JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

1 July 2010 *

In Case T-53/08,

Italian Republic, represented by S. Fiorentino, lawyer,

applicant,

v

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

defendant,

* Language of the case: Italian.

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 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 2 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).

10 By Legislative Decree No 79 of 16 March 1999 relating to 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 renewed 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 31 January 2008, the Italian Republic brought the present action.

21 The Italian Republic claims that the Court should annul the contested decision.

22 The Commission contends that the Court should:

— dismiss the action;

— order the Italian Republic to pay the costs.

Law

23 The Italian Republic puts forward three pleas in law, alleging, first, infringement of Article 87(1) EC and Article 88(3) EC in that the disputed measure is compensatory in nature; secondly, infringement of Article 87(1) EC and Article 88(3) EC in that the disputed measure did not entail a transfer of public resources; and, thirdly, infringement of essential procedural requirements and breach of the principle of *audi alteram partem* and of the principle of the protection of legitimate expectations.

24 At the hearing, however, the Italian Republic expressly withdrew its second plea, and note was taken of that withdrawal in the minutes of the hearing. The Court will accordingly examine only the first and third pleas.

The plea concerning the purportedly compensatory nature of the disputed measure

Arguments of the parties

25 The Italian Republic 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.

26 The Italian Republic submits that an allocation of resources which constitutes compensation for assets yielded in the general interest does not constitute an economic advantage where it does not exceed to an unjustifiable extent the remuneration which the party concerned would have obtained by way of consideration — for the same assets yielded — when acting as a private investor operating in a market economy.

27 The Commission's finding that the disputed measure conferred an advantage on the Terni companies is based on an inaccurate perception of the assets expropriated from Terni in 1962. That expropriation did not concern solely tangible assets: it also concerned the right to produce electricity, which forms the substance of the hydroelectric concessions in effect at the time when Law No 1643/62 entered into force.

28 In those circumstances, it was essential — according to the Italian Republic — to take account of the value of Terni's concession, considered separately as an intangible asset which formed part of the undertaking's property and the value of which varied according to the duration of the concession's validity. Accordingly, it is incorrect to maintain, as the Commission does, that the issue raised by the present case is the question of Terni's compensation for the 'market value of the property expropriated', in accordance with the principle that compensation for the expropriation of property is to be determined by reference to the value of the property at the time of expropriation.

29 As a consequence, the nature of the assets expropriated from Terni, thus described, led the Italian authorities to design a compensation mechanism under which the value of the compensation was directly related to the duration of the concession. The duration of the tariff scheme was therefore aligned with the remaining duration of the concessions, which were to apply until 31 December 1992.

30 The Italian Republic states that that direct relationship between the duration of the Terni tariff — the purpose of which was to ensure that the energy costs that Terni would have to bear would be similar to those it would have incurred if it had been able to retain the right to produce electricity — and the duration of the concessions protected both parties concerned against the risk of overcompensation or undercompensation. That direct relationship is a fundamental component of the compensation agreement between the parties, as referred to by the Commission in the contested decision, because it ensured the economic balance of that agreement.

31 In the contested decision, the Commission itself found that compensation formula to be acceptable, whilst raising the fundamental question as to whether the temporal extensions of the special tariff scheme could be regarded as forming an integral part of the compensation.

32 The Italian Republic argues in that regard that the additional compensation is not based on the conditions which have arisen on the electricity market, the changes in which are part of the normal hazards of the compensation agreement. The two temporal extensions, decided upon in 1991 and 2005, are in fact justified because the subsequent legislative provisions, which were not foreseeable at the time of the compensation agreement, had extended the duration of the concessions for the operation of the self-producers.

33 The wholly exceptional nature of the expropriation suffered by Terni made it necessary, it is argued, to recreate for Terni a situation as close as possible to the situation in which it would have found itself had it not undergone the expropriation: that is why Terni was treated as a 'virtual self-producer' for the purposes of the compensation mechanism put in place by the Italian authorities. The Italian Republic states that, in such circumstances, the crucial point is not so much to ascertain whether there was a relationship between the compensation mechanism provided for Terni and the concessions granted to the other self-producers, but rather to examine whether the extending laws would have applied to Terni if it had not undergone expropriation.

34 There is no doubt that the legislative provisions prolonging the duration of the concessions would also have covered the concessions held by Terni if it had continued to hold them. If the Terni companies had been prevented from benefiting from those temporal extensions, in the form of prorogations of the Terni tariff, their status as 'virtual self-producers', which — as even the Commission acknowledges — it is reasonable to maintain in their case, would have been undermined.

35 Accordingly, the two tariff extensions of 1991 and 2005, far from reflecting a reassessment of the underlying reasons for the original measures, were precisely, in the Italian Republic's submission, the application of those underlying reasons and of the principle, common to the law of contract in the Member States, that, in continuing legal relationships, account must be taken of changes in the contractual balance which are not brought about because of the materialisation of the normal risk which the parties accepted at the time when the contract was entered into, but which have arisen as a result of a subsequent event which was neither foreseen nor foreseeable at the time when the contract was concluded.

36 The Italian Republic refers to the principles of good faith and fairness, adding that the principle referred to in paragraph 35 above has been given standardised expression in the 'hardship clause' provided for in accordance with the principles relating to international commercial contracts and European contract law. The conditions for the application of those principles are met in the present case.

37 The Italian Republic describes as irrelevant the Commission's argument that Terni could have contested the compensation mechanism if it had considered it to be inappropriate. At the time when Decree No 1165/63 was adopted, Terni could have complained only if provision had been made for application of the Terni tariff to be phased out before the expiry of the concessions which, at that time, were due to expire on 31 December 1992, the date from which the Terni tariff was no longer to apply. The Italian Republic adds that, once it is accepted that the date of expiry of the Terni tariff was not fixed on the basis of a calculation of the overall profits which Terni would have generated up to that date, but solely with a view to aligning the duration of the Terni tariff with the duration of the concessions, Terni had no reason

to complain about the mechanism, since its application was designed to ensure that application of the tariff automatically kept pace with the renewal of the concessions.

38 As to the doubt expressed by the Commission about the actual intention behind the provisions prolonging the application of the Terni tariff, which was to supplement the initial compensation in the light of the prolonged duration — albeit only virtual — of the expropriated concession, the Italian Republic states that, in order to categorise a measure as State aid, only the effects, real or potential, may be considered, and that, if it is accepted that the Terni companies were entitled to the continued application of the Terni tariff in order to supplement duly the initial compensation, the measure which has the effect of prolonging the application of that tariff cannot be regarded as State aid, whatever the objectives pursued by the national legislature in adopting it.

39 The Italian Republic concludes by stating that the disputed measure was intended to preserve the validity, in terms of current economic relevance, of a mechanism which was necessarily intended to continue over time and that, in so far as it ensured that there was no change in the fundamental terms of the contract, it did not confer any undue advantage on the Terni companies but rather, on the contrary, it prevented them from having to suffer unjust loss.

40 The Commission replies that the Italian Republic's plea should be dismissed as being based on a false premiss.

41 According to the Commission, the Italian Republic appears to disregard the fact that Article 6 of Decree No 1165/63 had provided, by way of compensation for the transfer of Terni's assets to ENEL, for the supply of electricity at a reduced tariff until 31 December 1992. It is quite clear from the wording of that provision that the Terni tariff was granted, by way of compensation, for a highly specific period fixed definitively

at the time of the expropriation and that, in fixing that period, account had probably been taken of the remaining duration of Terni's hydroelectric concession, which was a fundamental component in the determination of the value of the expropriated concession.

42 The Commission contends that neither Decree No 1165/63 nor Law No 9/91 in any way linked the temporal extension of the Terni tariff to that of the hydroelectric concessions of other self-producers which had not undergone expropriation. There is no reason to view the temporal extension of that tariff granted in 2005 by the disputed measure as specifically linked to the renewal of the concessions granted six years earlier by Decree No 79/99. On the contrary, it is clear from Law No 80/05 that the temporal extension of the preferential tariffs, such as the Terni tariff, was granted generally in order to 'enable the development and restructuring of the production of the undertakings concerned'.

43 The Commission argues that, if Decree No 1165/63 had provided that application of the Terni tariff had automatically to be prolonged if the concessions of other self-producers were renewed, it would have run counter to the principle that the compensation paid for expropriation of property (including a tangible asset such as the concession) must be determined by reference to the value of the property at the time of the expropriation.

44 Moreover, it would be incorrect to maintain, as the Italian Republic does, that 'the Terni companies were entitled to an extension of the Terni tariffs in addition to the initial compensation'. The Commission states that the Italian authorities seem thus to be arguing that the Terni companies had a 'right' to temporal extension of the Terni tariff merely by virtue of the fact that, if they had not undergone expropriation, they would have benefited from the renewal of the hydroelectric concessions.

45 However, according to the Commission, the Terni companies could not claim any 'right' to a temporal extension on the basis of Decree No 1165/63, which provided for the supply of electricity at a reduced tariff until 31 December 1992, with no possibility of postponing that deadline. The lack of any 'right' to a temporal extension of the Terni tariff is also revealed by the fact that the extensions provided for under Law No 9/91 and under the disputed measure were granted unilaterally by the Italian authorities in the exercise of the broad discretion which characterises legislative activity.

46 Equally unfounded, according to the Commission, are the arguments to the effect that the change in the duration of the Terni tariff is based on rules of private law relating to the excessive cost of the subsequent contractual performance, since those rules do not seem to apply to expropriation in the public interest. The Commission adds that, even if expropriation could be equated with a simple contractual fact, Terni's obligation to transfer to ENEL the hydroelectric concession together with the related assets would have to be regarded as 'immediate' performance and not as ongoing performance likely to become excessively costly after a certain lapse of time. Moreover, the renewal of the hydroelectric concessions cannot be described as 'extraordinary and unforeseeable'.

Findings of the Court

47 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).

48 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 47 above, paragraph 122).

49 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 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).

50 The Italian Republic 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.

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

52 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.

53 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).

54 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).

55 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.

56 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.'

57 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.'

58 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.

59 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 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).

60 The Italian Republic submits that the contested decision is based on an incorrect assessment by the Commission of the actual nature and function of the compensation measure provided for under the legislation governing the nationalisation of Terni. The purpose of that legislation was to compensate Terni for the expropriation suffered in 1962, which was an exception in the context of the general rules governing self-producers and concerned not only various installations, but also the right, arising from a hydroelectric concession, to produce electricity.

61 In the submission of the Italian Republic, those circumstances explain why the national legislature adopted a specific compensation mechanism to allow Terni to obtain energy supplies under economic conditions similar to those which it would have enjoyed if the nationalisation had not taken place, for a period which mirrored the duration of the concession.

62 In the first place, the Italian Republic states that, in taking 31 December 1992 as the expiry date for the Terni tariff, the national legislature had decided to align the duration of that tariff with that of the hydroelectric concessions held by self-producers whose assets had not been expropriated, thereby introducing a direct link between those two factors. It states that both temporal extensions of the Terni tariff are justified because the legislative provisions — which were certainly not foreseeable at the time when the initial compensation was fixed — prolonged the duration of the self-producers' concessions, that latter duration being the parameter for the compensation granted to Terni. Those two temporal extension measures, far from reflecting a

reassessment of the underlying reasons for the original measures, are precisely the application of those underlying reasons.

63 It should be noted, however, 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.

64 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.

65 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.

66 Nor does the Italian Republic 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.

67 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 Italian Republic 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'.

68 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.

69 Moreover, 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 Italian Republic, 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.

70 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.

71 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 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.

72 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.

73 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.'

74 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.

75 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 that 'the 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' and that '[u]nder this action plan, new generating capacity will be developed in the area'. It is observed that '[t]he tariff is … meant as a temporary solution until such generating capacity is in place, and its abolition would jeopardise the investments currently under way'.

76 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.'

77 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.

78 In the second place, after indicating in its reply that the duration of the tariff scheme had been aligned with the 'remaining' duration of Terni's concession, the Italian Republic stated that 'the crucial point [was] not to ascertain whether there was a relationship between the compensation mechanism provided for Terni and the concessions granted to other self-producers, but rather to examine whether the extending legislation would have applied to Terni if, in accordance with the general rule, it had not suffered expropriation of its assets and the concession'.

79 According to the Italian Republic, there can be no doubt that the temporal extension provisions (namely Article 24 of Law No 9/91 and Article 12(7) of Decree No 79/99) would also have covered the concessions held by Terni 'if it had continued to hold them' and it is clear that, if the Terni companies had been prevented from benefiting from those temporal extensions, their status as virtual self-producers, which — as even the Commission acknowledges — it was reasonable to maintain, would have been brought to an end.

80 However, it should be noted that the line of reasoning put forward by the Italian Republic seeks to interpret the compensation mechanism set up under Article 6 of Decree No 1165/63 on the basis of an assumption which fails to take account of the expropriation situation which gave rise to the dispute and the debate on the scope of that mechanism.

81 It is possible that, had Terni's hydroelectric branch not been nationalised, its concession would have been renewed together with those of the other self-producers. It is also possible that, in such circumstances, the question of providing compensation for Terni by means of a preferential electricity tariff would not have arisen.

82 The fact remains that these are purely hypothetical arguments which seek to circumvent the obstacle of the temporal limitation, very clearly laid down in Article 6 of Decree No 1165/63, on the application of the Terni tariff, and they must be rejected.

83 The Italian Republic also states that the Commission doubts that the purpose of the provisions prolonging the application of the Terni tariff was to supplement the initial compensation provided for under Article 6 of Decree No 1165/63, whereas, according to the case-law, the categorisation of a measure as State aid requires that account be taken solely of the actual or potential effects.

84 However, the Commission clearly stated in recital 99 of the contested decision 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 see their production costs reduced and their competitive position strengthened.

85 The reference to the actual purpose of the disputed measure forms part of the discussion on the exact scope of the compensation mechanism provided for in Article 6 of Decree No 1165/63, the Italian Republic maintaining that that measure constituted the legal continuation of the compensation granted to Terni following the nationalisation of its hydroelectric branch in 1962.

86 That assertion is contradicted both by the wording of Article 11(11) of Law No 80/05, which extended the Terni tariff until 2010, and by the statements made by the Italian authorities during the administrative procedure, which have been summarised in recitals 61 and 67 of the contested decision, from which it emerges that the contested extension of the Terni tariff is, in reality, linked to a wide-ranging programme of investments which ThyssenKrupp is carrying out in the Terni-Narni industrial area.

87 In the third place, the Italian Republic argues that the two temporal extensions in 1991 and 2005 are also the application of a principle, common to the law of contract in the Member States, that, in continuing legal relationships, account must be taken of changes in the contractual balance brought about not by the materialisation of the normal risk which the parties accepted at the time when the contract was entered into, but by a subsequent event which was neither foreseen nor foreseeable at the time when the contract was concluded, namely the adoption of legislative provisions prolonging the duration of the self-producers' hydroelectric concessions.

88 The Italian Republic refers to the principles of good faith and fairness, adding that the principle referred to in paragraph 87 above has been given standardised form in the 'hardship clause' provided for in accordance with the principles relating to international commercial contracts and European contract law, drawn up by the Commission on European Contract Law.

89 That line of argument must be rejected, as it is based on a false premiss, namely that a situation where various assets are nationalised, thereby triggering the need for compensation, can be equated with a simple contractual fact.

90 It should be remembered, however, 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, 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'.

91 The sole legal instrument implementing the nationalisation was Law No 1643/62, as supplemented by Decree No 1165/63.

92 It thus appears that the transfer of property is decided upon unilaterally by the State, in the public interest, and that it is appropriate to refer to the provisions of Law No 1643/62 and Decree No 1165/63 in order to gain an understanding of all aspects of the nationalisation in question, including the compensation required by law in that situation.

93 The Italian Republic has wholly failed to establish that rules or principles governing contractual relations are applicable to such a situation. The fact that Decree No 1165/63 has provided for a specific compensation mechanism in the form of the supply of electricity at a preferential tariff for 30 years cannot serve as a basis for equating the present case with the case of a continuing contractual relationship, as the Italian Republic has sought to do.

94 In any event, even if such a position could be accepted, the line of argument purporting to justify the disputed measure on the basis of principles enabling a restoration of equilibrium in continuing contractual relationships which have allegedly been thrown off balance by an event which was neither foreseen nor foreseeable at the time the contract was concluded cannot succeed.

95 Not only must the transfer of Terni's assets to ENEL be categorised as 'immediate' performance and not 'ongoing', as it was fully accomplished shortly after the adoption of Decree No 1165/63, but the renewal of the self-producers' hydroelectric concessions cannot be described as 'unforeseeable'.

96 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 and that the possibility that they might be maintained, as a result of statutory renewal or a tendering procedure, was broadly foreseeable, not unforeseeable. The adoption of provisions renewing the self-producers' hydroelectric concessions in 1991, 1999 and 2005 provide *ex post* confirmation of this.

97 It follows from the above considerations that the plea challenging the categorisation of the disputed measure as State aid and claiming that the disputed measure is of a compensatory nature must be rejected.

The plea alleging infringement of essential procedural requirements and breach of the principle of audi alteram partem and of the principle of the protection of legitimate expectations

Arguments of the parties

98 The Italian Republic submits that, at the express request of the Commission, it provided the Commission with a study which compared the book value of the expropriated property with the value of the advantages granted over the years through the Terni tariff and showed that there was no overcompensation.

99 In the contested decision, however, the Commission found that study irrelevant because the adequacy of the compensation mechanism could be assessed only *ex ante*, that is to say, at the time of expropriation. The Commission therefore examined the content of the study only secondarily and concluded that the findings made therein were incorrect.

100 The Italian Republic maintains that that turnabout on the part of the Commission as to the usefulness of an *ex post* assessment of the adequacy of the compensation mechanism ought to have led the Commission to reopen the debate, suggesting a different angle of analysis or even accepting alternative proposals put forward by the Italian Republic, which it did not do. Had it done so, the Italian Republic would certainly have been able to put forward the arguments submitted in the context of the first plea.

101 The Italian Republic adds that, had the Commission indicated, before the adoption of the contested decision, that it had changed its opinion or had doubts about the assessment method proposed by the study in question, the Italian Republic would have been able to argue that if the Commission perhaps underestimated Terni's tariff advantage, it also underestimated Terni's economic sacrifice by regarding it as limited to the value of the assets, without taking separate account of the right expropriated, that is, the concession.

102 That procedural defect vitiates even the Commission's assessment of the merits of the study in question.

103 After stating that the Commission's conduct was at the least inconsistent, the Italian Republic argued in the reply that, in requesting the study in question in order to assess whether there had been any overcompensation, the Commission had created a legitimate expectation on the part of the Italian authorities that the results of

that study would be assessed in a certain manner for the purposes of the contested decision. By stating that the study was not relevant in any event, and by not doing so until the contested decision, and by assessing the content of that study as if it were of only secondary importance, the Commission breached the legitimate expectation to which the request for information, made in the letter of 20 February 2007, had given rise.

104 The Commission 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 did in fact rely, 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, on the arguments put forward under the first plea.

105 The Commission states that, since the Italian authorities did in fact put forward the arguments in question during the administrative procedure and since those arguments are in any event unfounded, as consideration of the first plea shows, the infringement of the rights of the defence alleged by the Italian Republic cannot have any bearing on the validity of the contested decision.

106 According to the Commission, that conclusion is not affected by the Italian Republic's assertion that, had it known of the Commission's objections to the study in question, 'it, too, could have expressed its doubts'. It is obvious, in the Commission's view, that, since the study was examined only secondarily, any doubts which the Italian Republic may have had as to its credibility would not have had the slightest impact in any event on the overall assessment on which the contested decision is based. Furthermore, the Italian authorities have in no way established that the assessment made by the

Commission of the merits of the study in question is vitiated by any error of fact or of law.

107 Lastly, the Commission argues that the complaints about its allegedly inconsistent approach and the breach of the principle of the protection of legitimate expectations must be held to be inadmissible, as they appear for the first time in the reply, contrary to Article 48(2) of the Rules of Procedure of the Court. In any event, no inconsistency or breach of that principle can be detected in the fact that the Commission examined the Italian authorities' study only as a matter of secondary importance. Lastly, the Commission points out that it is settled case-law that the principle of the protection of legitimate expectations is breached only where the administration has given 'precise assurances' to the persons concerned, which is clearly not the case here.

Findings of the Court

108 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.

109 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.

110 In response to that request, the Italian Republic 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.

111 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.

112 The Commission nevertheless also examined, as a matter of secondary importance, the merits 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).

113 In the first place, the Italian Republic's complaint, referred to in paragraphs 101 to 103 above, concerning the Commission's alleged failure to comply with the principle of *audi alteram partem*, thereby vitiating its assessment of the study provided by the Italian authorities on the value of the expropriated property, cannot be upheld.

114 In that regard, it should be borne in mind that the principle of *audi alteram partem*, which is a fundamental principle of European Union law, forms, in particular, part of the rights of the defence (see, by analogy, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 61). Respect for those rights is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27, and Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 12).

115 As regards the review of State aid, 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 a breach 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 (*France* v *Commission*, paragraph 114 above, paragraphs 12 and 13, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 30 and 31).

116 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 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), 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).

117 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).

118 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.'

119 Thus, during the formal investigation procedure, the Italian Republic clearly expressed its view on the compensatory nature of the disputed measure, which is substantively the same as the first plea put forward in the application initiating the annulment proceedings. 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.

120 In so far as the Commission was correct in finding that the temporal extension of the preferential 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 (see paragraph 97 above), the alleged breach of the rights of the defence cannot, in any event, have any bearing on the validity of the contested decision.

121 Moreover, the Italian Republic's complaint 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.

122 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, which 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).

123 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. It should be borne in mind in that regard 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 (Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 198).

124 The Italian Republic's allegation that the Commission made a 'turnabout' is based on a misreading of the letter of 20 February 2007, which does not indicate that the Commission found 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.

125 In any event, the Commission never indicated either to the Italian Republic 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.

126 In the second place, after highlighting the allegedly inconsistent nature of the Commission's conduct, the Italian Republic maintained that, in requesting the study in question in order to determine whether there was any overcompensation, the Commission had created a legitimate expectation on the part of the Italian authorities that 'the results of that study would be assessed in a certain manner for the purposes of the contested decision'. According to the Italian Republic, by stating that the study was not relevant in any event, and by not doing so until the contested decision, and

by assessing the content of the study as if it were of only secondary importance, the Commission breached the legitimate expectation to which the request for information, made in the letter of 20 February 2007, had given rise.

127 The allegation that the Commission's conduct was inconsistent belongs with the arguments in support of the complaint that the Commission had acted in breach of the principle of *audi alteram partem* and of the Italian Republic's rights of defence, which must be dismissed as unfounded.

128 As regards the allegation that it had acted in breach of the principle of the protection of legitimate expectations, 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.

129 It is common ground that it was in its reply that the Italian Republic first relied on breach of the principle of the protection of legitimate expectations, basing its claim on the content of the letter of 20 February 2007 containing a request for information, a fact already mentioned and discussed by the parties in the application initiating the proceedings and in the statement in defence.

130 It follows that the plea in question must be held to be inadmissible.

131 In any event, that plea fell inevitably to be dismissed as unfounded. First, the letter of 20 February 2007 does not contain any precise assurance on the part of the administration, a necessary condition for being able to rely validly on breach of the principle of the protection of legitimate expectations (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147, and Joined Cases T-346/99 to T-348/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-4259, paragraph 93), with regard to the belief that the results of the study requested in that letter 'would be assessed in a certain manner for the purposes of the contested decision'. Secondly, those results were in fact taken into account and examined by the Commission in the contested decision, even if the analysis was carried out as a matter of secondary importance.

132 Accordingly, it is appropriate to reject the plea alleging that the Commission acted in breach of essential procedural requirements by failing to carry out an adequate investigation and in breach of the principle of *audi alteram partem*, since, as has been pointed out, the allegation of an inadequate investigation is not a separate complaint but belongs, in reality, with the arguments in support of the plea of breach of the aforementioned principle.

133 It follows from all the above considerations that the application must be dismissed.

Costs

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

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Italian Republic to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 1 July 2010.

[Signatures]