OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 8 September 2005 [1]

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I — Introduction

1. By order of 11 February 2004, received at the Court Registry on 23 March 2004, the Commissione tributaria provinciale di Genova (Provincial Tax Commission, Genoa) referred to the Court several questions for a preliminary ruling concerning, first, the validity of Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy [2] and, secondly, the interpretation of Article 87 EC, Article 14 of Regulation (EC) No 659/1999 [3] and a number of general principles of Community law.

2. Those questions are raised in the context of a dispute between Unicredito Italiano SpA, which has its registered office in Genoa ('Unicredito'), and the Agenzia delle Entrate, Ufficio Genova 1 (Revenue Agency, Genoa 1 Office) ('the Authority') regarding the reimbursement of additional tax payments made by Unicredito in the light of measures introduced by Italy to implement the contested decision.

2 — OJ 2002 L 184, p. 27 ('the contested decision').

3 — Council regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

II — Facts and procedure

A — *Background to the contested decision*

3. Until the 1980s, the Italian banking sector was partly State-owned and, in general, characterised by significant State influence and both specialisation and regionalisation. From the early 1980s, the Italian authorities began to privatise banks, with the intention also of increasing the average bank size and bringing to an end specialisation. By Law No 218/90 of 30 July 1990, the so-called 'Amato Law' ('the Amato Law'), the Italian Government adopted fundamental measures with a view to the gradual privatisation of the banking sector.

4. Consequently, the banks which were State-owned were able to be converted into public limited companies, with such conversion becoming mandatory in 1993. Their shares were placed on the market or transferred to profit-oriented establishments, referred to as 'banking foundations'. As part of the latter processes, the following split occurred: the newly established banks (generally 'the banks') assumed responsibility for banking operations, whilst the banking foundations owned and managed the shares in the banks, thus controlling them. Under certain tax provisions contained in the Amato Law, the banking foundations were also entitled to transfer to the banks certain fixed and other assets which were not essential to the banks' corporate objectives.

5. In the late 1990s, the Italian Government adopted new measures to promote the restructuring and consolidation of the banking sector. Law No 461/98 of 23 December 1998 ('the Ciampi Law') granted the government the power, inter alia, to adopt tax provisions to facilitate the retransfer to the banking foundations of the banks' fixed and other assets, which were not essential to their corporate objectives, and to facilitate the restructuring of the banking sector by means of mergers between banks or similar restructuring measures.

6. The Ciampi Law was implemented by Legislative Decree No 153/99 of 17 May 1999 ('Decree No 153/99'), which provides for special tax rules in respect of certain restructuring and retransfer transactions. Those measures introduced by the Ciampi Law and Decree No 153/99 ('the disputed aid scheme') are described in recital 5 in the preamble to the contested decision.

7. The referring court states that the main proceedings concern the measure described as follows in point 1 of recital 5 in the

preamble to the contested decision ('the disputed measure'):

the reduction to 12.5% of the rate of income tax (IRPEG) for banks which merge or engage in similar restructuring, for five years after the operation, provided that the profits are placed in a special reserve which may not be distributed for a period of three years. The profits which may be placed in the special reserve may not exceed 1.2% of the difference between the sum of credits and debits of the post-merger bank and the sum of credits and debits of the largest pre-merger bank (Articles 22(1) and 23(1) of Decree No 153/99).

B — *Procedure before the Commission, the contested decision and the implementation of that decision*

8. In response to a parliamentary question on the matter, the Commission launched preliminary investigations into the disputed aid scheme in March 1999. In the course of the procedure, the Commission notified the Italian authorities by letter of 23 March 2000 that the disputed aid scheme might contain elements of aid and requested that it provisionally cease to apply the scheme. By letter of 12 April 2000, the Italian authorities informed the Commission that they would suspend the application of the disputed aid scheme, with the result that the tax relief could be granted in 1998, 1999 and 2000 only.

9. By letter of 25 October 2000, the Commission notified the Italian Government of the opening of State aid proceedings. In the context of those proceedings, Unicredito, together with a number of other banks, submitted written observations by letter of 10 March 2001.

10. On 11 December 2001, the Commission adopted the contested decision in which it held that the measures forming part of the disputed aid scheme in favour of the banks — with the exception of the measure set out in point 5 of recital 5 in the preamble to the contested decision — constituted State aid which is incompatible with the common market (Articles 1 and 2 of the decision). In addition, the Commission required the Italian Government to withdraw the disputed aid scheme (Article 3 of the decision), to recover the aid granted under the unlawful provisions plus interest (Article 4 of the decision) and to inform the Commission, within two months of notification of the decision, of the measures taken to implement it (Article 5 of the decision).

11. It is appropriate to reproduce Article 4 of the contested decision ('the order to recover') here:

'1. Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the scheme referred to in Article 1 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective implementation of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.'

12. In order to comply with the contested decision, the disputed aid scheme was initially suspended with effect from the 2001 tax year. Subsequently, by Decree-Law No 282/02 of 24 December 2002, which later became Law No 27 of 21 February 2003 on urgent provisions regarding 'Community and fiscal measures, tax collection and accounting procedures',[4] the banks which had benefited from the disputed aid scheme were required to make a supplementary tax payment plus interest corresponding to that amount of tax not paid, in accordance with the disputed measures, in each of the tax years in which those measures applied ('the national tax recovery').

C — Main proceedings and questions referred

13. Unicredito, which was established from the merger of six formerly independent banks which had profited from the tax relief provided for in the disputed measure, is one of the banks affected by the recovery.

14. In the main proceedings, the national court is required to rule on the action brought by Unicredito against the Authority's implicit rejection of its application for reimbursement of the, in total, EUR 244 712 646.05 in additional taxes and interest initially paid by it as part of the national tax recovery.

15. In support of its request for reimbursement, Unicredito claims in the main proceedings that the disputed aid scheme is

4 — Ordinary Supplement No 29 to GURI No 44 of 22 February 2003.

nothing more than the continuation of laws, such as the Amato Law, which were adopted a number of years previously and do not affect competition, because all banks, including the subsidiaries of foreign banks, were able to benefit from the tax relief, while the unequal treatment in comparison with other areas of activity is objectively justified. Unicredito further objects to the retroactive effect of the tax laws ordering repayment which, in the Italian legal system, is limited by principles such as the protection of legitimate expectations and legal certainty. The contested decision is contrary to the accepted interpretation given to the Amato Law. Finally, Unicredito claims that the contested decision, which underlies the national recovery of unpaid taxes, is unlawful. In the alternative, Unicredito claimed in the main proceedings that the national court should refer the questions regarding validity and interpretation which have now been submitted to the Court.

16. The referring court takes the view that the questions submitted to the Court for a preliminary ruling regarding the national tax recovery are properly raised from the points of view of the compatibility of the domestic provision with the principles of Community law of both the protection of legitimate expectations and proportionality.

17. As regards the issue of the existence of legitimate expectations, the referring court analyses the disputed measure and its aims and, in that context, refers primarily to the continuity of this measure in relation to the Amato Law and to the fact that the Commission did not object to the Amato Law.

18. The referring court also states that the possibility of benefiting from the disputed measure represented one of the conditions by which the individual banks assessed the economic feasibility of the mergers concerned. For that reason, in view of the scale of the repayment, an amendment to the tax scheme, introduced by the disputed measures, would adversely affect the stability of the financial sector and, in any event, unfairly alter the assessment criteria used in the context of decisions already implemented within undertakings. The principle of the protection of legitimate expectations therefore precludes the contested decision from having retroactive effect.

19. With regard to the principle of proportionality, the referring court states, inter alia, that there is no rational explanation why the recovery of all the tax difference rather than only a part thereof should be deemed appropriate to restore the status quo.

20. Against this background, the Commissione tributaria provinciale di Genova referred to the Court the following questions for a preliminary ruling:

'(1) Is Commission Decision 2002/581/EC of 11 December 2001 invalid and

incompatible with Community law, in that the provisions of the Ciampi Law and the related legislative decree regarding banks are compatible with the common market, contrary to the opinion of the European Commission, or do they in any case fall within the scope of the derogations provided for by Article 87(3)(b) and (c) EC?

(2) In particular, is Article 4 of the abovementioned decision invalid and incompatible with Community law, in that the Commission:

(a) failed in its duty to provide adequate reasons in accordance with Article 253 EC; and/or

(b) infringed the principle of legitimate expectations; and/or

(c) infringed the principle of proportionality?

(3) In any event, does a correct interpretation of Article 87 et seq. EC, Article 14 of Council Regulation (EC) No 659/1999 and the general principles of Community law, in particular [the principles of legal certainty, proportionality and the protection of legitimate expectations], preclude the application of Article 1 of Decree-Law No 282 of 24 December 2002?'

D — *Proceedings before the Community Courts*

21. It must be pointed out that the contested decision is the subject-matter of several proceedings before both the Court of Justice and the Court of First Instance.

22. In Case C-66/02, in which I am also delivering an Opinion today — and to which I shall also refer by citing points in that Opinion — a judgment must be given on the action for annulment, received at the Court Registry on 28 February 2002, which the Italian Republic has brought against the Commission. [5] Both that case and the present case were considered at a joint hearing before the Court.

23. In addition, essentially the same questions as those submitted in this case have been referred to the Court in Case C-336/04

5 — OJ 2002 C 109, p. 33; Opinion in pending Case C-66/02 *Italy* v *Commission*.

by order of the Commissione tributaria provinciale di Pordenone (Provincial Tax Commission, Pordenone) of 14 July 2004.[6] By order of the President of the Court of Justice of 10 September 2004, those proceedings were stayed until judgment is given in Case C-66/02 *Italy* v *Commission* and Case C-148/04 *Unicredito*.

24. Finally, as early as 21 February 2002, an action for annulment of the contested decision was brought by the Associazione Bancaria Italia (ABI), a banking association which represents Unicredito as well as six other banks, before the Court of First Instance.[7] Those seven actions for annulment were each stayed by orders of the Court of First Instance of 9 July 2003 until the judgment of the Court in Case C-66/02 *Italy* v *Commission*.

25. Unicredito, the Commission and the Italian Government have made written and oral submissions in this case. Only the arguments advanced by Unicredito are reproduced separately below, in so far as is necessary. Reference will be made, where appropriate, to the arguments put forward by the Italian Government, which primarily referred to its application in Case C-66/02 *Italy* v *Commission*, and by the Commission as part of the assessment.

6 — *Banca Popolare FriulAdria* (OJ 2004 C 251, p. 5)

7 — Case T-36/02.

III — Subject-matter and admissibility of the proceedings and of the questions referred

A — *Admissibility of the proceedings with regard to the action before the Court of First Instance*

26. The first point, which was raised by the Commission and might call into question the admissibility of the proceedings as a whole, relates to whether it is actually possible for a natural or legal person to call into question, by means of a reference for a preliminary ruling, the validity of a decision addressed to a Member State, as in this case.

27. In that connection, it must first be stated that it is settled case-law that references for a preliminary ruling to assess the validity of an act of a Community institution, together with actions for annulment under Article 230 EC and pleas of inapplicability under Article 241 EC, form part of a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the Community institutions, with such review entrusted to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the

invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity. [8]

28. It is clear from that fact alone that, in the Community system of legal remedies, the admissibility of an indirect challenge to an act of a Community institution made by a natural or legal person by means of a reference for a preliminary ruling turns on whether the possibility exists or would have existed to challenge that act directly on the basis of the fourth paragraph of Article 230 EC before the Court of First Instance. In this regard, the Community system of legal protection has also been referred to as a system 'of communicating vessels', within the framework of which the jurisdiction of the Community Courts usually precludes that of the national courts and vice versa. [9]

29. In that connection, the Commission cited the judgment of the Court in *TWD Textilwerke Deggendorf*. [10] In that judgment, the Court of Justice held that 'it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision'. [11]

30. However, as is clear from that judgment, that exclusion of the possibility of challenging a Commission decision by means of a reference for a preliminary ruling is intended to take account of the principle of legal certainty; the definitive nature which that decision assumes as against the person concerned after expiry of the time-limit for bringing an action, available to him under the fourth paragraph of Article 230 EC, must not be overcome. [12]

31. Nevertheless, this does not apply in a case where the individual concerned has brought such an action before the Court of First Instance within the prescribed time-limit, [13] as has occurred here in the form of the action brought before the Court of First Instance by the ABI, which also represents Unicredito.

8 — See Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 40; and Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425, paragraph 30.

9 — See K. Lenaerts, 'The Legal Protection of Private Parties under the EC Treaty: A Coherent and Complete System of Judicial Review?' in *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, 1998, p. 591 (598).

10 — Case C-188/92 [1994] ECR I-833.

11 — Paragraph 17 of that judgment.

12 — See paragraph 18 of the judgment.

13 — See, to that effect, the unambiguous finding in Case C-178/95 *Wiljo* [1997] ECRI-585, paragraphs 20 to 22.

32. In this regard, there is, therefore, no reason why the reference for a preliminary ruling is not admissible in this case.

B — *Subject-matter and admissibility of the questions referred*

33. In the light of the formulation of the questions referred and the statements made by the referring court in the order for reference, the Commission has raised doubts as to the admissibility of the first question referred and claimed that, in this case, the Court is not obliged to examine whether Article 87 EC has been infringed. In that connection, the Commission has also raised the question of the extent to which the arguments advanced by Unicredito in this case must be taken into consideration in the Court's examination.

34. It is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. [14]

35. However, if questions have been improperly formulated or go beyond the scope of the powers conferred on it by Article 234 EC, the Court is free to extract from all the factors provided by the national court, and in particular from the statement of the grounds contained in the reference, the elements of Community law requiring an interpretation — or, as the case may be, an assessment of validity — having regard to the subject-matter of the dispute. [15]

36. As far as the scope of examination of the Court in references for a preliminary ruling is concerned, that scope is, in principle, defined by the referring court in accordance with the separation of powers between the national courts, on the one hand, and the Court, on the other hand, in the order for reference. [16] In references for a preliminary ruling concerning validity, the Court of Justice examines within that scope, [17] and in the light of the arguments put forward by the parties to the proceedings, [18] whether factors exist which affect the validity of the Community act in question. It must also be borne in mind in this context that, as the Court has held, the information provided in

14 — See, inter alia, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraphs 22 and 23.

15 — See Case C-105/96 *Codiesel* [1997] ECR I-3465, paragraph 13, and Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 26.

16 — See *Codiesel* (cited in footnote 15), paragraph 12; Case 167/84 *Drunert* [1985] ECR 2235, paragraph 12; and Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4.

17 — Thus, in the context of a reference for a preliminary ruling, the possibility of a natural or legal person to assert grounds for invalidity is, to a certain degree, dependent on the national court. This is one of the restrictions on references for a preliminary ruling as compared with actions for annulment which caused Advocate General Jacobs, in his Opinion in *Unión de Pequeños Agricultores* v *Council* (judgment cited in footnote 8), point 102, to call into question the restrictive case-law of the Court on the right of individuals to institute proceedings under the fourth paragraph of Article 230 EC.

18 — See, for example, Case C-16/90 *Nolle* [1991] ECR I-5163, paragraphs 14 to 35; see also the explicit finding in Joined Cases 103/77 and 145/77 *Royal Scholten-Honig* [1978] ECR 2037, paragraphs 16 and 17.

orders for reference serves not only to allow the Court of Justice to give appropriate answers, but it is also intended to enable the governments of the Member States, as well as other parties concerned, such as the Commission, to submit observations under Article 20 of the Statute of the Court of Justice. [19]

37. However, in this regard, the Court has, for example, deemed it to be sufficient for it to be clear from the order for reference that the referring court has doubts as to the validity of an act of a Community institution, bearing in mind that the written observations may be supplemented and expanded upon in the course of the oral procedure. [20]

38. Finally, it must be recalled that the Court has no jurisdiction to rule on a question referred for a preliminary ruling where it is obvious that the interpretation or assessment of the validity of Community provisions sought bears no relation to the actual facts or subject-matter of the main proceedings. [21]

39. With regard to the first question referred, the Commission has essentially stated that, in the main proceedings, that question concerns merely the invalidity of the order to recover contained in the contested decision and not the validity of the contested decision as a whole.

40. In the main proceedings, Unicredito has claimed that the contested decision, implemented by means of the national tax recovery, is unlawful and, as is clear from the order for reference, supported that claim with arguments relating to not only the order to recover but also to the classification of the disputed measure as aid. It must be pointed out in this regard that the requirement to repay the tax relief received under the disputed measure is also clearly linked to the issue of the classification of that measure as aid. The first question referred is therefore not manifestly devoid of any relation to the subject-matter of the main proceedings.

41. In addition, it is clear from the wording of the first question referred and from the information provided in the order for reference — in particular the arguments advanced by Unicredito which are reproduced therein — that the referring court has doubts as to the validity of the contested decision from the point of view of its compatibility with the common market and the application of Article 87 EC.

19 — See, inter alia, Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6.

20 — Ibid., paragraph 7; see also the Opinion of Advocate General Jacobs in Case C-162/96 *Racke* [1998] ECR I-3655, point 67.

21 — See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18.

42. In this respect, there is no ground on which the first question referred can be held to be inadmissible.

43. The Commission then submitted that it is not permissible, in the context of a reference for a preliminary ruling under Article 234 EC, to refer questions to the Court regarding the compatibility with the common market of State aid or a national aid scheme.

44. The Commission is right to state that questions regarding the compatibility with the common market of a national aid scheme may not generally be referred to the Court and that the Commission alone is the body competent to assess the compatibility with the common market of State aid measures or schemes. [22] However, a finding that aid is incompatible with the common market — apart from in the case of the, in practice, less significant issue of compliance with the statutory derogations [23] contained in Article 87(2) EC — is, in reality, based on two elements: the classification of a scheme as aid satisfying the constituent elements of the prohibition on State aid laid down in Article 87(1) EC and the assessment as to whether the conditions for the application of the derogations [24] referred to in Article 87(3) are satisfied. In this context, the Court may first examine whether the State aid measure or scheme at issue must be classified as aid within the meaning of Article 87(1) EC. Secondly, within the context of the application of the derogations provided for in Article 87(3) EC, the Commission has extensive powers of discretion, the exercise of which involves complex economic and social assessments. [25] The Court cannot, therefore, substitute its own assessment of the matter for that of the Commission [26] or, for the same reason, decide whether an aid measure is ultimately compatible with the common market. However, that assessment by the Commission is subject — even if only to a very limited degree — to review by the Court. [27]

45. The possibilities of judicial review outlined above with regard to finding that an aid measure is compatible with the common market must also be open to the Court — not least in view of the necessary consistency between actions for annulment and references for a preliminary ruling on the validity of a Community act within the Community

22 — See the order in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraph 47.

23 — See Heidenhain, *Handbuch des Europäischen Beihilfenrechts*, 2003, p. 192, paragraph 2.

24 — Ibid.; Heidenhain describes these derogations as 'optional' derogations.

25 — See, inter alia, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; Joined Cases 62/87 and 72/87 *Executif régional wallon and Glaverbel* v *Commission* [1988] ECR 1573; and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83.

26 — See, inter alia, Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34.

27 — See in this regard, inter alia, Case C-372/97 *Italy* v *Commission* (cited in footnote 25), paragraph 83.

system of legal remedies — in the context of a reference for a preliminary ruling on the validity of a Community act.[28]

46. I therefore take the view that the first question referred is admissible and that, by that question, the referring court is requesting that the Court examine the validity of the contested decision as regards a possible infringement of Article 87(1) and (3) EC.

47. By its second question, the referring court is clearly asking the Court whether the contested decision is invalid because of the breach of the duty to state reasons, and because the principle of the protection of legitimate expectations and/or the principle of proportionality have been infringed.

48. By its third question, which takes the form of a question regarding the interpretation of Community law, the referring court is again clearly asking about the compatibility of the provisions and principles of Community law previously mentioned in the context of the first two questions referred, but on this occasion with reference to the national tax recovery.

28 — See Case 112/83 *Société des produits de maïs* [1985] ECR 719, paragraph 17.

49. It is therefore necessary to examine below whether the contested decision is invalid on the following grounds: infringement of Article 87(1) and (3) EC, infringement of the obligation to state reasons and infringement of the principles of the protection of legitimate expectation and of proportionality.

IV — First and second questions referred (assessment of validity)

A — *Infringement of Article 87 EC*

1. Lawfulness of the classification of the disputed measure as aid within the meaning of Article 87(1) EC

(a) Submissions of the referring court and main arguments of the parties

50. First of all, the referring court considers the validity of the contested decision from the point of view of whether the Commission was justified in classifying the disputed measure as aid within the meaning of Article 87(1) EC. Advancing the same arguments as

those submitted by the Italian Government in Case C-66/02 *Italy* v *Commission* to which reference can be made in this respect here, [29] Unicredito is essentially claiming that the disputed measure does not present the characteristics of the grant of an advantage, the use of State resources, the selectivity of the advantage granted or an effect on competition and trade between the Member States. In particular, it objects to the finding, in recital 33 in the preamble to the contested decision, that the disputed measure is not neutral with respect to the relative size of the undertakings involved. Furthermore, the Commission erred in failing to apply the *de minimis* aid principle, even though itself acknowledging that, in some cases, certain measures may fall below the *de minimis* threshold.

(b) Assessment

51. It must first be pointed out that, as the Commission stated, inter alia, in recital 29 in the preamble to the contested decision, the subject of the contested decision is not individual grants of aid but the (disputed) aid scheme itself. It is settled case-law that the Commission may confine itself to examining the general characteristics of an aid scheme 'in an abstract manner' in order to determine, on the basis of those characteristics, whether that scheme contains elements of aid. [30] Consequently, the validity of the contested decision may not be called into question by reference to individual grants of aid or cases of application such as that of Unicredito. The issue is therefore whether the disputed measure forming part of the disputed aid scheme from which Unicredito benefited was justifiably classified by the Commission as State aid within the meaning of Article 87(1) EC on the basis of that scheme's general characteristics.

52. With regard to this issue, it must first be borne in mind that Article 87(1) EC defines State aid governed by the EC Treaty as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

53. It is settled case-law that the following cumulative conditions must be satisfied in order to classify a measure as aid within the meaning of that article: (i) the measure must confer a selective advantage on a specific company or in respect of the production of specific goods; (ii) the advantage must be conferred directly or indirectly through State

29 — See, in particular, points 40 to 46 and 85 to 88 of my Opinion in Case C-66/02 *Italy* v *Commission* (cited in footnote 5).

30 — With regard to the examination of such an 'aid programme', see, inter alia, Case C-75/97 *Belgium* v *Commission ('Maribel')* [1999] ECR I-3671, paragraph 48, and Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18.

resources; (iii) the measure must distort or threaten to distort competition; and (iv) it must be liable to affect trade between Member States. [31]

54. In my Opinion in Case C-66/02 *Italy* v *Commission*, I have already considered whether, in the contested decision, the Commission was justified in finding that those conditions are satisfied in relation to the disputed aid scheme, which includes the disputed measure, and concluded that they are indeed satisfied.

55. It is therefore appropriate at this juncture to make reference to the relevant passages of that Opinion: with regard to the conferment of an advantage, I refer to my comments in points 47 to 57 of the abovementioned Opinion in which I specifically consider the disputed measure; with regard to the grant of an advantage through State resources, I refer to my comments in points 63 and 64 of the abovementioned Opinion. For the reasons which I subsequently gave in points 65 to 84 of that Opinion, I also consider the disputed measure to be selective, in any event from a sectoral point of view. As I further stated in points 82 and 83 of the abovementioned Opinion, there is therefore no need to examine, inter alia, whether the disputed measure is, in addition, selective within the sector, that is to say, for example, in relation to the size of the banks. With regard to the issue of whether the Commission could rightly consider competition to have been distorted and trade affected, reference should be made to my comments in points 89 to 99 of the abovementioned Opinion.

56. Finally, as regards Unicredito's argument that, in some cases, certain measures may fall beneath the *de minimis* threshold, it is sufficient to point out, as I have already stated, that the subject of the contested decision was not individual grants of aid but an aid scheme itself, and the fact that aid granted under that scheme remains, in individual cases, beneath the *de minimis* threshold is irrelevant. [32]

57. Accordingly, it must be held that the plea of invalidity based on infringement of Article 87(1) EC is unfounded.

(c) The lawfulness of the contested decision with regard to the application of Article 87 (3)(b) and (c) EC

(i) Submissions of the referring court and main arguments of the parties

58. Unicredito also takes the view — a view to which the national court also referred in

31 — See, inter alia, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27.

32 — See above, point 51.

the order for reference — that the Commission has infringed Article 87(3)(b) and (c) EC. It submits that the disputed measures actually seek to promote the complete and definitive privatisation of the Italian banking sector and that they should, therefore, have been declared to be compatible with the common market as 'aid to promote the execution of an important project of common European interest' or 'aid to facilitate the development of certain economic activities' within the meaning of those provisions.

(ii) Assessment

59. As I have previously stated above, in the context of the application of Article 87(3) EC, the Commission has wide discretionary powers, the exercise of which involves complex economic and social assessments, with the result that the Court cannot substitute its own assessment of compatibility for that of the competent authority. [33]

60. Consequently, nor is it for the Court to determine whether State aid should be or could have been declared to be compatible with the common market. [34]

61. In fact, judicial review of the manner in which the Commission exercises its discretion should be confined to establishing that the rules of procedure and the rules relating to the obligation to state reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers. [35]

62. In so far as Unicredito has claimed that the decision lacked an adequate statement of reasons, I refer here to my comments below in point 89 et seq. With regard to other points raised, the arguments advanced by Unicredito in connection with Article 87(3) EC essentially mirror those of the Italian Government, which I have previously assessed in points 113 to 125 of my Opinion in Case C-66/02 *Italy* v *Commission*, reaching the conclusion that the contested decision is lawful in this respect.

63. Accordingly, I take the view that nothing in this case indicates that the decision is legally flawed with regard to the application of Article 87(3) EC.

33 — See above, point 44 and the case-law cited.

34 — See also the order in *Sicilcassa and Others* (cited in footnote 22), paragraph 47.

35 — See, inter alia, Case C-372/97 *Italy* v *Commission* (cited in footnote 25), paragraph 83.

2. Infringement of the principles of the protection of legitimate expectations and of legal certainty

(a) Submissions of the referring court and main arguments of the parties

64. The referring court further asks whether the order to recover contained in the contested decision infringes the principles of the protection of legitimate expectations and of legal certainty. It refers in the order for reference to the fact that the disputed measure is consistent with the logic and continuity of the Amato Law which the Commission itself has held to be lawful and compatible with Article 87 EC. A manifest problem with the protection of legitimate expectations and with legal certainty arises from the fact that the possibility of benefiting from the disputed aid scheme was one of the conditions on the basis of which the individual banks assessed the feasibility of the mergers concerned from economic perspectives.

65. The referring court has thus essentially repeated the arguments advanced by Unicredito on this matter, by which it claims that the similarity of the disputed aid scheme with the Amato Law, in terms of purpose and content, justified the presumption of compatibility with Article 87 EC. Unicredito takes the view that the conduct of the Commission with regard to the Amato Law establishes an 'exceptional case' of legitimate expectations capable of protecting the undertakings from the recovery of the aid in accordance with Article 14(1) of Regulation No 659/1999. In addition, the Commission errs in its assumption that solely the provisions contained in Article 7(1) and (2) of the Amato Law provide the foundation for legitimate expectations. Rather, legitimate expectations may arise in connection with the tax measure laid down in Article 7(3) of the Amato Law because that provision was applied in a very similar way to Articles 22 and 23 of the Ciampi Law.

(b) Assessment

66. The Court has consistently held that the removal of unlawful State aid by means of recovery is the 'logical consequence' of its unlawfulness. [36] Under Article 14(1) of Regulation No 659/1999, the Commission may not require recovery of aid if this would be contrary to a general principle of Community law.

67. With regard to the principle of the protection of legitimate expectations, it must first be pointed out that it is settled case-law that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 88 EC may not rely on the legitimate expectations of the recipient undertaking in order to justify a failure to comply with the obligation to take the steps

36 — See, inter alia, *Maribel* (cited in footnote 30), paragraph 64, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66.

necessary to implement a Commission decision instructing it to recover aid. If it could do so, Articles 87 EC and 88 EC would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive of their effectiveness decisions taken by the Commission under those provisions. [37]

68. However, it is true, according to settled case-law, that an undertaking to which aid has been granted is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful. [38] In view of the mandatory nature of the review of State aid by the Commission under Article 93 of the Treaty, 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 laid down in that article and, second, that a diligent businessman should 'normally be able to determine whether that procedure has been followed'. [39]

69. In particular, where aid is paid without prior notification to the Commission, so 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. [40]

70. It is common ground in this case that the disputed aid scheme was introduced without prior notification in breach of Article 88(3) EC.

71. In addition, I take the view that no circumstances exist which are capable, exceptionally, of justifying reliance on legitimate expectations.

72. Indeed, account must, in principle, be taken of the fact that the classification of a State measure as aid within the meaning of Article 87 EC, in accordance with the constituent elements laid down in that provision, depends on a number of factors and requires a detailed analysis, on a case-by-case basis, of the technical and legal characteristics of the State measure at issue and its economic context. [41]

37 — See *Spain* v *Commission* (cited in footnote 26), paragraph 48.

38 — See, inter alia, Case C-372/97 *Italy* v *Commission* (cited in footnote 25), paragraph 111.

39 — See, inter alia, Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 44; Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14; *Spain* v *Commission* (cited in footnote 26), paragraph 51; and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25.

40 — See *Alcan Deutschland* (cited in footnote 39), paragraphs 30 and 31.

41 — With regard to the issue of the selective grant of an advantage, see the findings of Advocate General Tizzano in his Opinion in Case C-53/00 *Ferring* [2001] ECR I-9067, point 39.

73. In addition, as I have previously stated above, [42] in the context of the assessment of whether aid is compatible with the common market, the Commission has wide discretion, the exercise of which involves complex economic and social assessments which must take account of the Community as a whole. [43]

74. Precisely because the rules on State aid, as the Italian Government has rightly submitted, must take into account the economic realities, the review of aid within the meaning of the Treaty is not a static concept. The Council expressed that fact as follows in recital 4 in the preamble to Regulation No 659/1999:

'... the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; ... following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid'.

75. In the light of those aspects of the law on aid, the fact that the Commission did not earlier raise any objection to the Amato Law is not sufficient to establish legitimate expectations on the part of the recipient undertaking that the disputed aid scheme is lawful, even where that scheme is consistent with the Amato Law from the point of view of time and/or logic, and both the scheme and the Amato Law have common general objectives such as the privatisation of the banking sector. In addition, it is clear from the documents in the case that the Commission examined the Amato Law with regard to only a number of points, in particular the issue of capital increases.

76. In the light of the foregoing, it must therefore be held that, with regard to the order to recover, the principle of the protection of legitimate expectations has not been infringed. Moreover, since no separate arguments have, obviously, been advanced which could establish an infringement of the principle of legal certainty, I take the view that that allegation must likewise be dismissed as unfounded.

77. Accordingly, it must be held that, in this case, there is nothing to indicate that the order to recover would infringe the principles of the protection of legitimate expectations or of legal certainty.

42 — See above, points 44 and 59.

43 — See, inter alia, *Spain* v *Commission* (cited in footnote 26), paragraph 34.

3. Infringement of the principle of proportionality

(a) Submissions of the referring court and main arguments of the parties

78. The referring court then asks whether the order to recover infringes the principle of proportionality. It is indisputable that there is no rational explanation why the recovery of the entire tax difference rather than only a part thereof is deemed to be capable of restoring the status quo. Account must be taken, inter alia, of the fact that the disputed aid scheme was intended to encourage banks to merge and that a retroactive withdrawal of the advantage gained from the merger would fundamentally alter the economic relationships between private economic entities. The referring court also raises the issue of the stability of the financial sector.

79. Unicredito claims that, by requiring a full and immediate — rather than a gradual — recovery of the aid, the Commission infringed the principle of proportionality applicable in the light of Article 14(1) of Regulation No 659/1999. Recovery with retroactive effect is of a considerable disadvantage both to Unicredito and to the Italian banking sector as a whole, because it fundamentally alters the economic relationships established on the basis of the disputed measures. The consequences of the recovery for the undertakings concerned are palpably worse than if the disputed measure had never been applied.

(b) Assessment

80. I have already pointed out that the removal of unlawful State aid by means of recovery — of the aid in its entirety — is the logical consequence of finding that it is unlawful. [44] The Court has consistently held that, for that reason, the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid. [45]

81. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. [46]

44 — See, inter alia, Case C-142/87 *Belgium* v *Commission* (cited in footnote 36), paragraph 66.

45 — See, inter alia, Case C-372/97 *Italy* v *Commission* (cited in footnote 25), paragraph 103; Case C-142/87 *Belgium* v *Commission* (cited in footnote 36), paragraph 66; and *Spain* v *Commission* (cited in footnote 26), paragraph 47.

46 — Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22.

82. In view of that function, the Court has held that, as a general rule, save in exceptional circumstances, the Commission will not exceed the bounds of its discretion, recognised by the case-law of the Court, if it asks the Member State to recover the sums granted by way of unlawful aid, since it is only restoring the previous situation. [47]

83. In Case C-372/97 *Italy* v *Commission*, [48] the Court did not even regard the fact that the repayment would place a very heavy burden on the recipient undertakings, liable to cause many of them to disappear from the market and so giving rise to a serious employment and social crisis, as constituting such exceptional circumstances which could render an order to recover disproportionate.

84. In the light of that case-law of the Court, the disadvantages to the banks concerned, the banking sector itself and the Italian financial sector which, it is claimed, would result from the repayment at issue do not, in my view, constitute circumstances capable of rendering the order to recover contained in the contested decision disproportionate. It will often be the case that undertakings have made economic arrangements on the basis of aid, in particular in the case of incentive measures. However, that fact alone cannot render the recovery of aid disproportionate, since otherwise, as the Commission has rightly stated, the effectiveness of the Community prohibition on State aid in general and the function of recovery in particular would be severely impaired.

85. Finally, it has also not been submitted in this case that recovery would be absolutely impossible. [49]

86. Consequently, there is nothing to indicate that the order to recover would infringe the principle of proportionality.

4. Infringement of the obligation to state reasons under Article 253 EC

(a) Submissions of the referring court and main arguments of the parties

87. By its second question, the referring court, without providing any further infor-

47 — See, inter alia, *Maribel* (cited in footnote 30), paragraph 66, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 99.

48 — Cited in footnote 25, paragraph 105.

49 — See in this regard, inter alia, *Maribel* (cited in footnote 30), paragraph 86, which states that a Commission decision would be invalid if it imposed on the addressee an obligation, the implementation of which would, from the beginning, be impossible in objective and absolute terms.

mation in the order for reference, raises the issue of an infringement of the obligation to state reasons in relation to the disputed order to recover contained in the contested decision.

88. In that connection, Unicredito objects that the Commission failed to state the reasons for not availing itself of the possibility provided for in Article 14(1) of Regulation No 659/1999 to refrain from demanding repayment of aid, particularly since such recovery infringes the principle of the protection of legitimate expectations enshrined in Community law. The contested decision also fails to state the reasons with regard to the issues of selectivity and distortion of competition. In addition, the Commission should have specified the relevant market in its finding of a distortion of competition. Furthermore, the decision also fails to state the reasons for the Commission's refusal to apply the *de minimis* rule. Finally, the Commission should not have examined the disputed aid scheme in an abstract manner, but with regard to each individual case.

(b) Assessment

89. As a preliminary point, it must be borne in mind that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. [50]

50 — Case C-310/99 *Italy* v *Commission* (cited in footnote 47), paragraph 48.

90. Secondly, as regards the requirements which the statement of reasons must satisfy, it is settled case-law that the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirement to state reasons must be appraised by reference, in particular, to the content of the measure in question and the interest which the addressees of the measure, or other parties to whom it is of concern, may have in obtaining explanations. However, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [51]

91. First of all, with regard, in this case, to the reasons stated in relation to the order to recover, it must be stated that, in recital 49 in the preamble to the contested decision, the Commission refers to Article 14 of Regulation No 659/1999, under which, where negative decisions are taken in respect of unlawful aid, the Commission must decide to order recovery. Recitals 50 to 56 in the preamble to the contested decision then set out why the Commission considers that no

51 — See, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 93; Case C-17/99 *France* v *Commission* [2001] ECRI-2481, paragraphs 35 and 36; and Case C-310/99 *Italy* v *Commission* (cited in footnote 47), paragraph 48.

general principle of Community law stands in the way of recovery. The issues of the distortion of competition and the effects on trade between Member States as a result of the disputed aid scheme are considered in recitals 30 and 41 in the preamble to the contested decision.

92. With regard, in particular, to the allegation that the Commission should have specified the relevant market in its finding of the effects on competition, it must be pointed out that it is settled case-law that it is sufficient to prove that the aid concerned is capable of affecting trade between the Member States and threatening to distort competition without it being necessary to define the market and examine both its structure and the competitive relationships arising from that structure. [52]

93. Finally, the reasons why the Commission considers the disputed aid scheme, and the disputed measure in particular, to be selective are set out in detail in recitals 32 to 37 in the preamble to the contested decision. The Commission examines the issue of aid exceeding the *de minimis* limits in recital 44 in the preamble to that decision.

94. In this respect, the contested decision therefore satisfies the requirements governing an adequate statement of reasons.

95. Finally, with regard to the argument that the Commission should have examined and provided reasons for its assessment of the disputed aid scheme on a case-by-case basis, I have already stated that the subject of the contested decision is the examination of the aid scheme itself and that it is settled case-law that the Commission may confine itself to examining the general characteristics of an aid scheme 'in an abstract manner' in order to determine whether that scheme, according to those characteristics, contains elements of aid. [53] Consequently, the contested decision need not contain any reasons relating to individual cases of application of the disputed aid scheme.

96. It is clear from the foregoing — irrespective of the issue of the material accuracy of the reasons for the contested decision — that it cannot be held that the obligation to state reasons has been infringed.

5. Conclusion in respect of the assessment of validity

97. In the light of the foregoing, it must be held that this assessment has not revealed

52 — See, inter alia, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 9 to 12.

53 — See above, point 51.

anything to establish the invalidity of the contested decision or, in particular, that of the order to recover contained in that decision.

V — The third question referred (interpretation)

98. The third question referred is a question of interpretation and clearly relates to the provisions and principles of Community law which the referring court has previously mentioned in the context of the two questions submitted concerning the validity of the contested decision and, in particular, that of the order to recover. By this question, the referring court wishes to ascertain whether those provisions and principles of Community law, that is to say, in particular, the principles of the protection of legitimate expectations and of proportionality (thus the principles of Community law to which Article 14(1) of Regulation No 659/1999 refers) and Article 87 EC preclude the national tax recovery.

99. With regard to this question, which in the view of the Commission should not be answered separately, it must be held that, according to the order for reference, the national tax recovery represents merely the implementation of the order to recover. It is clear from the above assessment, however, that that order to recover does not infringe the provisions and principles of Community law cited by the referring court, in particular Article 87 EC and the principles of the protection of legitimate expectations and of proportionality, and is, therefore, valid. For that reason, those principles cannot preclude the national tax recovery, particularly since the referring court has not raised any factors supporting a claim of legitimate expectation or any other facts additional to those I have already considered as part of the assessment of validity. Furthermore, it must be pointed out that it follows from the Court's case-law that, where the Commission orders recovery by means of a valid decision, the national authorities are not entitled to reach any other finding; since the national authorities do not have any discretion in this regard, their role is merely to give effect to the Commission's decision. [54]

100. It is my opinion that the third question referred should be answered to the effect that the provisions and principles of Community law cited by the referring court do not preclude the application of a provision such as the national tax recovery, which is intended to give effect to the contested decision, in particular to the order to recover contained therein.

54 — See *Alcan Deutschland* (cited in footnote 39), paragraph 34.

VI — Costs

101. The costs incurred by the Italian Government and by the Commission are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

VII — Conclusion

102. In the light of the foregoing, I propose that the Court should answer the questions referred by the Commissione tributaria provinciale di Genova as follows:

(1) Assessment of the questions referred has not revealed any factors capable of affecting the validity of Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy, in particular with regard to the order to recover contained therein.

(2) The application of a provision such as the national tax recovery in order to give effect to Decision 2002/581, in particular to the order to recover contained therein, is not precluded by Article 87 EC, Article 14 of Regulation (EC) No 659/1999 or the principles of the protection of legitimate expectations or of proportionality.