JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

3 February 2011 *

In Case T-3/09,

Italian Republic, represented by P. Gentili, avvocato dello Stato,

applicant,

v

European Commission, represented by E. Righini, C. Urraca Caviedes and V. Di Bucci, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2010/38/EC of 21 October 2008 on State aid C 20/08 (ex N 62/08) which Italy is planning to implement through a modification of scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding (OJ 2010 L 17, p. 50),

* Language of the case: Italian.

THE GENERAL COURT (Eighth Chamber),

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

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2010,

gives the following

Judgment

Legal context

1 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides:

‘For the purpose of this Regulation:

…

(b) "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

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

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

2 Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1) provides:

'For the purposes of Article 1(c) of Regulation … No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.'

3 On the basis of Article 87(3)(e) EC, the Council adopted Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding (OJ 2002 L 172, p. 1). That regulation authorised such a mechanism in order to assist Community shipyards which had suffered serious harm caused by the unfair competition of shipyards in Korea (recital 3 in the preamble to the regulation). Article 2(2) and (3) of Regulation No 1177/2002 stated that direct aid in support of certain shipbuilding contracts could be considered to be compatible with the common market where that aid did not exceed 6 % of contract value and where the market segment at issue had suffered serious prejudice caused by unfair Korean competition.

4 Article 3 of Regulation No 1177/2002 makes the grant of the aid conditional on its being notified, in accordance with Article 88 EC, to the Commission, which must examine it and adopt a decision on it in accordance with Regulation No 659/1999.

5 Articles 2(4), 4 and 5 of Regulation No 1177/2002 are worded as follows:

'*Article 2*

…

4. This Regulation shall not apply in respect of any ship delivered more than three years from the date of signing of the final contract. The Commission may, however, grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company.

…

Article 4

The Regulation shall be applied to final contracts signed from the entry into force of this Regulation until its expiry, with the exception of final contracts signed before the Community gives notice in the *Official Journal of the European Communities* that it has initiated dispute settlement proceedings against Korea by requesting consultations in accordance with the World Trade Organisation's Understanding on the Rules and Procedures for the Settlement of Disputes and final contracts signed one month or more after the Commission gives notice in the *Official Journal of the European Communities* that these dispute settlement proceedings are resolved, or suspended on the grounds that the Community considers that the Agreed Minutes have been effectively implemented.

Article 5

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Communities* and shall expire on 31 March 2004.

…'

6 By Council Regulation (EC) No 502/2004 of 11 March 2004 amending Regulation No 1177/2002 (OJ 2004 L 81, p. 6), the date of expiry of Regulation No 1177/2002 provided for in Article 5 of that regulation was postponed to 31 March 2005.

Background to the dispute

7 On 15 January 2004, the Italian Republic notified a State aid scheme by which it intended to apply Regulation No 1177/2002 by means of Article 4(153) of legge no. 350 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004) (Law No 350 relating to the provisions for drawing up the annual and pluriannual budget of the State) of 24 December 2003 ('the 2004 Finance Law') (ordinary supplement to GURI No 299 of 27 December 2003) (Law 350/2003), which provided:

'In order to enable the application of [Regulation No 1177/2002], the sum of EUR 10 million is granted for 2004. The decree of the Ministry of Infrastructure and Transport lays down the detailed rules for the grant of the aid. The effectiveness of the provisions of the present paragraph is conditional, in accordance with Article 88(3) [EC], on the prior approval of the [Commission].'

8 The procedure for the grant of aid was laid down in the decreto ministeriale (ministro delle infrastrutture e dei trasporti), Attuazione del regolamento (CE) n. 1177/2002 del 27 giugno 2002 del Consiglio, relativo ad un meccanismo difensivo temporaneo per la costruzione navale (Ministerial Decree of the Ministry of Infrastructure and Transport concerning provisions relating to the application of Regulation No 1177/2002, GURI No 93 of 21 April 2004 ('the Ministerial Decree of 2 February 2004').

9 By decision of 19 May 2004 on aid scheme N 59/2004 relating to a defensive temporary mechanism for shipbuilding, notified under reference C (2004) 1807 ('the 2004 approval decision'), the Commission approved the scheme notified, on the view that it complied with Regulation No 1177/2002 and was compatible with the common market ('the 2004 scheme').

10 Since, in its estimation, the initial appropriation of EUR 10 million was not sufficient to cover all of the applications for aid submitted before the expiry of Regulation No 1177/2002, as amended by Regulation No 502/2004, the Italian Republic notified the Commission on 1 February 2008 of its plans to allocate, by means of Article 2(206) of legge nº 244 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008) (Law No 244 relating to the provisions for drawing up the annual and pluriannual budget of the State; 'the 2008 Finance Law') of 24 December 2007 (ordinary supplement to GURI No 300 of 28 December 2007), another EUR 10 million to the budget for the 2004 scheme (the measure notified).

11 By letter dated 30 April 2008, the Commission informed the Italian Republic that it had decided to initiate the procedure laid down in Article 88(2) EC with regard to the measure notified. The decision to initiate the procedure was, furthermore, published in the *Official Journal of the European Union* (OJ 2008 C 140, p. 20). The Commission invited all the interested parties to submit their comments within one month of the date of publication.

12 On 21 October 2008, the Commission adopted Decision 2010/38/EC on State aid C 20/08 (ex N 62/08) which Italy is planning to implement by altering scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding (OJ 2010 L 17, p. 50) ('the contested decision'), Article 1 of which provides:

'The State aid which Italy is planning to implement by altering scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding, which entails an increase [for 2004] of [EUR] 10 million, is incompatible with the common market.

Therefore the aid may not be implemented.'

13 In the contested decision, the Commission held that the measure notified constituted new aid within the meaning of Article 1(c) of Regulation No 659/1999 and Article 4 of Regulation No 794/2004 and that that aid could not be considered to be compatible with the common market, since Regulation No 1177/2002 was no longer in force and could not therefore serve as a legal basis for the assessment of the measure notified. The Commission also stated that that measure could not be considered to be compatible with the common market on the basis of the framework on State aid to shipbuilding (OJ 2003 C 317, p. 11); nor did it appear to be compatible with the common market on the basis of any other provision applicable to State aid.

14 Furthermore, the Commission noted that, following the entry into force of Regulation No 1177/2002, the Republic of Korea had brought to the attention of the Dispute Settlement Body ('the DSB') of the World Trade Organisation ('the WTO') the question of the lawfulness of that regulation in the light of the WTO rules. On 22 April 2005, a panel of experts created by the DSB issued a report in which it was concluded that Regulation No 1177/2002 and several national schemes applying that regulation, which were in place at the time when the Republic of Korea initiated the dispute before the WTO, were in breach of certain WTO rules. On 20 June 2005, the DSB adopted the panel report, which recommended that the Community bring Regulation No 1177/2002 and the national schemes applying it into conformity with the Community's obligations under the agreements entered into in the context of the WTO.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 2 January 2009, the Italian Republic brought the present action.

16 It claims that the Court should annul the contested decision.

17 The Commission contends that the Court should:

— dismiss the action;

— order the Italian Republic to pay the costs.

18 Acting upon a report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, called on the parties to set out their views on the appropriateness of having the present case joined with Case T-584/08, in which an action with the same subject-matter had been brought by Cantiere Navale De Poli SpA. On receipt of the observations of the parties, which did not raise any objections, those cases were joined for the purposes of the oral procedure by order of the President of the Eighth Chamber of 2 June 2010, in accordance with Article 50 of the Rules of Procedure.

19 At the hearing on 16 June 2010, the parties presented oral argument and answered the questions put to them by the Court.

Law

20 In support of its application, the Italian Republic raises seven pleas, alleging, respectively: (i) incorrect categorisation of the measure notified as new aid; (ii) infringement of Regulation No 1177/2002; (iii) infringement of Articles 87 EC and 88 EC; (iv) breach of the principles of the protection of legitimate expectations and equal treatment; (v) breach of the right to be heard; (vi) error in taking into account the WTO rules in the assessment of the compatibility with the common market of the measure notified; and (vii) error in basing the contested decision on the Commission communication to the WTO of 20 July 2005 ('the communication to the WTO').

The first plea: incorrect categorisation of the measure notified as new aid

Arguments of the parties

21 The Italian Republic states that Regulation No 1177/2002 does not specify any nominal ceiling with regard to the total amount of aid that each Member State could grant under that regulation. Likewise, the 2004 scheme - as notified to the Commission and approved by it - neither specified nor limited the total budget which has to be allocated to aid for shipbuilding. The only financial limitation under the 2004 scheme is that provided for in Article 2(3) of Regulation No 1177/2002, under which the grant of aid was subject to the aid being of a 'maximum intensity of 6% of the contract value.

22 In other words, the commitment of the Italian Republic, as provided for in Article 4(153) of Law 350/2003 and the Ministerial Decree of 2 February 2004, was unlimited with regard to the aggregate amount of the possible aid. The way in which the 2004 scheme was structured inherently meant that the total amount of the aid was impossible to determine beforehand, since it depended on the number and the value of the contracts adversely affected by unfair Korean competition during the period covered by Regulation No 1177/2002, as amended by Regulation No 502/2004.

23 The initial amount of EUR 10 million, provided for in Article 4(153) of Law 350/2003, was no more than a simple budgetary allocation - purely for indicative purposes - for 2004, with no impact on the scope of the commitment and the legal obligation of the Italian Republic towards Italian shipbuilders confronted with unfair Korean competition. Furthermore, the assessment of the compatibility of the 2004 scheme with the common market should have been based solely on the provisions of the Ministerial Decree of 2 February 2004, which, like Regulation No 1177/2002, did not specify a financial limit. In adopting the 2004 approval decision, the Commission did not accord any importance to the financial allocation of EUR 10 million.

24 Thus, the final and total amount of public expenditure was not part of the structure of the aid scheme notified to the Commission by the Italian Republic in 2004. On the contrary, the Italian Republic remained free to increase the allocation in the following years.

25 In support of its argument that the 2004 scheme benefited from a measure of independence in terms of its financial scope, the Italian Republic claims that the budget allocated to that scheme had already been increased by EUR 1 million in 2005 without the Commission making any objections.

26 As a consequence, by holding that the initial amount of EUR 10 million was an integral part of the 2004 scheme, the Commission wrongly assessed the facts of the case.

27 Furthermore, that error led the Commission to misapply several provisions of European Union ('EU') law: in particular, Article 87(1) EC, Article 88(3) EC, Article 1(c) of Regulation No 659/1999 and Article 4 of Regulation No 794/2004.

28 The measure notified cannot be regarded as an alteration to the 2004 scheme, since the new allocation has been no more than an accounting operation and has in no way affected the scope of the commitment and the obligations of the Italian Republic towards Italian shipbuilders confronted with unfair Korean competition. Accordingly, the Commission was wrong to find that the measure notified constituted new aid within the meaning of Article 1(c) of Regulation No 659/1999.

29 That allocation constitutes, in reality, an adjustment of a purely administrative nature, for the purposes of Article 4 of Regulation No 794/2004. In that context, the Italian Republic states that, by increasing the budget allocated to the 2004 scheme, it neither altered the conditions governing the application of that scheme nor extended its temporal scope.

30 The fact that the Italian legislature considered it appropriate to notify the Commission of the new allocation is not relevant for the purposes of the question whether the aid at issue is new aid, since a national provision cannot prevail over rules of EU law.

31 The Commission contends that this plea should be rejected, arguing in essence that the initial budget of EUR 10 million allocated to the 2004 scheme was an integral part of that scheme.

Findings of the Court

32 It should be pointed out that all the complaints raised by the Italian Republic in the context of the first plea are based on the premiss that, in the 2004 approval decision, the Commission did not find and, moreover, could not find, that the 2004 scheme, as notified by the Italian Republic, implied a financial ceiling of EUR 10 million. It follows that the measure notified - that is to say, the additional allocation of EUR 10 million in 2008 - does not constitute an alteration of existing aid.

33 The claims of the Italian Republic in that regard revolve, in essence, around two arguments, the first relating to the special nature of Regulation No 1177/2002, and the second to the way in which, in the national legislation, the Italian authorities had defined the procedures for applying Regulation No 1177/2002.

34 First, with regard to the argument that Regulation No 1177/2002 does not provide for a nominal ceiling for the total amount of aid that each Member State could grant under that regulation, it should be noted that the reasoning of the Italian Republic is lacking in two respects.

35 In that regard, it should be noted that Regulation No 1177/2002 is based on Article 87(3)(e) EC. Consequently, the aid covered by that regulation is only one category of aid which 'may be considered to be compatible with the common market'. Article 2(1) of Regulation No 1177/2002, moreover, closely mirrors that wording.

36 Thus, although it is possible for such aid to be considered to be compatible with the common market, it does not follow that it is necessarily so (see, to that effect, Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraphs 26 to 28).

37 It is for the Commission to establish, under Article 88(3) EC, whether that aid fulfils all the conditions governing compatibility with the common market. That fact is alluded to in Article 3 of Regulation No 1177/2002, which expressly provides that Article 88 EC and Regulation No 659/1999 apply to the aid at issue.

38 Moreover, it should be noted that Regulation No 1177/2002 is one of a long series of measures adopted by the Council, under Article 87(3)(e) EC, to combat the problems of competitivity and overcapacity confronting EU shipyards. Those measures always pursued two objectives: (i) to close the competitive gap between European shipyards and their international rivals and (ii) to ensure fair and uniform conditions of intracommunity competition (see, by way of example, recitals 2 and 6 in the preamble to Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55); recitals 5 and 9 in the preamble to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27), and Article 4(5) thereof; and recitals 3 and 6 in the preamble to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ 1998 L 202, p. 1), and Article 3(3) thereof).

39 It follows that, contrary to the assertions made by the Italian Republic, it was permissible for the Commission to cover, in its assessment of the compatibility of the 2004 scheme with the common market, the budget allocated by the Italian Republic to that scheme, since that enabled the Commission to monitor the conditions of intracommunity competition in the shipbuilding sector.

40 Secondly, it is necessary to reject at the outset the argument that the 2004 scheme effectively flows exclusively from the Ministerial Decree of 2 February 2004, which did not specify any budgetary limit. The higher ranking rule of national law - Law 350/2003 - which provides for the adoption of a lower ranking rule - in the present case, the Ministerial Decree of 2 February 2004 — cannot be ignored in the assessment of the legal basis for the 2004 scheme.

41 Furthermore, it is common ground that Law 350/2003, which states that the initial budget for the aid scheme amounted to EUR 10 million, was among the evidence that the Italian Republic had placed before the Commission for examination in the context of the procedure leading to the 2004 approval decision.

42 In that context, it must be held that the Italian Republic's argument that the Commission did not accord any importance to the sum of EUR 10 million in the 2004 approval decision cannot succeed. It is beyond dispute that the Commission approved the 2004 scheme in the form in which it had been notified by the Italian Republic. As was mentioned above, and as is apparent moreover from recital 11 of the 2004 approval decision, the initial budget of EUR 10 million was one of the parameters that the Italian Republic had placed before the Commission for assessment. In the cover letter accompanying the measure in question, it is stated that the budget is limited to EUR 10 million both for 2004 and for the total amount allocated.

43 Accordingly, the Italian Republic cannot reasonably argue that the initial budget allocated to the 2004 scheme was not a relevant factor for the purposes of the question whether or not the measure notified constituted new aid.

44 Furthermore, the fact that, in 2005, the Italian Republic allocated a further EUR 1 million to the budget of the 2004 scheme is not relevant for the purposes of determining whether the Commission was correct in finding, in the contested decision, that the measure notified constituted new aid. The budgetary increase carried out by the Italian Republic in 2005 was never notified to the Commission and, in any event, could be regarded as covered by the exception provided for in Article 4(1) of Regulation No 794/2004, under which an increase not in excess of 20 % of an existing budget is not an alteration to existing aid.

45 Lastly, and for the sake of completeness, it should be noted that the possible compatibility of State aid with the common market is not, in itself, liable to affect the definition of an alteration to existing aid, hence the requirement that it first be notified to the Commission under Article 88(3) EC (see, to that effect, Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraphs 26 to 31). Accordingly, the fact that the Italian Republic was able to make a notification, and possibly even to obtain approval in 2004, in relation to a total budget of EUR 20 million has no bearing on the finding that the Commission was justified in regarding the measure notified as new aid.

46 It follows from all the foregoing that the premiss on which the present plea is based — that the 2004 scheme and the initial budget of EUR 10 million are two separate matters - is mistaken. In consequence, the Commission cannot be criticised for finding that the measure notified constituted new aid for the purposes of the provisions of EU law, such as Article 1(c) of Regulation No 659/1999 and Article 4 of Regulation No 794/2004.

47 In the light of all of the foregoing, the first plea must be rejected.

The second plea: infringement of Regulation No 1177/2002

Arguments of the parties

48 The Italian Republic emphasises the Commission's assertion in recital 26 of the contested decision that Regulation No 1177/2002 could not serve as a legal basis for the assessment of the measure notified, since that regulation was no longer in force at the time when that measure was notified.

49 According to the Italian Republic, it is apparent from a close reading of Articles 2 to 5 of Regulation No 1177/2002, as amended by Regulation No 502/2004, that the date of expiry provided for therein - 31 March 2005 - means merely that contracts signed after that date are not able to benefit from the scheme set up by Regulation No 1177/2002. On the other hand, there is nothing in that regulation to suggest that it could no longer be applied after 31 March 2005 in respect of contracts duly signed before that date. On the contrary, it follows from Article 2(4) of Regulation No 1177/2002 that the payment of aid granted under that regulation could be effected until 31 March 2008 or, in the event of an extension for special cases, until 31 March 2011.

50 In that regard, the Italian Republic argues that the measure notified had been adopted on 24 December 2007 and had entered into force on 1 January 2008. The aim of that measure was to enable, in terms of administration and accounting, the payment of aid in favour of all the shipbuilding contracts signed before 31 March 2005. Those contracts should have complied with all the other conditions laid down in Regulation No 1177/2002, including the condition that the supply had to have been carried out

within three years following signature of the contract, except where that period had been extended by three years on one of the grounds provided for in that regulation. As a consequence, it is clear that the measure notified constitutes an accurate application of Regulation No 1177/2002 and that the Commission erred in law by not taking that regulation into account in the contested decision. That error of law alone justifies annulment of the contested decision.

51 The Italian Republic rejects the Commission's argument that the conditions of competition which had led to the adoption of Regulation 1177/2002 no longer existed when the contested decision was adopted. In that regard, first, it claims that the Commission's argument is inadmissible, since, by implication, it places significant limits on the implementation of Regulation No 1177/2002 and no mention is made of it either in the contested decision or in the 2004 approval decision.

52 Secondly, the Italian Republic claims that the Commission's argument is not well founded, since the Commission has not put forward any specific evidence to substantiate the claim that, in 2008, the shipbuilding undertakings within the European Union which had concluded contracts before 31 March 2005 no longer suffered, in relation to those contracts, from the effects of Korean dumping.

53 The Commission disputes the arguments of the Italian Republic.

Findings of the Court

54 In the context of this plea, it is necessary to resolve the question whether Regulation No 1177/2002 could apply after 31 March 2005, the date of its expiry, in order to assess the compatibility of the measure notified with the common market.

55 It is not disputed that, in the contested decision, the Commission held that Regulation No 1177/2002 could not serve as a legal basis for the assessment of the measure notified, since it had expired on 31 March 2005 (recitals 11, 25 and 26 of the contested decision).

56 With regard to the temporal application of a rule of law, in the absence of transitional provisions, it is necessary to distinguish, in each case, rules governing competence from substantive rules.

57 With regard to the rules governing the competence of the EU institutions, it is apparent from the case-law that the provision constituting the legal basis for a measure and empowering the EU institution to adopt the measure in question must be in force at the time when that measure is adopted (see, to that effect, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 45).

58 In the present case, it is Article 88 EC which constitutes the legal basis conferring on the Commission competence to adopt decisions concerning State aid and which has empowered the Commission, on an ongoing basis since 1968, to rule on the compatibility of State aid with the common market, in the light of Article 87 EC.

59 The substantive rules, on the other hand, govern, from their entry into force, all the future effects of situations which came about during the period of validity of the earlier legislation. Consequently, the substantive rules do not apply to the effects established prior to their entry into force, unless the exceptional conditions for retroactive application are satisfied (see, to that effect, Case 68/69 *Brock* [1970] ECR 171, paragraph 6; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 119; Case T-435/04 *Simões Dos Santos* v *OHIM* [2007] ECR II-A-2-427, paragraph 100; and Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 70).

60 With regard to aid which has been notified but not paid, under the EU system for the review of State aid, the date on which the effects of the planned aid becomes established is the same as that on which the Commission adopts the decision ruling on the compatibility of that aid with the common market. The rules, principles and criteria for assessing the compatibility of State aid which are in force at the date on which the Commission takes its decision may generally be regarded as those best adapted to the conditions of competition (Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraphs 50 to 53). That is because the aid in question would not create real advantages or disadvantages in the common market until, at the earliest, the date on which the Commission decides whether or not to authorise it.

61 On the other hand, in the case of aid which has been paid unlawfully without prior notification, the applicable substantive rules are those in force at the time when the aid was paid, where the advantages and disadvantages created by such aid arose during the period in which the aid in question was paid (Case T-348/04 *SIDE* v *Commission* [2008] ECR II-625, paragraphs 58 to 60).

62 It follows that, in the present case, the Commission cannot be criticised for not applying Regulation No 1177/2002, since the planned aid had been notified but not paid. The actual advantages and disadvantages in the common market of the measure notified were not likely to arise before the adoption of the contested decision, which was taken after the date of expiry of Regulation No 1177/2002, that is to say, after 31 March 2005.

63 The argument that, under Article 4 of Regulation No 1177/2002, that regulation was to apply to contracts concluded prior to 31 March 2005 does not cast doubt on the finding that Regulation No 1177/2002 was not applicable to the measure notified. Article 4 of Regulation No 1177/2002, like Article 2 of that regulation, sets out the substantive conditions which must be satisfied if the Commission is to be able, under that regulation, to take a decision declaring the aid at issue compatible with the common market. However, the temporal application of Regulation No 1177/2002 is governed by Article 5 of that regulation and by the principles set out in paragraphs 57 to 60 above.

64 Admittedly, the fact that — given that the aid was notified but not paid — the date establishing the applicable substantive legal rules is the same as the date on which the Commission adopted a decision on the compatibility of that aid means that the Commission can, by varying the duration of the assessment of the aid measure notified, trigger the application of a substantive legal rule which has entered into force after that measure was notified to the Commission. However, that situation — which, moreover, did not arise in the present case, since the measure notified was notified after the expiry of Regulation No 1177/2002 — cannot justify a derogation from the principle that new substantive legal rules govern, with effect from their entry into force, all the future effects of situations which came about under the old rules.

65 In that regard, it should be noted that the possibility open to the Commission of choosing to apply either the new rule or the old rule is limited and offset, first, by the fact that the Member States have a discretion with regard to the date on which they notify the aid measures and, secondly, by the fact that Article 4 of Regulation No 659/1999 enjoins the Commission, in accordance with the principle of sound administration, to act diligently (see, to that effect and by analogy, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 62 and the case-law cited).

66 The fact that, in order to benefit from the application of Regulation No 1177/2002, the Member States were required to notify the planned aid measures before the expiry of that regulation and before all the eligible aid contracts were signed cannot call into question the application to the EU system for the review of State aid of the principles governing the temporal application of substantive rules. It is inherent in the system of prior review of State aid measures that notifications must of necessity include estimates concerning the total amounts of the aid planned. That is particularly the case with regard to measures covering operational aid, such as the aid at issue in the present case.

67 In the light of all the foregoing and in the absence of transitional provisions extending the temporal scope of Regulation No 1177/2002, the second plea must be dismissed in its entirety.

The third plea: infringement of Articles 87 EC, 88 EC and 253 EC

Arguments of the parties

68 The Italian Republic claims that, even if it were to be supposed that the measure notified should be regarded as new aid, since it falls outside the scope of Regulation No 1177/2002, the Commission infringed Article 87(2) and (3) EC, and Article 88(3) EC in so far as it failed to examine effectively in the contested decision whether the measure notified could be considered compatible with the common market by virtue of one of the exceptions provided for in Article 87(2) and (3) EC and, in particular, of those set out in Article 87(3)(b) and (c) EC.

69 The Commission found that the measure notified was incompatible with the common market on the sole ground that Regulation No 1177/2002 had expired and the measure notified was not covered by any of the situations envisaged in sections 3.1 and 3.2 of the framework of State aid in favour of shipbuilding, cited in paragraph 13 above.

70 According to the Italian Republic, it follows from the case-law that the Commission must always examine on its own initiative the possible compatibility of the aid for the purposes of Article 87(2) and (3) EC, except where there are obvious circumstances which deprive the scheme in question of any possible justification. That last situation has not arisen in the present case, since the measure notified consists solely in the refinancing of an aid scheme which had already been held to be compatible with the common market and which had remained unchanged in all other respects.

71 In any event, the Italian Republic adds that, during the administrative procedure, it had attempted to draw the Commission's attention to the fact that the measure notified was necessary in order to achieve competitive equality between all the operators likely to benefit from the aid. The Italian Republic states also that the absence of aid could have led to the closure of shipyards. Nevertheless, in the contested decision, the Commission did not provide any suitable answers to those suggestions.

72 Furthermore, the Italian Republic requests the Court to assess the measure notified itself and to declare it compatible with the common market.

73 Moreover, the Italian Republic claims, for the same reasons as those set out in paragraphs 68 to 71 above, that the grounds set out in recital 26 of the contested decision are insufficient, which, in its opinion, amounts to an infringement of Article 253 EC. In that regard, the Italian Republic refers to the case-law according to which, in order to comply with its obligation to state reasons, the Commission must mention specific circumstances, not general circumstances.

74 Lastly, the Italian Republic claims that the contested decision is also vitiated by a failure to state reasons, in so far as the Commission confined itself to examining the measure notified, without taking account in its analysis of the 2004 scheme, to which the measure notified referred.

75 The Commission contends that the plea should be rejected.

Findings of the Court

76 First of all, it is necessary to dismiss as inadmissible the request made by the Italian Republic to the effect that the Court should rule that the measure notified is compatible with the common market. Since review by the Court under Article 230 EC relates exclusively to the lawfulness of the contested decision, it cannot lead to the Court varying the contested decision or adopting a new decision replacing it (see, to that effect, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 141). It follows that, in the present case, the Court must confine itself to examining the lawfulness of the contested decision in the light of complaints expressly put forward by the Italian Republic against that decision.

77 However, in case the above request falls to be construed as seeking annulment of the contested decision on the grounds that that decision is in breach of the principles of equal treatment and the protection of legitimate expectations, it will be addressed in the context of the assessment of the fourth plea.

78 With regard to the complaint that recital 26 of the contested decision is vitiated by a failure to state adequate reasons, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 230 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 (see Joined Cases C-341/06 P and C-342/06 P *Chronopost* v *UFEX and Others* [2008] ECR I-4777, paragraph 88 and the case-law cited).

79 In the present case, it must be noted that, in the light of the statements in recitals 11 and 25 to 35 of the contested decision, the reasoning followed by the Commission in its examination of the compatibility of the measure notified with the common market is clear both to the Italian Republic and to the Court. It follows from recitals 11 and 26 of the contested decision that the Commission took the view that Regulation No 1177/2002 had expired on 31 March 2005 and that it was not applicable to the measure notified. In recitals 29 and 30 of the contested decision, the Commission discounted as irrelevant the principles of the protection of legitimate interests and equal treatment, on the ground that, by the 2004 approval decision, it had not provided any assurances with regard to a possible further increase of the budget allocated to the 2004 scheme. Lastly, in recital 31 et seq. of the contested decision, the Commission exhaustively set out the reasons why it considered the case-law invoked by the Italian Republic not to be applicable to the case.

80 In view of the case-law cited in paragraph 78 above, and in the light of recitals 11 and 25 to 35 of the contested decision and the fact that, in the present case, it was for the Italian Republic to show that the measure notified was compatible with the common market (see paragraphs 83 to 85 below), the complaint concerning a failure to state reasons must be rejected as unfounded.

81 With regard to the claim that the Commission confined itself to examining the measure notified without including the 2004 scheme in its analysis must be rejected as unfounded. It is apparent from the contested decision that the Commission in effect regarded the initial budget of EUR 10 million as an integral part of the 2004 scheme,

since it found that the increase in that budget constituted an alteration to existing aid (recitals 7 to 9 and 11 of the contested decision). To the extent that the complaint should be understood as seeking to contest that finding, it should be noted that the Court has already confirmed that finding in the context of its examination of the first plea.

82 With regard to the complaint that the Commission erred by failing to assess whether the measure notified could be considered compatible with the common market by virtue of one of the exceptions provided for in Article 87(2) and (3) EC and, in particular, those set out in Article 87(3)(b) and (c) EC, it must also be rejected as unfounded.

83 It is settled law that, where the Commission decides to initiate the procedure under Article 88(2) EC, it is for the Member State and the potential recipient of the aid to put forward the arguments whereby they seek to show that the planned aid corresponds to the exceptions provided for under the Treaty, since the object of the formal investigation procedure is specifically to ensure that the Commission is fully informed of all the facts of the case. Although the Commission is required to express its doubts clearly as to the compatibility of the aid with the common market when it opens a formal procedure, in order to enable the Member State and the other parties concerned to respond as fully as possible, the fact remains that it is for the aid applicant to dispel those doubts and to establish that the aid scheme satisfies the conditions on which it may be granted (see *Ferriere Nord* v *Commission*, paragraph 65 above, paragraphs 93 and 94 and the case-law cited).

84 Also according to that case-law, while Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision, it does not prevent it from determining, in the absence of such comments, that certain aid is incompatible with the common market. In particular, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own motion and on

the basis of prediction, what information might have been submitted to it (see Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 48 and 49 and the case-law cited).

85 Since the legality of a decision concerning State aid falls to be assessed in the light of the information available to the Commission at the time when the decision was adopted, no party can rely before the Courts of the European Union on matters which were not put forward in the course of the pre-litigation procedure laid down in Article 88 EC (see, to that effect, *Fleuren Compost* v *Commission*, paragraph 84 above, paragraph 51 and the case-law cited).

86 In the present case, the Commission found in recitals 26 and 27 of the contested decision that, during the administrative procedure, the Italian Republic had referred to Regulation No 1177/2002 and to the principles of the protection of legitimate interests and equality of treatment as the basis for its application for authorisation of the measure notified. Furthermore, it is apparent from recitals 25 to 36 of the contested decision that the Commission did indeed examine and reject the arguments and case-law put forward in that regard by the Italian Republic.

87 At the hearing, the Italian Republic was requested by the Court to state the relevant additional factors that it would have presented to the Commission during the administrative procedure, but which the Commission refused to examine. It must be noted that the Italian Republic was unable to refer to arguments other than those examined and rejected by the Commission in the contested decision.

88 In the light of all of the foregoing, the third plea must be rejected in its entirety.

The fourth plea: breach of the principles of the protection of legitimate expectations and equal treatment

Arguments of the parties

89 The Italian Republic claims that, even assuming that the measure notified was incompatible with the common market, it follows from the case-law that the Commission should have approved it, in accordance with the principles of the protection of legitimate expectations and equal treatment.

90 Given that the 2004 approval decision did not attach any importance to the budget dedicated to aid in favour of shipbuilders, the Italian Republic and the final recipients of the aid scheme could legitimately expect the Commission to approve the measure notified, that measure being part of the of the 2004 scheme, as it merely increased the total budget without in any other way altering the conditions of application of that scheme.

91 The Commission also acted in breach of the principle of equal treatment, since the contested decision means that certain shipbuilders were not able to benefit from the aid scheme, even though they were in a factual and legal situation identical to that of the actual beneficiaries of the aid scheme.

92 By the measure notified, the Italian Republic sought precisely to restore equal treatment. It increased the total budget allocated to the aid scheme at issue so that no shipyard which had concluded a shipbuilding contract likely to benefit from that aid scheme would be deprived of its rights as a result of insufficient financial cover.

93 The Commission contends that the plea should be rejected.

Findings of the Court

94 First of all, it should be noted that the premiss on which the Italian Republic's plea is partly based — that the 2004 approval decision did not attach any importance to the budget dedicated to the aid in favour of shipbuilders — has already been rejected in paragraph 42 above.

95 Accordingly, the claim that the Commission acted in breach of the principle of the protection of legitimate expectations cannot succeed, since it is not possible to invoke breach of the principle of the protection of legitimate expectations in the absence of specific assurances provided by the institution concerned (Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 26).

96 Moreover, it should be noted that Regulation No 1177/2002 does not contain provisions relieving the Member States of their obligation to notify under Article 88(3) EC or provisions altering the definition of the concepts relevant to that obligation, such as the concept of alterations to existing aid. On the contrary, that regulation makes its application subject to compliance with Article 88 EC and Regulation No 659/1999. Accordingly, the 2004 approval decision, which is based on Regulation No 1177/2002,

could in no way create legitimate expectations above and beyond what was expressly set out in that decision, that is to say, above and beyond the authorisation for the Italian Republic to grant aid of a total amount of EUR 10 million.

97 As for the argument alleging breach of the principle of equal treatment, this is clearly unfounded. The fact that Regulation No 1177/2002 does not apply to the measure notified follows from the application of a rule of law and is not the consequence of the exercise of discretion. Accordingly, the reason why the contracts covered by the measure notified do not benefit from aid under Regulation No 1177/2002 relates only to the temporary character of that regulation and to the fact that the Italian Republic did not notify the measure at issue so that a decision could be taken by the Commission before the regulation expired.

98 The fourth plea must therefore be rejected.

The fifth plea: breach of the right to be heard

Arguments of the parties

99 The Italian Republic complains that, in the contested decision, the Commission took into account the WTO recommendation concerning Regulation No 1177/2002, without first opening up an exchange of views with the Italian authorities in that regard,

during the administrative procedure. As a consequence, according to the Italian Republic, the Commission could not base its decision on the procedure before the WTO and on the results of that procedure. The fact that, during the administrative procedure, the Commission raised the question of the WTO procedure is not relevant, since it did so for the sake of completeness, to point out that that procedure had no suspensory effect on the application of Regulation No 1177/2002, or on the measure notified.

100 The Commission contends that the plea should be rejected.

Findings of the Court

101 It should be borne in mind that, by its letter of 7 July 2008, the Italian Republic notified the Commission that it was of the opinion that the procedure before the WTO relating to Regulation No 1177/2002 could not prevent the shipyards which had submitted an application for aid before the end of that procedure from benefiting from aid under Regulation No 1177/2002 and the 2004 scheme.

102 In recitals 35 to 37 of the contested decision, the Commission responded to that assertion. In that regard, it maintained that, according to the case-law, Regulation No 1177/2002 must be interpreted, in so far as is possible, in the light of the Community's obligations in the context of the WTO. Subsequently, the Commission found that the procedure before the DSB — to which the Italian Republic had referred in its letter of 7 July 2008 — had led the DSB, on 20 June 2005, to conclude that Regulation No 1177/2002 and the various national schemes applying it infringed the WTO rules. The Commission then stated that the Community had informed the WTO on 20 July 2005 of the fact that Regulation No 1177/2002 had expired on 31 March 2005 and

that the Member States could therefore no longer grant aid under that regulation. The Commission found in that regard that the communication to the WTO constituted a commitment on the part of the Community vis-à-vis the WTO no longer to apply Regulation No 1177/2002.

103 In the light of those facts, it cannot be complained that the Commission acted in breach of the right to be heard. On the contrary, by responding to an assertion made by the Italian Republic, the Commission complied with that State's rights of defence and, in particular, its right to be heard. The fact that the Commission's response embodied the conclusion that the Commission drew from the outcome of the procedure before the DSB does not invalidate that finding, since it was the Italian Republic which, in its letter of 7 July 2008, had addressed the question of the implications of that procedure for the application of Regulation No 1177/2002.

104 The fifth plea must therefore be rejected.

The sixth plea: error in taking into account WTO rules in the assessment of the compatibility with the common market of the measure notified

Arguments of the parties

105 By this plea, the Italian Republic claims that, in assessing the compatibility of the measure notified with the WTO rules, the Commission erred in law. In assessing a State aid scheme under Article 88(3) EC — such as that at issue in the present case — the Commission was not entitled to base its assessment on considerations other than those set out in Article 87 EC.

106 The Italian Republic argues also that the question whether an aid scheme is potentially compatible with the WTO rules must be decided by the Court of Justice in the context of the procedure under Article 226 EC.

107 According to the Italian Republic, it follows from the foregoing that, by assessing the compatibility of the measure notified with the WTO rules, the Commission acted *ultra vires* and infringed Articles 88(3) EC 87 EC and 226 EC.

108 The Commission disputes the claim that it assessed the compatibility of the measure notified with the WTO rules.

Findings of the Court

109 Clearly, it follows from recital 26 of the contested decision that the Commission found that the measure notified was incompatible with the common market in the light, first, of the fact that Regulation No 1177/2002 had expired and, secondly, the fact that there was no other legal basis for a compatibility decision.

110 In recital 37 of the contested decision, the Commission stated, in response to the Italian Republic's argument set out in recital 35, that the Community had informed the WTO on 20 July 2005 of the fact that Regulation No 1177/2002 had expired on 31 March 2005 and that the Member States could therefore no longer grant aid under that regulation. The Commission found in that regard that that communication constituted a commitment by the Community to the WTO no longer to apply Regulation No 1177/2002.

111 Accordingly, recitals 26 and 37 of the contested decision, read together, indicate that the Commission found in that decision that approval of the measure notified would have been both incompatible with the common market and in conflict with the Community's commitments to the WTO, as the finding relating to the incompatibility of the measure notified with the common market is an assessment which is distinct and independent from, and prior to, the assessment relating to the Community's responsibilities to the WTO.

112 It follows that the applicant's sixth plea cannot succeed.

The seventh plea: error in basing the contested decision on the communication to the WTO

Arguments of the parties

113 The Italian Republic claims that the contested decision is vitiated by illegality in so far as it is based on the communication to the WTO declaring that the Member States could no longer grant aid on the basis of Regulation No 1177/2002, since it had expired on 31 March 2005.

114 In that regard, first, the Italian Republic claims that it was never informed of the communication to the WTO, a fact which should have prevented the Commission taking it into account at the time of adopting the contested decision.

115 Secondly, the Italian Republic alleges that that communication did not, in any event, permit the Commission to refuse to authorise the measure notified. By the communication to the WTO, the Commission had merely declared that it was not going to

extend Regulation No 1177/2002. Accordingly, the Member States were prevented from granting aid to undertakings for shipbuilding contracts signed after 31 March 2005. Nevertheless, the communication to the WTO did not release Member States from the obligation to respect the right to aid acquired by undertakings on the basis of contracts signed before 31 March 2005.

116 The Commission contends that the plea should be rejected.

Findings of the Court

117 It should be noted that Article 1 of the contested decision states that the measure notified cannot be implemented, since it is not compatible with the common market.

118 As was stated in paragraph 111 above, the reference in the contested decision to the communication to the WTO had as its sole purpose to show, in response to the Italian Republic's questions and for the sake of completeness, that approval of the measure notified would, furthermore, have been in conflict with the Community's commitments to the WTO. It follows from recital 26 of the contested decision that, by drawing the conclusion that the measure notified was incompatible with the common market, the Commission in no way based its findings on the communication to the WTO.

119 It follows that the communication to the WTO did not, in any event, have any impact on the enacting terms of the contested decision.

120 It must therefore be concluded that the seventh plea cannot succeed either.

121 In consequence, the action must be dismissed in its entirety.

Costs

122 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 (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Italian Republic to pay the costs;

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 3 February 2011.

[Signatures]

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