 5) and the Commission called upon interested parties to submit their comments on the measures in question.

14 The Italian Republic submitted comments by letter of 25 October 2006 and provided further information by letters of 9 November 2006 and 7 December 2006.

15 The Commission received comments from interested third parties and forwarded them to the Italian authorities, thus giving them an opportunity to react. The Commission received the comments of the Italian Republic by letter of 22 December 2006.

16 By letter of 20 February 2007, the Commission requested further information, which was provided by the Italian authorities by letters of 16 April 2007, 10 May 2007 and 14 May 2007.

17 On 20 November 2007, the Commission adopted Decision 2008/408/EC on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche (OJ 2008 L 144, p. 37; 'the contested decision').

18 Recital 163 of the contested decision is worded as follows:

'The Commission finds that [the Italian Republic] has unlawfully implemented, in breach of Article 88(3) [EC], the provision of Article 11[11] of Decreto-legge [No 35/05], converted into Law [No 80/05], providing for the modification and extension in time until 2010 of the preferential electricity tariff applicable to the three Terni companies. The Commission considers that such measure, which constitutes pure operating aid, is not eligible for any derogation under the EC Treaty, and is therefore incompatible with the common market. Therefore, the parts of the above measure that have not yet been granted or paid must not be implemented. The aid already paid has to be recovered. The amounts to which the beneficiaries would have been entitled in 2005, 2006 and 2007 under Law [No 9/91] may be deducted from the total amount to be recovered.'

19 The enacting terms of the contested decision include the following provisions:

'*Article 1*

1. The State aid which [the Italian Republic] has implemented in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche is incompatible with the common market.

2. The State aid which [the Italian Republic] has granted but not yet paid out to ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche is also incompatible with the common market and may not therefore be implemented.

Article 2

1. [The Italian Republic] shall recover from the beneficiaries the aid referred to in Article 1(1).

…'

Procedure and forms of order sought

20 By application lodged at the Registry of the Court on 6 February 2008, the applicant brought the present action.

21 The applicant claims that the Court should:

— declare the contested decision unlawful and annul it in its entirety;

— order the Commission to pay the costs;

— if necessary, order the Commission to provide, in accordance with Articles 64 and 66 of the Rules of Procedure of the Court, the correspondence sent and received by the Italian authorities in September and November 1991 and also any other measure of organisation of procedure or inquiry it may deem appropriate;

or, in the alternative, annul the contested decision in so far as it:

— declares that the Italian Republic put the aid granted to the applicant, Cementir and Nuova Terni Industrie Chimiche into effect, contrary to Article 88(3) EC;

— declares that the amounts must be recovered from the applicant, Cementir and Nuova Terni Industrie Chimiche and, consequently;

— orders the Italian Republic to proceed without delay with the recovery of those amounts and interest;

or, in the further alternative, annul the contested decision in so far as it orders the Italian Republic to proceed without delay with the recovery of those amounts and interest, in so far as that recovery is contrary to the general principle of the protection of legitimate expectations.

22 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

23 The applicant puts forward four pleas in law, alleging, first, infringement of Article 87(1) EC; secondly, infringement of essential procedural requirements and infringement of Articles 87 EC and 88 EC due to a manifest error of assessment of the economic study produced by the Italian authorities; thirdly, infringement of Article 88(3) EC; and, fourthly, infringement of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), and of the principle of the protection of legitimate expectations.

The plea alleging infringement of Article 87(1) EC

Arguments of the parties

24 The applicant submits that the Commission was incorrect in categorising the disputed measure as State aid and in finding, subsequently, that that measure should have been notified to it.

25 It states that compensation granted by Member States by way of reparation for losses caused to undertakings, following, inter alia, expropriation, is not considered State aid, a point which the Commission acknowledges in recital 70 of the contested decision.

26 In the present case, the exceptional expropriation suffered by Terni in 1962 placed it at an obvious competitive disadvantage in relation to its competitors, which led the legislature to create for Terni, in order to remedy that serious discrimination, a compensation 'criterion' entirely different from that granted in the form of a lump-sum compensation amount to the other expropriated undertakings so as 'not to disturb the internal balance of that undertaking' which, under the law, should have fallen outside the scope of the nationalisation.

27 Law No 1643/62 thus gave Terni the right to receive financial compensation at the time, in the form of a special tariff for the supply of electricity, placing it in the situation of a virtual self-producer, in order to provide long-term cover for any possible additional damages — which were difficult to estimate at the time of the expropriation

— caused by changes in electricity prices and thus neutralise the effects of those changes.

28 Applying that flexible criterion, which consisted in maintaining non-discriminatory parallelism between Terni and the other non-expropriated self-producers, Decree No 1165/63 provided that the Terni tariff was to have the same duration as the hydroelectric capture concessions granted to the non-expropriated self-producers, that is, until 31 December 1992, when the discriminatory effects of the expropriation of Terni's hydroelectric branch would come to an end. In fact, Terni ought to have lost the concessions authorising the exploitation of water resources for self-production of electricity at the end of 1992.

29 The compensation thus defined is therefore the result of three factors: the volume of electricity, the price thereof and the duration. Only the first of those factors was fixed definitively, according to Terni's consumption in 1961 and the forecasted increase in consumption linked to investments already undertaken but not yet completed in 1962. The price is not determined by its amount, but rather by its method of calculation, since only price flexibility allows for keeping in line with the compensation approach adopted. The duration was set at 30 years, not because that duration allows for covering the value of the property expropriated, but because it is still, according to the criterion of comparison with the non-expropriated self-producers, that of the hydroelectric concessions, as recognised by the Commission in recitals 18 and 77 of the contested decision.

30 The objective of re-establishing as much as possible the economic conditions and balance that Terni enjoyed before the expropriation was also taken within the context of Italian constitutional principles, in this case that of non-discrimination and the principle providing for 'genuine' and 'appropriate and adequate' compensation following

expropriation, and the principle of Community law protecting free competition, laid down in the first paragraph of Article 4 EC.

31 That original compensatory mechanism is also in keeping with the principles laid down in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and the case-law of the European Court of Human Rights.

32 The Commission is incorrect to state that any temporal extension of that scheme would entail an amendment to the original mechanism which would effect an across-the-board transformation of the remedial nature of the compensation. A possible transformation of the nature of the compensation through the extension of the tariff must be assessed having regard to observance of the abovementioned objective, as defined beforehand.

33 The applicant states that Law No 529 of 7 August 1982 regulating the relationships between ENEL, the local companies' electric undertakings and the self-producing electricity undertakings as regards the concessions for hydroelectric capture (GURI No 222 of 13 August 1982, p. 5771), and Article 24 of Law No 9/91 extended until 31 December 2001, in favour of the existing concession-holders, the hydroelectric capture concessions due to expire at the end of 1992 and that that renewal, which was wholly exceptional and certainly unforeseeable at the time of the nationalisation, brought to the fore again the problem of applying the compensation criterion created for Terni. Under the compensation method defined by Law No 1643/62 and Decree No 1165/63 and in order to preserve the parallelism between Terni and the other self-producers, the legislator decided to extend the Terni tariff until 31 December 2001 by adopting Article 20(4) of Law No 9/91.

34 The applicant observes that, contrary to the Commission's assertions, Article 20 of Law No 9/91, which provides for a temporal extension of the Terni tariff, contains two express references and one indirect reference to the self-producers, which confirm that the extension of that tariff was, for the Italian State, an obligatory step in implementing the compensation 'criterion' established by Law No 1643/62.

35 It adds that, by the decision of 6 August 1991, the Commission decided 'not to raise objections' to the application of Law No 9/91. Moreover, after asking the Italian Republic for specific information 'relating to presumed aid granted to Ilva [Terni's successor] through a reduced electricity tariff' and having received responses clarifying the true compensatory nature of the preferential tariff, it did not initiate any procedure in relation to it. It follows, in the applicant's view, that the Commission accepted the conclusion that that extension was the legal continuation of the compensation granted to Terni by Law No 1643/62 and Decree No 1165/63 and that, as such, that tariff scheme was not subject to the Community rules on State aid.

36 The applicant observes that the hydroelectric concessions were once again extended, until 31 December 2010, by Article 12(7) of Decree No 79/99, whereas the Terni tariff was not extended at the same time, since the extension provided for by Law No 9/91 had also established a gradual phase-out scheme which was to commence when the hydroelectric concessions expired (that is, at the end of 2001) and end at the end of 2007. Moreover, the intention was that the liberalisation of the electricity market, which was also introduced by Decree No 79/99, was to enable the Terni companies to obtain electricity on the liberalised market at competitive rates, similar to the production costs they would have had if they had retained possession of the expropriated plants.

37 However, in 2005 the liberalisation of the electricity market in Italy did not produce the anticipated favourable effects in terms of competition and the Terni companies were once again in the position of being discriminated against as compared with the non-expropriated self-producers, which led the legislature to adopt the disputed measure. In the applicant's submission, it is clear that, when the Italian Republic decided to postpone once again the end of the hydroelectric concessions until 2010, the applicant and the other Terni companies already enjoyed a right to continuation of the Terni tariff, even if it was to a lesser extent and for a shorter duration than under those concessions. Ultimately, the disputed measure kept intact the underlying rationale of the compensation, which was to treat Terni like a virtual self-producer.

38 The applicant states that that status of virtual self-producer was maintained at the time for other reasons, including when the so-called 'thermic surtax' was introduced in the electricity tariff in Italy, from which Terni, like all self-producers, was exempt. Moreover, both the Corte suprema di cassazione (Supreme Court of Cassation) and the Consiglio di Stato (Council of State), in judgments delivered *in tempore non suspecto* and in cases the subject-matter of which was entirely different from that of the present case, officially recognised the rationale behind the parallelism and of the criterion of virtual self-producer, which was the basis of the Terni tariff. Both of those higher instance courts confirmed that, after 1992, the electricity tariff which Terni had to pay to ENEL had to comprise the same elements as the costs of the other self-producers. The Commission's objection, to the effect that that interpretation is irrelevant because it does not concern Decree No 1165/63, but only Law No 9/91, is formalistic and does not reflect the reality of the situation, since the conclusions in those judgments are based precisely on the underlying rationale of the compensation granted to Terni in the context of the nationalisation, particularly the interpretation of Article 4 of Law No 1643/62 and Articles 7 and 8 of Decree No 1165/63.

39 The Commission's position reveals inconsistencies both in the contested decision itself and between that decision and the statement in defence.

40 The applicant maintains that the Commission's statement that 'any *ex post* revision of the amounts or of the mechanism necessarily changes the nature of the measure' flagrantly contradicts what the Commission itself recognises, namely that the rationale behind the extensions was 'to retain the parallelism in treatment with those hydropower producers who had seen their concessions renewed' (recital 92 of the contested decision), that the initial duration had been fixed according to the expiry date of the hydroelectric concessions (recital 77 of the contested decision), or that the compensation method chosen by the Italian legislature in 1962 was justified in so far as it allowed for 'neutralising the risk of additional damage that might have arisen to Terni, over the years, in case of an increase in energy prices …' (recital 73 of the contested decision).

41 That last statement is implicit recognition of the fact that the harm suffered by Terni following the expropriation is closely linked to the advantage potentially enjoyed by the other self-producers in terms of electricity supply costs; accordingly, the conclusion must be that the extension of the duration of the compensation, linked to the extension of the date of expiry of the concessions, is not a new measure (or a new criterion), but solely the correct implementation of the original measure.

42 The only reason why the Commission disagrees as to the compensatory nature of the extension of the Terni tariff in the contested decision relates to the temporal aspect, which reflects an extremely formalistic approach which is not consistent either with the rules of interpretation in Italian law, which recognises the importance of the legislature's intention, or with the 'substantive assessment' adopted by both the

Commission and the Community case-law, inter alia in the application of the provisions of the EC Treaty.

43 The applicant states that, once it is recognised that the compensation did not consist in an updated valuation of the expropriated assets, but was to maintain Terni's economic and financial balance in terms of electricity costs by equating it with a virtual self-producer, it is no longer permitted to allege that one of the variables defined to reach that result must remain unchanged if the factor on the basis of which it was initially defined changes. That, in the applicant's submission, means that, just as the price of the electricity delivered to Terni (that is, the Terni tariff) was intended to follow the trend in ENEL's tariffs, likewise the duration of the right to benefit from that tariff was changed to reflect the change in the expiry date of the hydroelectric concessions, then fixed at 31 December 2001. The only difference is that, whereas the price variation was clearly and expressly provided for in Article 8 of Decree No 1165/63, in that the variation in the prices applied by ENEL was a normal, foreseeable event when that rule was adopted, the variation in duration was not referred to expressly, as no one could have foreseen 30 years beforehand that the legislature would decide to extend the duration of the concessions.

44 Lastly, the Commission's reasoning contains another error in the statement that, if Terni was not satisfied with the compensation it should have challenged it pursuant to Article 5(5) of Law No 1643/62. The Commission failed to consider that, given the very specific nature and the flexibility of the method adopted for granting Terni the preferential tariff, it had no interest in challenging the suitability of that tariff. The applicant adds that the provision in question was in fact applicable only in cases where the expropriation was compensated for by cash payments and not through a preferential tariff as in the case of Terni.

45 The Commission states that the applicant's plea must be dismissed as being founded on an incorrect premiss and disagrees that its position, in the present case, expresses any contradiction whatsoever.

46 It points out that the contested decision states that the Terni tariff was granted in a specific manner for a fixed duration according to the terms set out in Article 6 of Decree No 1165/63, that is, until 31 December 1992. It is clear from those provisions that that tariff was granted to Terni, by way of compensation, for a fixed, definitive period at the time of the expropriation and that that period was probably fixed taking into account the remaining duration of Terni's hydroelectric concession, which is a fundamental factor in determining the value of the expropriated concession.

47 The Commission contends that neither Law No 1643/62 nor Decree No 1165/63 in any way linked the duration of the Terni tariff, through some sort of dynamic reference, to the future duration of the hydroelectric concessions of other, non-expropriated self-producers, by providing for an automatic extension of that tariff in the event of renewal or extension of those tariffs. In the Commission's view, even if it was possible that the Italian legislature contemplated the expiry of the hydroelectric concessions in fixing the duration of the Terni tariff, it is undeniable that the wording of Law No 1643/62 refers only to the legislature's decision to indemnify Terni (for the expropriation of the hydroelectric concession) not through a lump-sum payment, but through the supply of electricity at a reduced rate for a given period (fixed subsequently by Decree No 1165/63).

48 It states that, under Italian case-law, the criterion of interpretation according to which the law is to be construed according to the usual meaning of the words prevails over any other criterion, provided the wording is unambiguous. That principle is usually applied by the Community Courts.

49 The reading of Decree No 1165/63 advocated by the Commission is in no way contradicted by the judgments of the Corte suprema di cassazione and the Consiglio di Stato referred to by the applicant. Those judgments are not based on the original text of that decree, but on the rules applicable following the extension of the Terni tariff provided for by Law No 9/91. It is obvious that those judgments refer to the provisions laid down in Law No 1643/62 and Decree No 1165/63 only in so far as they were extended and made applicable, after the expiry date of 31 December 1992, by Law No 9/91. The Commission contends that those judgments run counter to the position advocated by the applicant.

50 Regarding Law No 9/91, the contested decision states merely that, on the basis of the information provided by the Italian authorities, the Commission understood that the decision to extend the Terni tariff until 2001 (with gradual phasing-out from 2002 to 2007) was adopted taking account of the almost simultaneous extension of the hydroelectric concessions. It is clear, however, from the wording of the law in question that it did not link the temporal extension of the Terni tariff with that of other self-producers' hydroelectric concessions and the assertion that the extension of the Terni tariff was 'necessary' is clearly without basis in the light of the content of Law No 1643/62 and Decree No 1165/63.

51 Nor is there any reason to consider that the extension of that tariff granted in 2005 by the disputed measure is specifically linked to the extension of the concessions granted six years earlier by Decree No 79/99. Not only does the wording of the disputed measure contain no indication to that effect, it is difficult to understand why, if its actual intention was to align the Terni tariff with the new expiry date fixed for the hydroelectric concessions, the legislature waited six years before extending that tariff. That inconsistency is highlighted by the fact that, a few months before the extension of the Terni tariff, Law No 266/05 granted a fresh extension of the hydroelectric concessions (until 2020), without however providing for a similar extension of the Terni tariff.

52 On the contrary, it is clear from Law No 80/05 that the extension of the favourable tariffs, including the Terni tariff, was granted generally in order to 'enable the development and restructuring of the production of the undertakings concerned', an objective expressly confirmed by the Italian authorities during the administrative procedure.

53 The Commission states that, had Decree No 1165/63 provided for an automatic extension of the Terni tariff in the event of extension of the concessions of other self-producers, it would have run counter to the principle that the compensation paid for expropriation of property should be determined according to the value of the property at the time of the expropriation (a value which, in the case of expropriation of a concession, depends also on its remaining duration). Once the compensation has been determined taking into account the value of the expropriated property, that compensation cannot be modified *ex post* on the basis of subsequent variations (upwards or downwards) in the value of the property, following legislative or regulatory amendments.

54 The choice of method of compensation for Terni does not imply an unlimited or perpetual right to maintenance of that preferential tariff, and the Commission states that it does not understand how the interpretation proposed by the applicant is confirmed by the case-law of the European Court of Human Rights.

Findings of the Court

55 According to settled case-law, categorisation as 'State aid' for the purposes of Article 87(1) EC requires that all the conditions set out in that provision be satisfied (Case

C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 25, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 121).

56 First, there must be intervention by the State or through State resources; secondly, the intervention must be liable to affect trade between Member States; thirdly, it must confer an advantage on the recipient; fourthly, it must distort or threaten to distort competition (Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 56, and *Chronopost and La Poste* v *UFEX and Others*, paragraph 55 above, paragraph 122).

57 Measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking and which, in that way, are similar to subsidies constitute benefits for the purposes of Article 87(1) EC (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19; and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 24), such as, among others, the supply of goods or services on favourable terms (see Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 44 and the case-law cited).

58 In the present case, the applicant argues that the disputed measure cannot be categorised as State aid as the condition relating to the grant of an advantage to the recipients is not satisfied, that measure being purely compensatory in nature.

59 It is common ground that certain forms of compensation granted to undertakings do not constitute aid.

60 Thus, in Joined Cases 106/87 to 120/87 *Asteris and Others* [1988] ECR 5515, the Court of Justice held in paragraphs 23 and 24 of its judgment that State aid — that is to say, measures of the public authorities favouring certain undertakings or certain products — is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals as compensation for the damage they have caused to those individuals and that, in consequence, such damages do not constitute aid for the purposes of Articles 87 EC and 88 EC.

61 The Court of Justice also stated that public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations and which comply with certain conditions do not fall within the scope of Article 87(1) EC (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 94).

62 In the present case, the Commission states that compensation granted by the State for an expropriation of assets does not normally qualify as State aid (recital 70 of the contested decision).

63 The disputed measure consists in the temporal extension of an initial measure granting a preferential tariff to Terni in respect of the supply of electricity, by way of compensation following the nationalisation of the hydroelectric branch of that company in 1962.

64 Article 6 of Decree No 1165/63, which defines the terms of that compensation, states as follows:

'ENEL shall be required to supply to Terni … 1 025 000 000 kWh (one billion twenty-five million) each year, at 170 000 kW (one hundred and seventy thousand) of power, the volume of electricity used in 1961 by Terni … for the activities not included in those referred to in Article 1 of Law No 1643[/62], and 595 000 000 kWh (five hundred and ninety-five million) per year, with additional power of 100 000 kW (one hundred thousand), for activities in progress at the date of entry into force of Law No 1643[/62].

Those supplies shall continue until 31 December 1992 at delivery points situated at Terni establishments to be determined by common agreement between the parties.'

65 That fixed volume of electricity had to be supplied in accordance with a preferential tariff as laid down in Article 7 of Decree No 1165/63:

'For the supply of 1 025 000 000 kWh … per year, the price of the supply per kWh shall be determined according to the average internal sale prices applied during the period 1959 to 1961 by Terni's electricity production branch … to the company's establishments operating in other sectors.

For the volumes of energy consumed by Terni … in excess of 1 025 000 000 kWh … per year up to 595 000 000 kWh … per year, the price referred to in the preceding paragraph shall be increased by ITL 0.45 per kWh.'

66 The measure in relation to which Terni is the recipient thus appears to be the combination of three factors: the volume of electricity; the price of that electricity; and the duration of the preferential scheme.

67 The Commission contends that the initial measure constituted compensation; that it was adjusted; and that the Terni tariff did not confer any advantage on the recipients throughout the duration fixed by the initial measure, that is, until 1992. Basing its arguments on a literal reading of Article 6 of Decree No 1165/63 and on the clear establishment of a duration of 30 years for the application of that tariff, the Commission maintains that the temporal extension of the tariff cannot be regarded as an integral part of the compensation and concludes that that tariff, as granted to the Terni companies with effect from 1 January 2005 in accordance with Article 11(11) of Law No 80/05, constitutes State aid for the purposes of Article 87(1) EC (recitals 78, 79, 94 and 117 of the contested decision).

68 The applicant disagrees with that conclusion, relying on a dynamic interpretation of the national compensation provisions. It argues that the latter establish a specific yet flexible compensation mechanism, under which the volume of electricity is the only one of the three factors determining the compensation, with the price and the duration having been fixed once and for all.

69 That mechanism aims to ensure the economic balance which Terni enjoyed prior to the nationalisation of 1962, a measure which was exceptional and discriminatory in relation to the other self-producers of electricity, whether or not they were competitors of Terni. In those circumstances, the legislature's intention was to compensate Terni through a mechanism under which Terni was equated with a virtual self-producer, the idea being to ensure continuous parallelism between the treatment of Terni as compared with non-expropriated self-producers.

70 In keeping with the underlying rationale of the compensation, the Italian authorities therefore extended the Terni tariff in line with the renewals of the self-producers' hydroelectric concessions, that extension being a mandatory act for the implementation of the compensation and not being severable therefrom.

71 That line of argument cannot be accepted.

72 In the first place, it should be noted that the present dispute can be traced back to the nationalisation of the electricity sector in Italy on the basis of Article 43 of the Italian Constitution, the legal implementing instrument for which was Law No 1643/62, as supplemented by Decree No 1165/63.

73 It is appropriate, therefore, to refer to that legislation in order to gain an understanding of all aspects of the nationalisation in question, including the compensation required by law in the event of a transfer of property decided upon unilaterally by the State.

74 It is clear from the wording of Article 6 of Decree No 1165/63, which is completely unambiguous, that the Terni tariff was granted by way of compensation for a very specific period, with no possibility of postponing the expiry date. That provision states that supplies of electricity to Terni 'shall continue until 31 December 1992', the reference to a specific date precluding from the outset any difficulties of interpretation as to the temporal scope of that provision.

75 Nor does the applicant refer to any provision of Law No 1643/62 or Decree No 1165/63 under which the duration of the application of the Terni tariff can be revised, with a possible extension of that duration beyond the expiry date laid down. By contrast, the possibility of reassessing the price for the supply of electricity to Terni was explicitly provided for by the national legislature in Article 8 of Decree No 1165/63.

76 Whilst noting that the expiry date of the self-producers' hydroelectric concessions had been taken into account by the national legislature at the time of the nationalisation in setting the date of 31 December 1992 in Decree No 1165/63, the applicant argues that the lack of express provision as to the possibility of adjusting the duration of the Terni tariff to match that of the concessions is attributable to the fact that the renewal of those concessions was, for the same legislature and at the same time, 'definitely unforeseeable'.

77 It should be noted that the future of those concessions following their expiry was already, by implication, an issue at the time when the duration of their validity was initially fixed. The possibility that they might be maintained, as a result of statutory renewal or a tendering procedure, was foreseeable, not 'definitely unforeseeable'. The case-file makes clear that the lack of express provision in the national legislation for the possibility of reassessing the duration of the Terni tariff appears to be simply the result of a choice on the part of the legislature to compensate Terni by granting a preferential tariff for the supply of electricity for a highly specific period, fixed definitively at the time of the nationalisation.

78 Even if it were necessary, as the applicant suggests, to consider the context and intention of the national legislature to interpret the national rules at issue, despite their clear wording, the analysis above cannot be called into question.

79 The applicant refers, first, to parliamentary *travaux préparatoires* and, more specifically, to documents from the parliamentary working session of the afternoon of 18 September 1962 and from the Senate session of the afternoon of 15 November 1962.

80 From the former, it refers to the following extract:

'What can we do, then, [to compensate Terni]? … The Commission had initially adopted a very specific criterion: provide the plants currently operated by Terni with the quantities of electricity consumed in 1961, at the rate for that year. We can, on the other hand, give a criterion.'

81 As to the Senate session, the applicant observes that it was specifically stated that the specific form of compensation granted to Terni was 'naturally intended not to disturb the internal balance of that undertaking'.

82 Those two references reveal, at most, concern on the part of the parliamentarians, first, to preserve Terni's financial balance which, in principle, ought to have fallen outside the scope of Law No 1643/62 and, secondly, to use a compensation criterion or mechanism, which in fact came through in the legislation in the choice of a specific method of compensation, as evidenced by the content of Article 6 of Decree No 1165/63.

83 It is common ground that the compensation in the present case does not consist in the payment of a lump sum determined according to the market value of the expropriated assets, but in a mechanism providing for the supply of electricity at the rate Terni would have paid if it had retained its production facilities for a period proportionate

to the remaining duration of the expropriated concession, which reflects the legislature's concern not to disturb Terni's internal balance.

84 It is true that the duration of application of the Terni tariff exceeds slightly the remaining duration of Terni's concession and that the Commission acknowledges that it is conceivable that the Italian authorities decided to make the expiry of that tariff coincide with the date of expiry of the Italian hydroelectric concessions (recital 77 of the contested decision).

85 The fact remains, however, that the national legislature chose a specific date for the expiry of the Terni tariff, without any other temporal indication in Decree No 1165/63, and that the applicant has not established that the parliamentary documents reveal a wish by the legislature to align the duration of application of the Terni tariff with that of the self-producers' hydroelectric concessions, in that the renewal of the latter was to entail automatic extension of that tariff.

86 Secondly, the applicant relies on the 'unambiguous interpretation of the national legislature's intention' by the Italian higher courts, referring in that regard to judgment No 17686 of 21 November 2003 of the Corte suprema di cassazione, and judgment No 606 of 21 February 2005 of the Consiglio di Stato, which confirmed the need, even after 1992, to ensure comparable treatment of Terni and non-expropriated self-producers.

87 The reference to those two judgments does not appear to be relevant, however, as they were delivered after Law No 9/91, which extended and made applicable, after the expiry date of 31 December 1992, the provisions providing for a preferential tariff to be granted to Terni by way of compensation.

88 Moreover, as the applicant states, those judgments were delivered 'in cases the subject-matter of which was entirely different from that of the present case'. The national courts did not have to rule on the issue whether, in extending the Terni tariff beyond 31 December 1992, the Italian authorities had infringed the obligation Member States have under Article 88(3) EC not to implement new aid without informing the Commission beforehand.

89 The question before those courts was whether, following changes to the national electricity tariff structure, Terni had to bear additional electricity supply costs. The courts answered that question in the negative, in the legal context described in paragraph 87 above, on the basis of the rationale behind the particular system for determining the price of supply of electricity to Terni used for the compensation paid to it following the nationalisation.

90 It was held that the purpose of the Terni tariff was to maintain for it the possibility of procuring electricity 'at costs largely similar to those Terni itself would have had if it had been able to continue using self-generated electricity' and that Terni could not therefore be charged 'additional costs [for the supply of electricity] which it would not have had to pay if it had been able to continue generating electricity for its own use and therefore using the thus self-generated electricity'.

91 That line of reasoning contradicts the applicant's position. Contrary to its assertions, the national courts did not consider that the electricity tariff which Terni had to pay to ENEL had to remain similar 'to that of the other self-producers', but that it had to correspond to the costs which 'Terni itself' would have borne if it had been able to continue using self-generated electricity, which was possible only on the basis of its hydroelectric concession and while that concession lasted.

92 As correctly pointed out by the Commission, in keeping with the rationale underlying the compensation as identified by the national courts with respect to the factor relating to electricity prices, the duration of the Terni tariff could not simply disregard the remaining duration of the expropriated concession and be pegged to future trends in the self-producers' hydroelectric concessions.

93 In the second place, it should be borne in mind that the legislation governing renewals of hydroelectric concessions subsequent to Law No 1643/62 and Decree No 1165/63 contradicts the interpretation of that legislation argued for by the applicant, to the effect that those legislative acts link the duration of the Terni tariff, through some kind of implied dynamic reference mechanism, to that of the self-producers' hydroelectric concessions, with the renewal of the concessions automatically entailing a temporal extension of the tariff.

94 That interpretation is contradicted by the fact that the temporal extensions of the Terni tariff, far from being automatic, required legislative intervention in order to adjust the compensation initially fixed by Decree No 1165/63.

95 The first temporal extension of the Terni tariff came about under Article 20(4) of Law No 9/91, which also renewed until 2001 the hydroelectric concessions then in existence. That law cannot be construed as done by the applicant, that is, as merely effecting until 2001 an automatic temporal extension of the Terni tariff and renewal of the self-producers' hydroelectric concessions, because it had a twofold objective: to prolong the application of the Terni tariff, but also to phase it out by the end of 2007 (see recital 19 of the contested decision), a date which was subsequent to — hence independent of — the expiry of the hydroelectric concessions existing at that time. Those two factors are inextricably linked and in fact show that the duration of the tariff is a question quite separate from that of the situation of the self-producers.

96 The separate nature of the future of the Terni companies in relation to that of the self-producers is confirmed by the fact that in 1999 the Italian authorities intervened solely in order to renew the existing hydroelectric concessions until 2010.

97 The second temporal extension of the Terni tariff came about under Article 11(11) of Law No 80/05, which provides:

'In order to enable the development and restructuring of the production of the undertakings concerned, the application of favourable tariff conditions for the supplies of electricity referred to in Article 1(1)(c) of Decree-Law No 25 of 18 February 2003, converted, with amendments, into Law … No 83 of 17 April 2003, shall continue to apply throughout the year 2010 under the tariff conditions applicable at 31 December 2004.'

98 There is no reference in that provision to hydroelectric concessions; nor is there anything to indicate that the legislature's intention was to align the duration of the Terni tariff with that of those concessions.

99 On the contrary, it appears from that provision that the Terni tariff is only one of a number of preferential tariff conditions, the temporal extension of which is intended to 'enable the development and restructuring of the production of the undertakings concerned'. In recital 67 of the contested decision, which is in the section summarising observations of the Italian authorities put forward during the formal investigation procedure, it is stated that the Italian authorities emphasise the following:

'[T]he contested extension of the tariff laid down in Article 11[11] of Law [No 80/05] is linked to a wide-ranging programme of investments which ThyssenKrupp is carrying out in the Terni-Narni industrial area. Under this action plan, new generating

capacity will be developed in the area. The tariff is therefore meant as a temporary solution until such generating capacity is in place, and its abolition would jeopardise the investments currently under way.'

100 As noted in recital 61 of the contested decision, in relation to 'the policy reasons of the second extension', the Italian authorities stated as follows:

'… the tariff is necessary to establish a level playing field between these energy-intensive companies active in Italy and their competitors in the [European Union], which also benefit from reduced energy prices (tariff or contract-based), pending the completion of ongoing infrastructure projects on electricity generation and transport. If the tariff was abolished, the companies in question would delocalise their operations outside the [Union]. This would inevitably lead to an industrial crisis and [severe] job losses in the affected regions. Therefore, according to [the Italian Republic], the extension of the tariff should be seen as a transitional solution.'

101 The matter at issue, therefore, is not a measure constituting the statutory continuation of the compensation granted to Terni following the nationalisation of its hydroelectric branch in 1962.

102 It should further be noted that the Terni tariff was extended almost six years after the renewal of the hydroelectric concessions through Decree No 79/99. Such a lapse of time weighs against there being a link as alleged between the disputed measure and the extension of those concessions.

103 The applicant argues that the Terni tariff was not extended at the same time, in 1999, because Law No 9/91 had introduced a 'gentle phase-out' scheme, with the application of that tariff to end in 2007. However, instead of supporting the applicant's position, that argument merely serves to confirm the dissociation of the future of the Terni tariff from that of the self-producers with hydroelectric concessions.

104 The finding of an objective link between the planned, gradual phase-out of the Terni tariff and the lack of temporal extension of that tariff in 1999 is not affected by the mere theory put forward by the applicant to the effect that the tariff in question was not extended in 1999 in anticipation of lower electricity prices following the liberalisation of the market, a theory which is, moreover, completely unsubstantiated by the applicant.

105 It appears, in reality, that in 1991 the Italian authorities decided to phase out gradually the application of the Terni tariff and that, in 2005, they changed their mind and the disputed measure complemented the investments made in particular by the applicant.

106 Lastly, it should be noted that, a few months after the temporal extension of the Terni tariff, Law No 266/05 granted a fresh extension of the hydroelectric concessions (until 2020) without, however, providing for a corresponding extension to the Terni tariff.

107 In the third place, the applicant's line of argument, based on the decision of 6 August 1991 and, more generally, the Commission's alleged contradictions, is irrelevant.

108 The applicant maintains, first, that it follows from the decision of 6 August 1991 'not to raise objections' to the application of Law No 9/91 and from an exchange of correspondence between the Commission and the Italian authorities that the Commission accepted the conclusion that the temporal extension of the Terni tariff in 1991 was a legal continuation of the compensation granted to Terni under Law No 1643/62 and Decree No 1165/63 and that, pursuant thereto, that tariff scheme was not subject to the Community rules on State aid.

109 It is common ground that, following the notification by the Italian authorities of Law No 9/91, Article 20(4) of which had provided for the first temporal extension of the Terni tariff, the Commission adopted the decision of 6 August 1991, under which it decided not to raise objections.

110 In the contested decision, the Commission states, without being contradicted by the applicant, that Law No 9/91 was notified to it at the same time as Law No 10/91, which also related to energy, and that the documents on the basis of which the Commission adopted its decision merely contained a brief description and assessment of the articles with State aid relevance. Article 20(4) of Law No 9/91, providing for the temporal extension of the Terni tariff, was not mentioned (see recitals 20 and 134 of the contested decision).

111 The Commission adds that, given such scant information, it is unfortunately impossible to trace back the reasoning followed at the time and, in particular, to know whether the Commission had examined and intended to approve the Terni tariff but that, in any event, both the notification from the Italian Republic and the approval decision referred to the entire law (recitals 135 and 136 of the contested decision).

112 Contrary to the applicant's assertions, the Commission declared 'compatible the aid contained in both laws under the State aid rules' (recital 20 of the contested decision).

113 That conclusion is supported by the wording of the decision of 6 August 1991, where the Commission states that, 'since energy savings are an objective of the Community energy policy, and after examining the financial incentives provided for by the laws [in question], in the light of the commitments of the Italian authorities under certain provisions, [it] has decided not to raise any objections to their application'. The reference to an environmental purpose and commitments of national authorities, referred to explicitly in the subsequent paragraphs of the same decision with, inter alia, the reference to the maximum ceiling provided for regional aid, confirms that the measures contained in Laws Nos 9/91 and 10/91, after having been initially considered aid, were authorised as being compatible with the common market, even though the decision of 6 August 1991 does not specify which derogation was applied.

114 It should also be borne in mind that the decision not to raise objections corresponds, according to the definition given in Article 4(3) of Regulation No 659/1999, which codifies and reinforces the practice with regard to examining State aid in accordance with the Community case-law (Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 5), to the situation where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 87(1) EC, and decides that the measure is compatible with the common market.

115 The applicant also argues, on the basis of a letter of 19 September 1991 from the Italian Ministry of Industry, Trade and Crafts, addressed to the Italian Ministry of State Involvement, that the Commission contacted the Italian authorities seeking

information concerning presumed aid granted to Ilva, formerly Terni, and that, after receiving a response from them to the effect that the temporal extension of the Terni tariff through Law No 9/91 was not aid but a sort of extension of the compensation provided for by Law No 1643/62, the Commission did not challenge that interpretation.

116 Beyond the disagreement expressed by the Commission as to the sending of that response by the Italian authorities, no official stance on the measure provided for by Law No 9/91, which was moreover already present in the decision of 6 August 1991, can be inferred from the mere silence on the part of the Commission, in the light of the wording of Regulation No 659/1999.

117 It should be noted, in any event, that the temporal extension of the Terni tariff through Law No 9/91 does not constitute the disputed measure which led to the adoption of the contested decision, the subject-matter of the present proceedings, and that the applicant's line of argument based on the decision of 6 August 1991 and an alleged exchange of correspondence between the Commission and the Italian authorities is part of the discussion on the Commission's alleged infringement of the principle of the protection of legitimate expectations, which is the subject-matter of the last ground of annulment put forward by the applicant.

118 The applicant maintains, secondly, that the contested decision is self-contradictory, as the Commission categorises the disputed measure as State aid, whilst acknowledging that the rationale behind the temporal extensions consists in 'retain[ing] the parallelism in treatment with those hydropower producers who had seen their concessions renewed' (recital 92 of the contested decision), that the initial duration had been aligned with the expiry of the hydroelectric concessions (recital 77 of the contested decision), or that the compensation method chosen by the Italian legislature in 1962 was justified because it enabled 'neutralising the risk of additional damage that might have arisen to Terni, over the years, in case of an increase in energy prices' (recital 73 of the contested decision), this latter statement being implicit recognition of the fact

that the harm suffered by Terni following the expropriation is closely linked to the advantage potentially enjoyed by the other self-producers.

119 That line of argument is based on a partial and subjective reading of the contested decision and, more specifically, recital 92 thereof, which summarises the Commission's analysis and reads as follows:

'As regards the extensions in time of the Terni tariff, the Commission appreciates that their rationale was to retain the parallelism in treatment with those hydropower producers who had seen their concessions renewed. However, such parallelism, which lies at the heart of the compensatory mechanism, was foreseen in the expropriation arrangement only for 30 years, not indefinitely. Therefore, for the reasons already explained in [recitals] 73 to 78 above, these extensions did not have a compensatory nature.'

120 The Commission adds the following in recital 93 of the contested decision:

'This conclusion is even more obvious for the second extension of the tariff. This extension interrupted a phasing-out mechanism intended to ease the companies' transition to the full tariff, which signalled the Italian authorities' conviction that the companies had been fully compensated for. [The Italian Republic] itself has, indeed, extensively explained the reasons which led to this second extension, and which are related to industrial policy alone (see [the Italian Republic's] comments in [recital] 61 above).'

121 There is therefore no ambiguity or contradiction in the Commission's reasoning; it considers that the rationale which prevailed in the choice of method of compensation for Terni cannot justify an extension of the application of the Terni tariff beyond the 30-year period laid down very specifically by the national legislature.

122 Lastly, it should be noted that the applicant's reasoning would lead to compensation being granted for an indefinite period and therefore in an unlimited volume, the permissibility of which has not been demonstrated by the applicant, either under national law or the European Court of Human Rights' case-law.

123 It should be borne in mind that the decision by the Italian authorities to nationalise Terni's hydroelectric branch was taken pursuant to Article 43 of the Italian Constitution, which provides that '[i]n the public interest, the law may reserve at the outset or transfer, by means of expropriation and subject to compensation, to the State, to public bodies, or to consortia of workers or consumers, specific undertakings or categories of undertaking which have to do with essential public services or sources of energy, or which act as monopolies, and are of prime importance for the public interest'.

124 The applicant states that, according to the case-law of the Corte suprema di cassazione and the Corte costituzionale (Constitutional Court), the compensation must be 'appropriate and adequate', 'genuine' and correspond 'to the value of the property having regard to its essential characteristics as evidenced by their potential economic use'.

125 The Commission does not challenge those assertions and refers to judgment No 5/1980 of 30 January 1980 of the Corte costituzionale, where it was held:

'The compensation guaranteed to the expropriated party …, even though it does not constitute full reparation for the loss suffered — in so far as it is necessary to reconcile the rights of the individual with the general interest which the expropriation seeks to serve — cannot, however, be set at a derisory or purely symbolic level but must constitute genuine compensation. In order to make that possible, reference must be had, for the calculation of the compensation, to the value of the property with its essential characteristics as evidenced by its potential economic use, in accordance with the law.'

126 It is common ground that the method of compensation provided for in Article 6 of Decree No 1165/63 was drawn up according to the characteristics of the nationalised assets, namely the electricity production facilities operated on the basis of a concession the duration of which would enable the concession-holder to amortise the investment made.

127 The Italian Republic thus chose to grant compensation, not in the form of a lump-sum payment determined according to the market value of the expropriated assets, but in the form of supply to Terni of a given volume of electricity at the price it would have paid if it had retained its facilities. In that context, the national authorities logically took into account the remaining duration of Terni's concession to determine the duration of application of the Terni tariff, as the expiry date of the tariff was even slightly subsequent to that of the concession.

128 As stated by the Commission in recital 75 of the contested decision, the overall amount of the compensation thus depended on the duration of the Terni tariff.

129 In the applicant's submission, the duration of that tariff must, in keeping with the underlying rationale of the compensation chosen by the national legislature, be extended systematically in alignment with the non-expropriated self-producers' renewals, in order to neutralise 'continually' the adverse effects of nationalisation, in the light of changes in electricity prices.

130 The applicant's interpretation of Article 6 of Decree No 1165/63 would lead to a situation where the compensation, following the nationalisation of Terni's hydroelectric branch, would be granted for an indefinite period, where the calculation of its amount would be contingent on factors occurring subsequently — even several years subsequently — to the nationalisation and, consequently, both the amount of the compensation and the value of the nationalised assets would be undetermined and unlimited.

131 Yet the applicant has not referred to any rule, principle of Community law, provision of national law or decision of a national court on which to base its interpretation, which would lead to the grant of compensation for an indefinite period or providing more generally for the possibility of taking account of events subsequent to the fixing of the compensation in order to alter the estimate of the nationalised or expropriated asset and, therefore, the scope of the compensation.

132 The applicant, moreover, seems to recognise the impossibility of such an interpretation, in acknowledging the content of a provision referred to by the Commission, namely Article 32 of Decree No 327 of the President of the Republic of 8 June 2001 consolidating the legislative and regulatory provisions on expropriation in the public interest. It states in that regard that 'it is of course true that the compensation granted for expropriation cannot be a measure of indefinite duration' and that it 'must be clearly established in a foreseeable manner at the time of expropriation'. Article 32 of that decree provides that 'the compensation for expropriation is calculated on the

basis of the features of the assets at the time of the transfer agreement or on the date of publication of the expropriation decree'.

133 The applicant states, however, that the 'flexible original compensatory mechanism, in the light of the exceptional nature of the Terni expropriation, also complies with the principles laid down in Article 1 of the First Protocol to the [ECHR] and the case-law of the European Court of Human Rights'.

134 That article, entitled 'Protection of property', reads as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

135 That provision lays down the right to own property whilst setting out the limits thereof; the reference to that text alone cannot form a basis for the applicant's position in the present case.

136 Regarding the case-law of the European Court of Human Rights, the applicant refers to the judgment of 11 April 2002, *Lallement v. France*, which, it argues, is to the effect that the requirement of compensation which is 'reasonably related to the value [of the expropriated property]' may 'sometimes call for amounts which are significantly higher than the value of the expropriated property alone'.

137 In that judgment, which concerned the expropriation of property used for agricultural purposes, the European Court of Human Rights observed that a measure interfering with the peaceful enjoyment of a person's possessions, such as expropriation, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the area of expropriation, that balance is generally achieved when the expropriated party receives compensation which is 'reasonably related' to the market value of the property, even if the legitimate objectives of public interest might weigh in favour of compensation well under the full market value. The European Court of Human Rights took the view that, notwithstanding the discretion the State has when the expropriated property is the expropriated party's 'work tools', the compensation paid is not reasonably related to the value of the property, in one way or another, if it does not cover that specific loss or does not afford the possibility of using those tools in some other way after the expropriation (paragraphs 18, 20 and 23).

138 However, not only is the analogy drawn by the applicant between Terni's situation and that which gave rise to that judgment, namely the expropriation of agricultural land which interfered with a farmer's means of production and thereby his ability to pursue his farming operations, questionable, but furthermore the judgment of the European Court of Human Rights contains no explicit statement to the effect that compensation may 'sometimes call for amounts which are significantly higher than the value of the expropriated property alone'.

139 That judgment is based on the reasonable relationship which must exist between the amount of compensation and the given value of the expropriated property, a ground which is incompatible with the applicant's interpretation of Article 6 of Decree

No 1165/63, which is liable to lead to there being an unlimited or perpetual right to enjoy the Terni tariff, due to the lack of temporal specification.

140 It follows from all the foregoing that it cannot be accepted that the temporal extension of the Terni tariff granted in 2005 by the disputed measure was an integral part of the compensation owing to Terni for the expropriation suffered by it in 1962. The applicant's assertion to that effect is based more on an extrapolation from the underlying rationale of the compensation chosen by the national legislature, which in turn was based on equating Terni with a virtual self-producer. It aims at departing from the temporal limit fixed for the application of the Terni tariff and leads to a distortion of the clear and precise terms of Article 6 of Decree No 1165/63.

141 The Commission was therefore correct, after observing that there could be no doubt that the provision of electricity at lower prices as compared with the ordinary electricity tariff constituted a clear economic advantage for the beneficiaries, who saw their production costs reduced and their competitive position strengthened (recital 99 of the contested decision), in finding that the preferential tariff granted to the Terni companies as from 1 January 2005 constituted State aid within the meaning of Article 87(1) EC.

142 It follows that the plea alleging infringement of Article 87(1) EC must be rejected.

The plea alleging infringement of essential procedural requirements and infringement of Articles 87 EC and 88 EC due to a manifest error of assessment of the economic study produced by the Italian authorities

Infringement of essential procedural requirements

— Arguments of the parties

143 The applicant states that, by letter of 20 February 2007, the Commission expressly asked the Italian Republic to provide it with information enabling it to make an objective comparison of the value of the expropriated assets and the value of the advantage obtained through the Terni tariff from the start of that scheme until 2010, with updating of the values in question so as to make a comparison possible. It adds that, in that letter, the Commission stated that the information requested was 'necessary in order to reach a conclusion', which had led the Italian authorities and the recipient companies, in the exercise of their rights as part of their participation in the formal investigation procedure, to consider the results of the comparative analysis requested as decisive for the issue of categorisation of the Terni tariff as State aid.

144 In response to that request, the Italian authorities provided the Commission in April 2007 with a study carried out by an independent consultant at the request of the Terni companies, which states that the total value of the advantage gained from the Terni tariff is lower than the book value (updated 2006 value) of the property

expropriated because of nationalisation and, accordingly, concludes that there was no overcompensation.

145 Yet in the contested decision the Commission states, spontaneously and in an 'instrumental' manner, that the study was completely irrelevant, taking the view that the adequacy of the compensatory mechanism could be measured only at the time of expropriation (*ex ante*) and not subsequently (*ex post*).

146 The contested decision was adopted in conditions which prevented the applicant from exercising fully its rights of defence and participating in the procedure with respect to the issue of what the subject-matter of that procedure was. In failing to inform the applicant of the radical change in its assessment in the course of the procedure, the Commission diverted the applicant's attention to aspects which it ultimately found to have no bearing on the contested decision. This resulted in a serious infringement of the principle of *audi alteram partem*, which is the principal and inviolable guarantee of any administrative procedure, including a Community procedure. No administrative procedure can disregard the fundamental principle of the rights of defence of individuals participating in such a procedure.

147 The case-law referred to by the Commission in its written submissions is based on an incorrect reading of Article 20 of Regulation No 659/1999 and does not take account of Article 88(2) EC, which provides for a procedure in which the principle of *audi alteram partem* is observed, as the Commission is required to 'giv[e] notice to the parties concerned to submit their comments'.

148 The applicant argues that it is clear that the Member State is not the only legal party concerned by a measure declaring an aid measure incompatible for the purposes of Article 87 EC. On the contrary, both the recipient of the aid and competing undertakings, in their capacity as 'interested parties', are concerned directly by the decision-making power conferred on the Community administration and by its related power to order recovery of unlawful aid, it being noted that they have standing to bring an action against a negative decision of the Commission. The rights of the defence are therefore linked to administrative acts which are adverse for all addressees (that is, both the State and third parties excluded from the aid censured by the Commission) and that disadvantageous situation should be considered as the condition of application of the principle of *audi alteram partem* in respect of all addressees.

149 The case-law referred to by the Commission recognises, at the very least, that the 'the right [of interested parties other than the Member State] to be involved in the administrative procedure [must be ensured] to the extent appropriate in the light of the circumstances of the case'. Yet in the present case one of the decisive points for ruling on the compatibility of the Terni tariff with the Community rules on State aid is the assessment of the Terni companies' economic and financial situation at the time of the expropriation effected by Law No 1643/62. According to the applicant, that point is equally decisive, whether the outcome of the case depends on the comparison of the updated value of the assets expropriated from Terni and the value of the Terni tariff, updated as at 31 December 2010, or whether the point in dispute concerns solely the possibility of regarding the recent temporal extension of that tariff as additional compensation for the exceptional expropriation suffered by Terni.

150 The applicant argues, lastly, that, even without having regard to the foregoing, the Commission nevertheless committed a serious infringement of essential procedural requirements during the formal investigation procedure, one adverse both to it and to the Italian Republic. Even taking a restrictive view of the applicant's rights of defence, the contested decision is still unlawful because it is vitiated by an irremediable defect of contradiction between the investigation, the statement of reasons and the enacting terms of the contested decision. The persons concerned by the procedure were not

given adequate guarantees enabling them to present counterarguments against the body which initiated the procedure regarding a point which turned out to be essential for the adoption of the contested decision. That shortcoming effectively rendered nugatory the detailed response of the Italian Republic to the questions asked by the Commission in its letter of 20 February 2007.

151 The Commission replies that it follows from settled case-law that, in the procedure for reviewing State aid, the recipients of the aid cannot themselves claim a right to debate the issues with the Commission, may not avail themselves of the rights of defence and may not avail themselves of those of the Member State against which the procedure has been instituted.

152 For the sake of completeness, the Commission adds that in the present case there has been no infringement of the principle of *audi alteram partem* or of the Italian Republic's rights of defence. The Commission further states that at no time during the proceedings had it indicated to the Italian Republic that it would make an *ex post* assessment of the adequacy of the Terni tariff without examining whether the temporal extension of that tariff, as provided for under the disputed measure, could be justified as being compensation for the expropriation suffered by Terni in 1962. That statement, the Commission argues, is confirmed by the fact that, during the proceedings, the Italian authorities and the Terni companies put forward arguments in the proceedings in order to establish that the extension had to be regarded as an integral part of the mechanism provided for *ex ante* under Decree No 1165/63 for Terni's compensation.

153 The Commission states that, although the study produced by the Italian authorities was found not to be relevant, it nevertheless examined the content of it, concluding that the methods on which it was based were inaccurate and/or incorrect. It adds that, in stating that 'the [contested] decision is in any event unlawful because it is vitiated by an irremediable defect of contradiction between the investigation, the statement

of reasons and the enacting terms', the applicant puts forward a new plea in law which must be held to be inadmissible under Article 48(2) of the Rules of Procedure.

— Findings of the Court

154 It should be borne in mind that, by letter of 19 July 2006, the Commission informed the Italian Republic of its decision to initiate the procedure provided for in Article 88(2) EC and that, by the publication of that decision in the *Official Journal of the European Union*, it called on interested third parties to submit their comments on the disputed measure.

155 By letter of 20 February 2007, after finding that further information was 'necessary in order to reach a conclusion', the Commission requested the Italian Republic to provide it with, inter alia, information enabling it to make an objective comparison of the value of the expropriated assets with the value of the advantage gained from the Terni tariff since the start of those arrangements until 2010, with updating of the values in question.

156 In response to that request, the Italian authorities provided the Commission in April 2007 with a study carried out by an independent consultant at the request of the Terni companies, which states that the total value of the advantage gained from the Terni tariff is lower than the book value (updated 2006 value) of the property expropriated because of nationalisation and, accordingly, concludes that there was no overcompensation.

157 Recitals 82 and 83 of the contested decision indicate that the Commission found, as a matter of primary importance, that that study was not relevant, because any analysis of the adequacy of the compensation mechanism could only be carried out *ex ante*, that is to say, at the time of expropriation. The Commission accordingly concluded that, until the expiry of the original compensatory tariff arrangement — and only until that date — the beneficiaries had not enjoyed any advantage. According to the Commission, that conclusion could not be called into question as a result of applying alternative 'benefit and loss' calculations, especially where they were carried out retrospectively.

158 The Commission nevertheless also examined, as a matter of secondary importance, the substance of the study provided by the Italian authorities, and found that the methods on which it was based were inaccurate and incorrect, as it systematically underestimated the tariff advantage for the Terni companies, and in all likelihood overestimated the value of the expropriated assets (recitals 87 to 90 of the contested decision).

159 The applicant states, first of all, that the contested decision was adopted in conditions which prevented the applicant from exercising fully its rights of defence and 'participating in the procedure with respect to the issue of what the subject-matter of that procedure was'. After obtaining a study containing the comparative analysis requested, the Commission, spontaneously and without informing it, found that study to be completely irrelevant. By failing to inform it of the radical change in its assessment in the course of the procedure of the information requested in the letter of 20 February 2007 and therefore of the disputed measure, the Commission did not enable the applicant to present counterargument, during the formal investigation procedure, against the Commission's position regarding the unlawfulness of the temporal extension of the Terni tariff in the light of the rules on State aid.

160 That line of argument cannot be accepted.

161 With respect to the alleged infringement of the rights of the defence, it is settled case-law that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its Community obligations, for granting the aid (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 29, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 81).

162 In the procedure for reviewing State aid, interested parties other than the Member State responsible for granting the aid therefore cannot themselves claim a right to debate the issues with the Commission in the same way as may that Member State (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59, and *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 161 above, paragraph 82). Therefore, they essentially play the role of a source of information for the Commission (Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 59).

163 In that regard, none of the provisions on the procedure for reviewing State aid reserves a special role, among the interested parties, to the recipient of aid. Moreover, the procedure for reviewing State aid is not a procedure initiated 'against' the recipient of the aid that entails rights on which it may rely and which are as extensive as the rights of the defence as such (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 161 above, paragraph 83, and Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 193).

164 The applicant argues that the aforementioned case-law is based on an incorrect reading of Article 20 of Regulation No 659/1999 and does not take account of Article 88(2) EC, which provides for a procedure in which the principle of *audi alteram partem* is observed, as the Commission is required to 'giv[e] notice to the parties concerned to submit their comments'.

165 Suffice it to observe that that case-law was intended precisely to provide an interpretation of Article 88(2) EC and Articles 6 and 20 of Regulation No 659/1999, which provides for the right of interested parties to submit observations during the formal investigation procedure.

166 Moreover, contrary to the applicant's assertions, it cannot be regarded as the addressee of the contested decision, even if it does declare the aid it received incompatible. The sole addressees of decisions adopted by the Commission in the field of State aid are the Member States concerned (see Article 25 of Regulation No 659/1999 and *Commission* v *Sytraval and Brink's France*, paragraph 162 above, paragraph 45).

167 In that connection, it should be pointed out that the Community Court cannot, on the basis of the general legal principles, such as those of the right to be heard or sound administration, relied on by the applicant, extend the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing State aid (*Technische Glaswerke Ilmenau* v *Commission*, paragraph 163 above, paragraph 194). Nor can this be permitted on the ground that the applicant has legal standing to bring an action against the contested decision.

168 Lastly, it has already been held that there is nothing in the legislation on State aid or in the case-law to suggest that the Commission is required to hear the views of the recipient of State resources on the Commission's legal assessment of the measure in question or to inform the Member State concerned — or, a fortiori, the recipient of the aid — of its position before adopting its decision, where the interested parties and the Member State concerned have been given notice to submit their comments (*Technische Glaswerke Ilmenau* v *Commission*, paragraph 163 above, paragraph 198).

169 In any event, it should be remembered that the applicant was called on to submit comments and that it availed itself of that opportunity by submitting detailed observations to the Commission.

170 It stated that the Terni tariff was the legitimate compensation to which Terni was entitled following the expropriation of its assets and could not therefore be qualified as State aid. It retraced the history of that tariff, pointing out that all the temporal extensions of the Terni tariff beyond 1991 were concomitant with the general renewal of the hydroelectric concessions for other producers, and thus in line with the principle that there should be no discrimination between Terni and other self-producers who had not been expropriated and who could therefore continue to produce and consume electricity at very low cost (recitals 43 and 44 of the contested decision).

171 The applicant thus put forward, during the formal investigation procedure, arguments intended to establish that the temporal extension of the Terni tariff had to be considered as an integral part of the criterion provided for *ex ante* by Article 6 of Decree No 1165/63 in order to compensate Terni.

172 It is precisely on this point, however, that the Commission made its primary finding in order to conclude that the disputed measure constituted State aid for the purposes of Article 87(1) EC. The applicant is therefore incorrect in stating that the Commission prevented it from 'participating in the procedure with respect to the issue of what the subject-matter of that procedure was' or that it was 'unjustifiedly prevented from exercising its right to present counterargument to the position of the Community administration regarding the unlawfulness of the extension of the preferential tariff in the light of the rules on State aid'.

173 Moreover, the applicant's assertion, to the effect that the Commission made a radical change in its assessment in the course of the procedure of the information requested in the letter of 20 February 2007 and therefore of the disputed measure, disregards the purpose of the formal investigation procedure and is based on a strained interpretation of the Commission's letter of 20 February 2007 containing the request for information.

174 The Commission did consider it necessary to gather information on the book value of the property transferred to the State at the time of the nationalisation. However, that was not the only reason for the request for information contained in the letter of 20 February 2007 and the wording to the effect that the information requested was necessary 'in order to reach a conclusion' in the case at hand must be placed back in the context of the formal investigation procedure and its objectives, which are to enable interested parties to express their views and the Commission to be fully enlightened with regard to all the information in the case before taking its decision (see, to that effect, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

175 The scope of the formal investigation procedure cannot be other than as described above and, specifically, the formal investigation procedure cannot accommodate a definitive ruling on certain aspects of the case before the final decision is adopted.

176 It cannot be inferred from the letter of 20 February 2007, as argued by the applicant, that the Commission had considered it 'decisive, for the purposes of ruling on the categorisation of the temporal extension of the Terni tariff as State aid, to demonstrate that the (updated) value of that compensation was equal to or lower than the value of the expropriated property'. That statement is based on an incorrect reading of that letter.

177 In any event, the Commission never indicated either to the Italian authorities or to the Terni companies that it was conducting an *ex post* assessment of the adequacy of the Terni tariff without examining whether the temporal extension of that tariff under the disputed measure could be justified as being compensation for the expropriation suffered by Terni in 1962.

178 It follows from the foregoing considerations that the complaint of infringement of the applicant's rights of defence must be rejected.

179 Secondly, the applicant states that, even if one accepts (*quod non*) a restrictive view of the rights of defence of interested parties in the procedure opened pursuant to Regulation No 659/1999, the contested decision would still be unlawful because it is vitiated by an irremediable defect of contradiction between the investigation, the statement of reasons and the enacting terms of the contested decision.

180 The Commission contends that the complaint is inadmissible under Article 48(2) of the Rules of Procedure, which provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

181 It must be observed, however, that that plea cannot be considered new, as reference was made to it previously in the application. The Commission's form of order seeking dismissal of the plea must, accordingly, be rejected.

182 The exact scope of the plea does remain difficult to ascertain, as a mere reference to an 'irremediable defect of contradiction between the investigation, the statement of reasons and the enacting terms of the contested decision' does not enable a precise determination of unlawfulness to be made, in the light of a possible infringement by the Commission of a legislative provision or of a general principle of Union law.

183 In the reply, the statement of the plea is followed by this explanation: '[t]he persons concerned by the procedure were not given adequate guarantees enabling them to present counterarguments against the body which initiated the procedure (the Commission) regarding a point which turned out to be essential for the adoption of the contested decision'. That line of argument shows that that plea was not a different one from the plea alleging infringement of the applicant's rights of defence, which, as stated in paragraph 178 above, was rejected.

184 Lastly, it should be noted that, in the reply, it is stated that 'the Commission nevertheless committed a serious infringement of essential procedural requirements during the formal investigation procedure, one adverse both to it and to the Italian State, which were both unjustifiably prevented from exercising their right to present counterargument to the position of the … administration regarding the unlawfulness of the extension of the preferential tariff in the light of the rules on State aid'.

185 In so far as the applicant intended to raise a plea alleging infringement of the Italian Republic's rights of defence, that plea must be dismissed as inadmissible and, in any event, as unfounded.

186 It must first be recalled that breach of the rights of the defence is an irregularity which by its nature is subjective (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 425 and the case-law cited), and which must therefore be raised by the Member State concerned itself (see, to that effect, *Technische Glaswerke Ilmenau* v *Commission*, paragraph 163 above, paragraph 203).

187 Accordingly, the applicant is not entitled to plead an infringement of the rights of defence of the Member State concerned, in this case the Italian Republic.

188 Even if such a plea were admissible, it could not be upheld as well founded.

189 It is settled case-law that the principle of observance of the rights of the defence requires that the Member State concerned be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties under Article 88(2) EC and on which the Commission proposes to base its decision and that, in so far as the Member State has not been afforded the opportunity to comment on such observations, the Commission may not incorporate them in its decision against that State. However, if such an infringement of the right to be heard is to result in an annulment, it must be established that, had it not been for such an irregularity, the outcome of the procedure might have been different (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraphs 12 and 13, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 30 and 31).

190 In the present case, suffice it to note that it has in no way been claimed that the Commission based the contested decision on the observations of interested third parties in respect of which the Italian Republic was not given an opportunity to express its views. In accordance with the requirements of Article 88(2) EC and Article 6(2) of

Regulation No 659/1999, the Italian Republic was given an opportunity to submit its comments on the decision to initiate the procedure and the comments submitted in that connection by the interested parties were sent to it, which prompted a reaction on its part as expressed by letter of 22 December 2006 (recital 6 of the contested decision).

191 The applicant argues that, by failing to inform the Italian Republic of the radical change in its assessment in the course of the procedure of the information requested in the letter of 20 February 2007 and therefore of the disputed measure, the Commission did not enable the Italian Republic, like it, to present counterargument, during the formal investigation procedure, against the Commission's position regarding the unlawfulness of the temporal extension of the Terni tariff in the light of the rules on State aid.

192 It should be noted that, in its comments lodged with the Commission during the formal investigation procedure, the Italian Republic submitted that neither the original tariff arrangement — which constituted Terni's legitimate compensation for the expropriation of its assets — nor its further extensions in time constituted State aid. To substantiate that claim, the Italian Republic referred to a number of rulings of the Court of Justice according to which certain forms of compensation to undertakings, notably compensation for damages and services of general economic interest, do not constitute State aid (recital 58 of the contested decision).

193 Recital 59 of the contested decision further states:

'As regards the State aid clearance of Terni's tariff, [the Italian Republic] underlines that Law [No 9/91], laying down the first extension of the tariff, was duly notified

to the Commission and approved by it. The subsequent extensions in time of the tariff, which are concomitant with the extensions of hydroelectric concessions for hydropower producers, follow the same logic, which was never challenged by the Commission. Therefore, according to [the Italian Republic], the Terni tariff should be considered an existing non-aid measure.'

194 Thus, during the formal investigation procedure, the Italian Republic clearly expressed its view on the compensatory nature of the disputed measure.

195 Moreover, as stated earlier, the applicant's assertion referred to in paragraph 191 above disregards the purpose of the formal investigation procedure and is based on an incorrect reading of the Commission's letter of 20 February 2007.

196 Lastly, it must be borne in mind that neither the provisions on State aid nor the case-law require the Commission to hear the views of the recipient of State resources on its legal assessment of the measure in question or to inform the Member State concerned — or, a fortiori, the recipient of the aid — of its position before adopting its decision, where the interested parties and the Member State concerned have been given notice to submit their comments (*Technische Glaswerke Ilmenau* v *Commission*, paragraph 163 above, paragraph 198).

The manifest error of assessment of the economic study produced by the Italian authorities

— Arguments of the parties

197 The applicant argues that the Commission disputes the validity of the study produced by the Italian authorities on two points.

198 First, that study overestimates the value of the expropriated sites, by failing to take account of the fact that those sites and the assets relating to those sites should have been restored to the State at the end of the concession.

199 The applicant states that the calculation of the value of the expropriated property, according to Terni's annual accounts, is exactly what the Commission had requested and that the original accounts, certified by a notary, comply fully with the applicable companies and accounting legislation, including the obligation to 'amortise' proportionately the value of the property according to the remaining duration of any concessions.

200 Not only does the Commission's line of argument amount to a reversal of the burden of proof, it does not take account of the fact that, had the expropriation not taken place, the hydroelectric concessions held by Terni would have been extended several times until 31 December 2020, as were all the other hydroelectric concessions held by self-producers whose assets had not been expropriated.

201 The applicant claims, secondly, that, according to the Commission, the study in question underestimates the value of the advantage conferred by the Terni tariff in that, in order to calculate that tariff advantage, the amount actually paid by Terni should have been compared with the tariff normally paid by a non-self-producing operator having a similar consumption profile to Terni's.

202 The applicant argues that Terni and its successors have been exempted from certain tariff-related factors (including the thermic surtax) by statutory and legislative provisions which are completely distinct from and subsequent to Law No 1643/62 and its implementing decree but, in keeping with the rationale of comparing with the self-producers, form the basis of that law. It is thus incorrect to assert that, in order to estimate the value of the advantages conferred, the Terni tariff should be compared with the 'ordinary tariff' (including the thermic surtax) which should be paid by a non-self-producing operator. The same line of reasoning applies to the calculation of the 'compensatory advantages' which the Terni companies received from the electricity sector compensation fund between 2000 and 2006.

203 Accordingly, in the applicant's view, the advantage should be calculated according to the price which the Terni companies would have had to pay in any event pursuant to the aforementioned provisions (distinct from the Terni tariff), and not according to the regular price on the electricity market, as incorrectly argued by the Commission.

204 The Commission reiterates that it examined the substance of the study produced by the Italian authorities only in the alternative and that, if its conclusions on the irrelevance of the study are upheld, the arguments put forth in the second part of this plea are in any event ineffective.

205 It observes that the applicant does not dispute the observation, expressed in recital 90 of the contested decision, to the effect that '[t]he study simply takes as the book value of the assets the difference between the item "plant and machinery" in Terni's 1962 budget … and the same item the following year', whereas 'there is no concrete proof that the difference is attributable exclusively to the loss of the hydropower plant'. That objection suffices to establish the study's low credibility, since it is not proven that the adequacy of the compensation was examined solely in the light of the hydroelectric installations which were expropriated.

206 The Commission contends that the study submitted by the Italian authorities does not specify whether the value of the installations as stated in Terni's 1963 accounts took account of the fact that, at the time of expiry of the concession, a large share of those installations would be transferred over to the State. The ambiguity concerning that fundamental aspect is not dispelled by the applicant's formal observation regarding the scope of accounts certified by a notary. Regarding the applicant's assertion that, had the expropriation not taken place, Terni's hydroelectric concession would have been extended until December 2020, the Commission states that, in order to assess the value of the property expropriated in 1962, reference must be had to the situation prevailing at the time of the expropriation, without it being possible to consider the changes which, had the expropriation not taken place, could have taken place later, and that the date of 2020 is, in any event, incorrect, since the temporal extension of the hydroelectric concessions until 2020, provided for by Law No 266/05, was held to be unconstitutional.

207 Regarding the comparative analysis of the tariffs, the Commission states that the study in question incorrectly takes as its reference point the price paid by a self-producer (instead of the regular market price), and fails to consider Terni as a virtual self-producer which, until 1992, was part of the compensation granted to Terni. If Terni had been expropriated without compensation, it would not have been equated with a 'virtual self-producer' and, consequently, it would have had to pay the regular market price for its electricity (and not the price paid by a self-producer exempted from

certain tariff factors). Consequently, in order to assess the amount of the compensation granted to Terni, it is appropriate to calculate the difference between the market price (that is, the price with no compensation) and the reduced tariff granted to Terni (equated with a virtual self-producer) by way of compensation to it.

— Findings of the Court

208 It should be borne in mind that the Commission examined the substance of the study in question only in the alternative and that it found, as a matter of primary importance, that that study was not relevant, because any analysis of the adequacy of the compensation mechanism could only be carried out *ex ante*, that is to say, at the time of expropriation. The Commission accordingly concluded that, until the expiry of the original compensatory tariff arrangement — and only until that date — the beneficiaries had not enjoyed any advantage. According to the Commission, that conclusion could not be called into question as a result of applying alternative 'benefit and loss' calculations, especially where they were carried out retrospectively (recitals 82 and 83 of the contested decision).

209 The applicant does not explicitly dispute the approach taken by the Commission in regarding the study to be irrelevant in the categorisation of the disputed measure under the rules on State aid. In its second plea, it has not asserted that there have been any procedural defects arising from any alleged infringement of its rights of defence.

210 It did, however, dispute the well-foundedness of the conclusion of that approach in the plea alleging infringement of Article 87(1) EC. It should be borne in mind, however, that the Commission was correct in finding that the temporal extension of the

Terni tariff granted in 2005 under the disputed measure was not an integral part of the compensation owing to Terni for the expropriation suffered by it in 1962 and that the preferential tariff granted to the Terni companies with effect from 1 January 2005 constituted State aid for the purposes of Article 87(1) EC.

211 In those circumstances, the plea alleging a manifest error of assessment on the part of the Commission with regard to the economic study produced by the Italian authorities must be rejected as ineffective.

The plea alleging infringement of Article 88(3) EC

Arguments of the parties

212 The applicant claims that the contested decision is unlawful, in that the Commission states that the Italian Republic implemented the disputed measure contrary to Article 88(3) EC and consequently orders the Italian Republic to recover the amounts granted pursuant to Law No 80/05.

213 It states that the disputed measure did not repeal Law No 9/91, which provided for a temporal extension of the Terni tariff until 31 December 2007, with a gradual reduction in quantities from 2002 to 2007, but in fact 'exceeded' it, in that it fixed the quantities to which the undertakings were entitled on 31 December 2004, whilst extending

the application of that tariff in time, until 2010. Accordingly, if the disputed measure was unlawful, the provisions of Law No 9/91 would continue to apply until they came to their normal end. Yet, by way of precaution, in 2006 the Autorità per l'energia elettrica e il gas (Electricity and Gas Authority; 'the AEEG') took a series of decisions in order to enable the applicant and the other Terni companies to receive only the amounts of the Terni tariff owing under Law No 9/91, which had already been examined and approved by the Commission.

214 The receipts for payments which the applicant received from the electricity sector compensation fund in the period from 2005 to 2007 indicate that all reimbursements under the Terni tariff were always made, even after the entry into force of Law No 80/05, without any reference to that provision, which shows that any lack of payment to the applicant of the amounts provided for by the disputed measure is a result of the wish of the Italian authorities to comply with the obligation to postpone granting the aid laid down in Article 88(3) EC. The applicant states that it did not receive, either during or after the procedure which led to adoption of the contested decision, any amount which was part of the tariff which was extended by the disputed measure, as the money received was solely pursuant to Law No 9/91.

215 The applicant states that the Commission knew that the amounts received by the applicant until 2007 were paid to it by way of advance on the amounts owing pursuant to Law No 9/91, as evidenced by recitals 33 to 35 and 162 of the contested decision. The Commission's statement that that fact cannot affect the validity of the contested decision and concerns solely the implementation thereof is clearly incorrect. It is undeniable that, if the disputed measure has not actually been implemented for the purposes of Article 88(3) EC, the essential conditions for declaring the aid unlawful and ordering the State to recover it are lacking.

216 Moreover, the Commission's argument, to the effect that the infringement of the obligation to postpone granting the aid consists in the mere publication or entry into effect of the disputed measure, not only runs counter to the literal meaning of Article 88(3) EC, but is also contrary to the rationale and effectiveness of that prohibition.

217 The fundamental purpose of Article 88(2) and (3) EC is to prevent any distortion of competition in the internal market resulting from the advantage enjoyed by the recipient of the aid, to the detriment of its competitors, prior to the Commission's decision on the compatibility of that aid with the common market. The obligation to postpone putting the aid into effect is intended to guarantee true equal treatment of operators, as an undertaking derives an advantage only as from the time the State implements an aid measure, in the period before the Commission has assessed its compatibility with the common market. In the present case, as the applicant was unable to receive the amounts granted by the disputed measure, it did not enjoy any advantage over its competitors and no distortion of competition occurred in the common market.

218 The Commission states that the applicant does not deny that the temporal extension of the Terni tariff provided for by the disputed measure was put into effect without having been previously notified, contrary to the requirements of Article 88(3) EC, and even acknowledges that the AEEG adopted specific implementing measures relating to compensatory factors corresponding to the Terni tariff, by authorising their payment, provided that the recipient undertakings provide a special guarantee. In those circumstances, even if the amounts provided for by the disputed measure were not paid, that would not in any way change the fact that that measure was implemented contrary to the obligation of prior notification referred to in the aforementioned article.

219 Contrary to the applicant's assertions, the Commission's position is entirely consistent with the text and logic of Article 88(3) EC. Once put into effect, an aid scheme, such as the one provided for by the disputed measure, can no longer be categorised as merely a 'plan' to grant aid for the purposes of that article. In such a situation, it would be absurd, and contrary to the logic of the system of prior scrutiny of State aid, to consider that the Commission may find an infringement of Article 88(3) EC only after having checked that each recipient actually derives the advantages conferred by the scheme in question.

220 The case-law is to the effect that the fact that the applicant did not receive the amounts provided for by the disputed measure falls to be assessed as part of the implementation of the contested decision; it has no bearing on whether or not it is lawful.

221 The Commission states that, during the administrative procedure, it was not argued that, despite the disputed measure's having been put into effect, the applicant had not benefited from advantages deriving therefrom, which explains the reference, in the contested decision, to the unlawful grant of aid contrary to Article 88(3) EC and the order to recover with, however, the necessary verification, in the implementing phase of the contested decision, of the actual amount of aid received by the different recipients. It refers to settled case-law, according to which it cannot be complained that the Commission failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it.

222 Lastly, it states that the applicant has in no way established that it did not benefit from the advantages conferred by the disputed measure and that the information provided by the Italian authorities following the adoption of the contested decision indicate, on the contrary, that, overall, the Terni companies benefited from the temporal

extension of the Terni tariff by obtaining reimbursements going over and above those provided for by Law No 9/91.

Findings of the Court

223 Recitals 118 to 132 of the contested decision indicate that the Commission took the view that the disputed measure had to be considered as new aid as from 1 January 2005 and that, as the Italian Republic had not notified Article 11(11) of Law No 80/05, that aid was unlawful.

224 After finding that the aid in question could not come within any of the derogations provided for in Article 87 EC and declaring the second extension of the Terni tariff incompatible with the common market (recital 147 of the contested decision), the Commission stated that all amounts of incompatible aid received by the applicant, Cementir and Nuova Terni Industrie Chimiche pursuant to Article 11(11) of Law No 80/05 and covering the period starting on 1 January 2005 were to be recovered, with interest (recital 160 of the contested decision).

225 In recitals 161 and 162 of the contested decision, the Commission further stated the following:

‘(161) It should be recalled, in this context, that the purpose of recovery is to restore the beneficiary’s competitive situation prevailing before the grant of the incompatible aid. In establishing what was the competitive situation of

the Terni companies before the introduction of Law [No 80/05], account should be taken of the existence of the existing aid measure laid down in Law [No 9/91], which was cleared under the State aid rules until 2007.

(162) Therefore, the Commission considers that the residual amounts of aid to which the beneficiaries would have been entitled under Law [No 9/91] in 2005, 2006 and 2007 if Law [No 80/05] had not been implemented may be deducted from the sums to be recovered, if [the Italian Republic] considers that the beneficiaries are entitled to them under national law.'

226 The applicant argues that, if the disputed measure has not actually been implemented for the purposes of Article 88(3) EC, the essential conditions for declaring the aid unlawful and ordering the Member State to recover it are lacking. In fact, the applicant did not receive any amount under the tariff extended by the disputed measure, as the money received until 2007 was solely an advance on the amounts owing pursuant to Law No 9/91, approved by the Commission. If there has been no infringement of the obligation of prior notification and there is no amount to be recovered, the Commission infringed Article 88(3) EC in declaring the aid unlawful and ordering its recovery.

227 That line of argument cannot be accepted.

228 It should be borne in mind that, as regards proposed new grants of aid by the Member States, a procedure for prior scrutiny has been established which must be followed before any aid can be regarded as lawfully granted (Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 12, and *Commission* v *Sytraval and Brink's France*, paragraph 162 above, paragraph 35).

229 Under Article 88(3) EC and Articles 2 and 3 of Regulation No 659/1999, any plans to grant new aid are to be notified to the Commission and should not be put into effect before the Commission has authorised it, implicitly or explicitly.

230 The Member States must thus comply with two unseverable obligations: that of prior notification of plans to grant aid and that consisting in postponing putting those plans into effect until the Commission has ruled on the compatibility of the measure with the common market.

231 Under Article 1(f) of Regulation No 659/1999, unlawful aid means 'new aid put into effect in contravention of Article [88](3) of the Treaty', that is, aid granted without having been notified beforehand to the Commission or, where it has been notified, granted before the Commission has given a decision within the prescribed time-limits.

232 In the present case, it is common ground that the second temporal extension of the Terni tariff is provided for, not in draft legislation, but in Article 11(11) of Law No 80/05 and that the Italian authorities made no notification to the Commission, which situation constitutes an infringement of Article 88(3) EC.

233 The applicant's assertion as to the lack of payment of any amount under the tariff extended by the disputed measure is, in that regard, irrelevant.

234 The case-law is to the effect that an aid measure may be considered granted, even if it has not yet been paid out to the recipient.

235 The Court of Justice has held that a Member State fails to fulfil its obligations under Article 88(3) EC by failing to notify measures introducing aid schemes until after they have been enacted as legislation (Case 169/82 *Commission* v *Italy* [1984] ECR 1603, paragraph 11). Basing itself on the wording of that provision, this Court has held that aid measures must be notified to the Commission while they are still at the draft stage, that is to say, before they are implemented and while they are still capable of being adjusted in the light of any observations the Commission may have (Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 118).

236 That interpretation of Article 88(3) EC complies with both the wording and the objectives pursued by the rules of which it is part, to provide the Commission with the opportunity to review, in sufficient time and in the general interest, any plan to grant or alter aid and thus to carry out a prior assessment (see, to that effect, Case 301/87 *France* v *Commission*, paragraph 189 above, paragraph 17). It would be contrary to the logic of the system of prior scrutiny of State aid to consider that the Commission may find an infringement of Article 88(3) EC only after having checked that each recipient actually benefits from the advantages conferred by the scheme in question.

237 The Commission was accordingly correct in finding that the disputed measure constituted unlawful aid.

238 In recital 147 of the contested decision, the Commission also found that since the aid in question did not come within any of the derogations laid down in Article 87 EC, the second extension of the Terni tariff was incompatible with the common market.

239 According to Article 14 of Regulation No 659/1999, '[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid …'. That wording indicates that recovery is to be the rule. The contested decision thus provides that the State aid implemented by the Italian Republic in favour of the applicant, Cementir and Nuova Terni Industrie Chimiche is incompatible with the common market (Article 1) and that the Italian Republic is to recover that aid from the recipients (Article 2).

240 The applicant disputes the validity of the recovery order, arguing that the amounts received until 2007 were paid to it by way of advance on the amounts owing pursuant to Law No 9/91, of which the Commission was aware, as indicated by recitals 33 to 35 and 162 of the contested decision.

241 It should be remembered, first of all, that the step of informing the Commission during the administrative procedure that the contested aid had not yet been paid to the recipients in no way guarantees that such payments were not made subsequently, particularly between the time when the Commission was so informed and the time when the final decision was notified. In any event, the Commission cannot be criticised for clearly setting out the practical consequences of its decision with the intention of creating greater legal certainty (see, to that effect, Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraphs 48 and 49), which the Commission did in recitals 160 to 162 of the contested decision.

242 Next, it should be noted that the contested decision indicates that, after the formal investigation procedure was initiated, the AEEG, by Delibera No 190/06, made payments under Law No 80/05 conditional upon the provision, by the Terni companies, of a guarantee to cover the risk of recovery of the aid (recital 33 of the contested decision).

243 In the same delibera, the AEEG foresaw the alternative of paying out in 2006 as an advance the amounts of aid due until the end of the previous arrangement (2007) on the basis of Law No 9/91. The AEEG did not require a guarantee for those amounts. That option was taken up by the Terni companies and implemented by the AEEG (recital 34 of the contested decision).

244 The Commission states that, with the exception of the advance payments referred to in the preceding paragraph, 'all other payments made to the companies by Cassa Conguaglio [parity fund for the electricity sector] under Law [No 80/05] are covered by a guarantee' (recital 35 of the contested decision).

245 It thus appears that the Commission did consider, in the light of the information in its possession during the administrative procedure, that the applicant had received amounts of aid by way of advance pursuant to both Law No 9/91, in 2006, and Law No 80/05. This explains why the Commission required the recovery of the aid already paid out, whilst stating that the residual amounts of aid to which the recipients would have been entitled under Law No 9/91, 'if Law [No 80/05] had not been implemented', could be deducted from the total amount to be recovered (recital 162 of the contested decision).

246 In its written pleadings, the Commission emphasised that, during the administrative procedure, neither the Italian authorities nor the applicant maintained that, despite the implementation of the disputed measure, the Terni companies had not enjoyed the advantages deriving therefrom. The applicant's written pleadings contain nothing contradicting that statement by the Commission.

247 On the contrary, that statement is corroborated by the application itself, in which the applicant criticises the Commission for having failed to carry out an investigation which would have enabled it to find that there was no amount to be recovered. Thus, the applicant states that the Commission did not bother 'to ascertain whether, specifically, [the Italian Republic] had actually implemented the new measure for the part over the amounts to which [it] was entitled under Law No 9/91 (possibly upon presentation of a guarantee)'.

248 Reference should be had, at this stage, to the settled case-law, according to which the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 49, and *Spain* v *Commission*, paragraph 57 above, paragraph 31).

249 Yet it has not been demonstrated that, at the time the contested decision was adopted, the Commission was aware that the amounts paid out to the applicant by the parity fund for the electricity sector had been paid out pursuant to Law No 9/91.

250 Lastly, it must be noted that the obligation on a Member State to calculate the exact amount of aid to be recovered — particularly where that calculation is dependent on information which that Member State has not provided to the Commission — forms part of the more general reciprocal obligation to cooperate in good faith in the implementation of Treaty rules concerning State aids imposed on the Commission and the Member States (*Netherlands* v *Commission*, paragraph 248 above, paragraph 91). It cannot be complained that the Commission failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it (Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 49).

251 Consequently, even if the fact alleged by the applicant and reiterated in paragraph 249 above is true, it cannot affect the validity of the contested decision, but only the detailed rules for recovering the aid (Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 68). In principle, the recovery of aid unlawfully paid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (*Tubemeuse*, paragraph 55 above, paragraph 61, and Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 12) and it is for the national court alone to assess the material circumstances of the case (*Kuwait Petroleum (Nederland)* v *Commission*, paragraph 68).

252 It follows from the foregoing considerations that the plea alleging infringement of Article 88(3) EC must be rejected.

The plea alleging infringement of Article 14(1) of Regulation No 659/1999 and of the principle of the protection of legitimate expectations

Arguments of the parties

253 The applicant observes that, according to Article 14(1) of Regulation No 659/1999, '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. Yet in the present case the recovery order in the contested decision infringes the principle of the protection of legitimate expectations which, if interpreted specifically in the field of State aid, can be relied on

in exceptional circumstances such as to give reason to entertain an expectation that prima facie a certain right exists.

254 The Commission cannot infer from one example taken from the case-law, in an entirely different context from the present case, an absolute and universal rule which restricts the protection of legitimate expectations solely to those cases where the administration has given 'precise assurances' to the addressees to the effect that a prima facie right exists.

255 The applicant's legitimate expectation relating to the Terni scheme arose from a series of legally significant acts and conduct which are verifiable and unambiguous in meaning.

256 The applicant observes that the Italian authorities extended the Terni tariff once by Article 20(4) of Law No 9/91, due to the parallel temporal extension of the hydroelectric concessions of the self-producers who 'escaped' the nationalisation of the electricity sector in 1962, then notified the Commission of that law in order for it to be examined in the light of the rules on State aid.

257 By the decision of 6 August 1991, the Commission authorised Law No 9/91 in its entirety and without expressing any objections. That decision does not contain anything categorising the temporal extension of the Terni tariff provided for in Article 20(4) of Law No 9/91 as 'compatible aid'. On the contrary, the Commission declared in that decision that it had decided not to raise objections to the application of those provisions of that law. The Commission has not proven its allegations that the decision of

6 August 1991, far from stating that the scheme provided for by Law No 9/91 was not in the nature of aid, declared it compatible with the common market.

258 The applicant states that, following the adoption of the decision of 6 August 1991, a phase of dialogue ensued between the Italian authorities and the Commission, following a query by the latter concerning the temporal extension of the Terni tariff provided for in Law No 9/91, which is confirmed by the letter of 19 September 1991 from the Italian Ministry of Industry, Trade and Crafts, addressed to the Italian Ministry of State Involvement, and by a fax sent in November 1991 by the Presidency of the Council to the Permanent Representation of the Italian Republic to the European Communities. In those pieces of correspondence, the Italian authorities dispute the assertion that the temporal extension of the Terni tariff may be considered State aid. Yet the Commission did not express any objection to the Italian authorities' conclusions, thereby implicitly acknowledging that they were well founded.

259 That exchange of correspondence, which is subsequent to the decision of 6 August 1991, contradicts the Commission's theory, according to which that decision approved the temporal extension of the Terni tariff, considering it to be aid which was compatible with Community law. The Commission merely denies having found the substance of the abovementioned letter and fax in the file relating to the procedure which led to the adoption of the decision of 6 August 1991 and should be requested by the Court to produce the correspondence addressed to the Italian Republic, apparently in September 1991, on the question of the temporal extension of the Terni tariff.

260 The applicant argues that the decision of 6 August 1991, the ensuing exchange of correspondence and the Commission's subsequent acquiescence are such as to give grounds for an expectation that a prima facie right exists. The Commission caused the applicant to have a legitimate expectation that the compensatory nature of the Terni scheme would be maintained even after it was redefined *ex post*, which should

be considered lawful. Those considerations rule out categorising the scheme as State aid. That information establishes that there were exceptional circumstances which led the applicant, like the Italian authorities, to count on the fact that the compensatory nature of the Terni scheme would not be altered by a temporal extension of the Terni tariff, in keeping with the parallelism, decided upon in the beginning, between the virtual self-producer and the self-producers holding hydroelectric concessions.

261 The Commission's finding in recital 123 of the contested decision, to the effect that the disputed measure altered the method by which the Terni tariff was calculated, is not such as to affect the conclusion referred to in the preceding paragraph. In the applicant's submission, all the factors which gave rise to a legitimate expectation on its part are not a consequence of the same calculation methods being used to establish that tariff in 1991 and in 2005, but a result of the fact that, in both cases, the compensation granted to Terni (and its successors) was lawfully redefined *ex post*, in keeping with its original rationale, and that, in both cases as well, the *ex post* redefinition of that compensatory measure could not in itself define that aid measure. The Commission fails to consider the fact that that revision method is less favourable to recipient undertakings than it was under Decree No 1165/63 and is intended solely to pass on, within certain limits, fluctuations in electricity prices recorded on the markets, which clearly was not possible in 1963.

262 The applicant states that it relied in good faith on the Commission's ultimate acquiescence as to the compensatory nature of the temporal extension granted in 1991 in order to make considerable investments in the steel sector, on the basis of an agreement with the Italian authorities in which the temporal extension of the compensation constituted the principal commitment in response to the considerable investment- and employment-related commitments undertaken.

263 It states, lastly, that any recovery of the preferential tariff would also be contrary to the maxim *non venire contra factum proprium*, under which the Commission may not engage in contradictory conduct on a single issue, especially when that conduct gives rise to a belief on the part of the addressees that a certain legal situation exists. That aspect of the principle of the protection of legitimate expectations prevents the Commission from reversing, in the present case, its assessment of the compensatory nature of the preferential tariff.

264 The Commission states that the case-law has clearly and consistently held that the principle of the protection of legitimate expectations can be pleaded only when 'precise assurances' have been given by the administration and not, as in the present case, when there have been vague circumstances supposed to give rise to a 'legal appearance' without further explanation.

265 The applicant cannot base its plea on a mere exchange of correspondence between different Italian administrative departments. It is obvious that, even if contacts between the Commission and the Italian authorities did actually take place, it would in any event not be possible to consider that they gave rise to the legal appearance asserted by the applicant, in the absence of any evidence of communications originating from the Commission, of which there is no trace.

266 It would appear to follow from the letter of 19 September 1991, referred to by the applicant, that the Commission requested information from the Italian authorities regarding the temporal extension of the Terni tariff provided for by Law No 9/91. That fact, far from confirming the applicant's argument, seems, on the contrary, to indicate that, in the decision of 6 August 1991, the Commission did not adopt a specific position on the temporal extension of the Terni tariff; otherwise, the request for explanations would not make sense.

267 In any event, nothing about the decision of 6 August 1991 could give the Italian authorities or the Terni companies grounds to believe that the Commission did not consider the temporal extension of the Terni tariff as State aid. The Commission adds that the disputed measure not only extended the duration of the preferential tariff, but also altered completely the method laid down for the calculation of that tariff and it inferred therefrom that the Terni companies therefore could not consider, even in the light of that important change, that the disputed measure was indirectly covered by the decision of 6 August 1991, which referred to Law No 9/91.

Findings of the Court

268 It should be borne in mind that the disputed measure was introduced without prior notification, contrary to Article 88(3) EC.

269 However, in view of the mandatory nature of the review of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for therein. A diligent business operator must normally be in a position to confirm that that procedure has been followed (*Commission* v *Germany*, paragraph 251 above, paragraph 14; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51; Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 235).

270 In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 88(3) EC, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 45 and the case-law cited).

271 However, according to the case-law, a recipient of aid which is granted unlawfully is not precluded from relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful, in order to oppose repayment of the aid (Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18; *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 270 above, paragraph 51; and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69).

272 The recipients of unlawful aid have standing to bring proceedings in such cases, as evidenced by Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraph 17.

273 In that case, the Court of Justice held that the delay by the Commission in deciding that an aid measure was unlawful and had to be recovered by a Member State could, in certain circumstances, give rise to legitimate expectations on the part of the recipients of that aid which prevented the Commission from ordering that Member State to demand repayment of that aid.

274 It follows that the presence of exceptional circumstances may justify annulment of a Commission decision if it fails to take those circumstances into consideration and the recipient of the aid may successfully rely on the argument of legitimate expectations before the Community Courts.

275 Additionally, and especially, it should be noted that the adoption of Regulation No 659/1999 created a new situation for the recovery of incompatible aid, all the legal consequences of which must be observed. Article 14(1) of that regulation confirms recovery as the rule (first sentence), whilst providing for an exception (second sentence) when recovery runs counter to a general principle of Union law.

276 There is, accordingly, a provision of secondary law which the Commission must take into account in adopting its decisions and which may lead it to reverse a decision to require recovery of incompatible aid. It is undeniable that infringement of such a provision may be relied on in support of a claim for annulment of the part of the decision requiring recovery.

277 That is the case here, in that the Commission, in recitals 149 to 159 of the contested decision, ascertained the presence of exceptional circumstances liable to have given rise to a legitimate expectation on the part of the Terni companies as to the lawfulness of the disputed measure and reached a negative conclusion, which the applicant contested, relying on precisely an infringement of Article 14 of Regulation No 659/1999 and the principle of the protection of legitimate expectations.

278 Turning to the merits of the plea, the applicant's line of argument does not establish the presence of exceptional circumstances such as to give rise to a legitimate expectation that the aid in question was lawful or, as the applicant argues, that the disputed measure did not constitute State aid.

279 It is common ground that the decision of 6 August 1991 not to raise objections corresponds, according to the definition given in Article 4(3) of Regulation No 659/1999, to the situation where the Commission, after a preliminary examination, finds that

no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 87(1) EC, and decides that the measure is compatible with the common market. The wording of that decision corroborates the Commission's statement that the temporal extension of the Terni tariff provided for in Law No 9/91 was categorised therein as compatible aid (see paragraph 113 above).

280 This finding is not affected by the fact that the letter of 19 September 1991 from the Italian Ministry of Industry, Trade and Crafts, addressed to the Italian Ministry of State Involvement, indicates that, following the adoption of the decision of 6 August 1991, the Commission requested information from the Italian authorities regarding the temporal extension of the Terni tariff provided for by Law No 9/91.

281 Rather, it tends to show, as observed by the Commission in recitals 134 and 135 of the contested decision, that the documents on the basis of which it adopted the decision of 6 August 1991 contained merely a succinct description and assessment of the articles of Law No 9/91 which were of interest from a State aid angle and that Article 20(4) of the law, which extended the Terni tariff, was not mentioned, which does not enable a definite conclusion to be drawn as to whether the Terni tariff was examined and whether the intention was to authorise it.

282 The fact remains that a simple request for documents by the Commission and its silence following the response from the Italian authorities, supposing it was actually given and received by the Commission, cannot give rise to a legitimate expectation on the part of the applicant.

283 The Commission's conduct in the period from August to November 1991 could, at the most, create the impression of some confusion and give rise to questions on the applicant's part. However, the mere fact that the classification of the temporal extension of the Terni tariff provided for by Law No 9/91 as State aid may have appeared doubtful to the recipients is clearly insufficient to justify any legitimate expectation on their part as to the lawfulness of the aid or the fact that the disputed measure did not constitute State aid (see, to that effect, Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 128).

284 Lastly, as observed by the Commission in recital 154 of the contested decision, the decision of 6 August 1991 covers only the measure laid down in Law No 9/91, so that the approval of that measure cannot give rise to legitimate expectations concerning the lawfulness or compatibility of the new aid measure introduced by Law No 80/05 or the fact that the temporal extension of the Terni tariff contained therein did not constitute aid.

285 It should be borne in mind, in that regard, that Law No 9/91 had a twofold objective: to extend in parallel the Terni tariff and the self-producers' hydroelectric concessions until 2001, but also to phase out the tariff by the end of 2007.

286 It is common ground that the disputed measure, first of all, put an end to the gradual phasing-out of the Terni tariff by providing for the application of that tariff until at least 2010 and, secondly, altered completely the method laid down for the calculation of that tariff, as evidenced by recitals 123 and 124 of the contested decision.

287 In that context, the Commission classified the disputed measure as new aid, which classification is not disputed by the applicant. That measure should have been notified to the Commission, in accordance with Article 88(3) EC, which was not done.

288 It follows that the applicant could not infer from the decision of 6 August 1991 and the Commission's subsequent conduct that the new temporal extension measure introduced by Law No 80/05 could not be categorised as State aid within the meaning of Article 87 EC.

289 In those circumstances, the plea alleging infringement of Article 14(1) of Regulation No 659/1999 and of the principle of the protection of legitimate expectations must be rejected.

290 It follows from all the above considerations, without it being necessary to order the measures of organisation of procedure requested, that the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders ThyssenKrupp Acciai Speciali Terni SpA to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 1 July 2010.

[Signatures]

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