JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Case C-91/01,

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by D. Del Gaizo, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and J.M. Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 2001/779/EC of 15 November 2000 on the State aid which Italy is planning to grant to Solar Tech Srl (OJ 2001 L 292, p. 45), in so far as it did not allow the application to that aid of the bonus of 15% gross grant equivalent provided for for small and medium-sized enterprises,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, acting for the President of the Fifth Chamber, A. Rosas and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 February 2001, the Italian Republic brought an action under the first paragraph of Article 230 EC for annulment of Commission Decision 2001/779/EC of 15 November 2000 on the

State aid which Italy is planning to grant to Solar Tech Srl (OJ 2001 L 292, p. 45, 'the contested decision'), in so far as it did not allow the application to that aid of the bonus of 15% gross grant equivalent provided for for small and medium-sized enterprises.

Legal framework

2 The first recital in the preamble to Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4, 'the SME Recommendation'), which was in force at the time of the facts giving rise to this case, states that 'the implementation of the Integrated Programme in Favour of Small and Medium-Sized Enterprises (SMEs) and the Craft Sector ... requires the establishment of a coherent, visible and effective framework within which the enterprise policy in favour of SMEs can take its place'.

3 According to the 14th recital to the SME Recommendation, 'application of the same definition by the Commission, the Member States, the EIB [European Investment Bank] and the EIF [European Investment Fund] would reinforce the consistency and effectiveness of policies targeting SMEs and would, therefore, limit the risk of distortion of competition'.

4 The 16th and 17th recitals to the SME Recommendation set out the defining criteria in respect of SMEs, namely the criterion of number of persons employed and the financial criterion.

5 Furthermore, according to the 18th to 21st recitals to the SME Recommendation:

'... independence is also a basic criterion in that an SME belonging to a large group has access to funds and assistance not available to competitors of equal size; ... there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME;

... in respect of the independence criterion, the Member States, the EIB and the EIF should ensure that the definition is not circumvented by those enterprises which, whilst formally meeting this criterion, are in fact controlled by one large enterprise or jointly by several large enterprises;

... stakes held by public investment corporations or venture capital companies do not normally change the character of a firm from that of an SME, and may therefore be disregarded; the same applies to stakes held by institutional investors, who usually maintain an "arm's-length" relationship with the company in which they have invested;

... a solution must be found to the problem of joint stock enterprises which, although they are SMEs, cannot state with any accuracy the composition of their share ownership due to the way in which their capital is dispersed and the anonymity of their shareholders and cannot therefore know whether they meet the condition of independence'.

6 The 22nd recital to the SME Recommendation states:

'... fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap'.

7 The first indent of Article 1 of the SME Recommendation provides:

'Member States, the European Investment Bank and the European Investment Fund are invited:

— to comply with the provisions set out in Article 1 of the Annex for their programmes directed towards "SMEs" ...'.

8 Article 1(1) and (3) of the Annex to the SME Recommendation, entitled 'Definition of small and medium-sized enterprises adopted by the Commission', provides:

'1. Small and medium-sized enterprises, hereinafter referred to as "SMEs", are defined as enterprises which:

— have fewer than 250 employees, and

— have either,

— an annual turnover not exceeding ECU 40 million, or

— an annual balance-sheet total not exceeding ECU 27 million,

— conform to the criterion of independence as defined in paragraph 3.

— ...

3. Independent enterprises are those which are not owned as to 25% or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise, whichever may apply. This threshold may be exceeded in the following two cases:

— if the enterprise is held by public investment corporations, venture capital companies or institutional investors, provided no control is exercised either individually or jointly,

— if the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise declares that it can legitimately presume that it is not owned as to 25% or more by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply.'

9 Point 1.2 of Information from the Commission (96/C 213/04) — Community guidelines on State aid to small and medium-sized enterprises (OJ 1996 C 213, p. 4, 'the SME Guidelines'), which were in force at the time of the facts giving rise to this case, reads as follows:

'At its meeting in Cannes in June 1995, the European Council emphasised in its conclusions that SMEs "play a decisive role in job creation and, more generally, act as a factor of social stability and economic drive". But it is generally accepted that SMEs suffer from a number of handicaps that can slow down their development. One of the main such handicaps is the difficulty in obtaining capital and credit, the chief causes of which are imperfect information, the risk-shy nature of financial markets and the limited guarantees that SMEs are in a position to offer; SMEs limited resources also restrict their access to information, notably regarding new technology and potential markets. The introduction of new regulatory arrangements often entails higher costs for SMEs. The imperfections in the market which limit the socially desirable development of SMEs justify the favourable consideration which the Commission has traditionally been prepared to give to State aid to SMEs, provided that such aid does not affect trade to a disproportionate extent relative to the contribution it makes to the achievement of Community objectives allowed by Article 92(3)(c) of the EC Treaty ...'.

10 Point 3.1 of the SME Guidelines states that 'the Commission will follow these guidelines when it considers whether the exemption in Article 92(3)(c) applies to State aid granted to SMEs'.

11 According to the first and fourth paragraphs of point 3.2 of the SME Guidelines, entitled 'Definition of SMEs':

'For the purpose of applying the guidelines, an SME is defined in accordance with the [SME] recommendation'

...

The three tests — workforce, turnover or balance-sheet total, and independence — are cumulative: all three must be satisfied. The independence test, according to which a large enterprise must not hold 25% or more of the SME's capital, is based on practice in a number of Member States where this percentage is the threshold at which supervision becomes possible. In order to ensure that only genuinely independent SMEs are included, there has to be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than an individual SME. In calculating the thresholds referred to above, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25% or more of the capital or of the voting rights.'

12 Point 4.2.1 of the SME Guidelines, entitled 'Tangible investment', provides in the fourth paragraph:

'In assisted areas, the Commission may approve aid to SMEs which exceeds the level of regional investment aid it has authorised for large enterprises in the area:

...

— by 15 percentage points gross in areas covered by Article 92(3)(a) [of the Treaty], provided the total does not exceed 75% net.'

13 Point 1.4 of Information from the Commission (98/C 107/05) — Multisectoral framework on regional aid for large investment projects (OJ 1998 C 107, p. 7, 'the Multisectoral Framework') states:

'Under this framework the Commission will decide on a case-by-case basis a maximum allowable aid intensity for projects which are subject to the notification requirement. This might lead to aid intensities below the applicable regional ceiling. ...'

Facts of the case and contested decision

14 By letter of 24 November 1999, the Italian Republic notified the Commission of the aid it planned to award Solar Tech Srl ('Solar Tech'), consisting of a non-repayable grant for the construction of a plant for producing amorphous silicon film and integrated solar panels located in the municipality of Manfredonia (Italy), in the region of Puglia, which is an assisted region for the purposes of Article 87(3)(a) EC.

15 By letter of 4 April 2000, the Commission informed the Italian Government of its decision to initiate proceedings under Article 88(2) EC in respect of the aid.

16 At the end of those proceedings, the Commission adopted the contested decision.

17 Points 7 and 8 in the statement of reasons for the contested decision state that 24% of the shares in Solar Tech are held by Permasteelisa SpA ('Permasteelisa'), the enterprise heading the Permasteelisa Group, which is specialised in curtain walls and other cladding materials for large civil infrastructure projects.

18 In points 34 to 36 of the contested decision, in the part entitled 'The SME guidelines', the Commission stated:

'(34) Point 1.2 of the SME guidelines states that SMEs play a decisive role in job creation but suffer from a number of handicaps that can slow down their development. Those handicaps include the difficulty in obtaining capital and credit, the difficulty in gaining access to information, new technology and potential markets, and the costs of complying with new regulatory requirements.

(35) The bonus, or increase in the amount of aid allowable, for SMEs is therefore justified not only by the contribution which they make to objectives in the common interest, but also by the need to compensate for

the handicaps they face, given the positive role they play. It is necessary, however, to make sure that the bonus is indeed granted to enterprises suffering from such handicaps. In particular, the SME definition used has to circumscribe the concept of a small or medium-sized enterprise so as to include therein only those enterprises which generate the positive externalities envisaged and suffer from the abovementioned handicaps. It should not therefore extend to the many larger firms which do not necessarily produce the positive external effects or suffer from the handicaps typical of SMEs. Aid granted to such firms is liable to result in further distortion of competition and intra-Community trade.

That principle is set out in the 22nd recital to the [SME Recommendation] ... .

(36) It is consequently in the light of those principles that the Commission has to determine whether Solar Tech falls within the scope of the definition of SMEs. Solar Tech does not fulfil the necessary conditions to qualify for the bonus for SMEs.

This is because, from an economic standpoint, Solar Tech has to be regarded as belonging to the Permasteelisa Group, a large firm, despite the fact that the latter holds only 24% of its shares. Thanks to the economic, financial and organisational links between the two companies, Solar Tech does not have to contend to any great extent with the handicaps from which SMEs usually suffer and which constitute a fundamental justification for the increase in the maximum amount of aid allowable for such enterprises.'

19 In points 37 to 39 of the contested decision the Commission analyses the links between Solar Tech and the Permasteelisa Group. It states in point 37 that it is clear from the notification of State aid that Solar Tech must be regarded as belonging to the Permasteelisa Group, in so far as it states that the reasons for the investment lie in the fact that the Permasteelisa Group, the world leader in the production and installation of innovative cladding materials for large civil infrastructure works, wishes through this project to extend its range of products.

20 In point 38 of the contested decision, the Commission states that it is also clear from the notification that the individuals who are shareholders and/or executives of Solar Tech are also shareholders and/or executives of Permasteelisa in that:

— the founder and reference shareholder of the Permasteelisa Group, who acts as the group's chief executive officer, holds 46% of the shares in Solar Tech and is the sole director of that company,

— the chairman of the Permasteelisa Group holds 15% of the shares in Solar Tech,

— one of the members of the board of directors of Permasteelisa, who is also chairman of one of the companies in the group, also holds 15% of the shares in Solar Tech.

21 According to point 39 of the contested decision, the above is in addition to the fact that Permasteelisa holds 24% of the shares in Solar Tech.

22 In points 40 to 43 of the contested decision, the Commission considers whether Solar Tech suffers from the typical handicaps faced by SMEs, such as the difficulty in obtaining capital and credit, and the difficulty in gaining access to information and new technology. It finds in point 40 that, thanks to the extremely close ties between Permasteelisa and Solar Tech, the latter does not suffer from those handicaps.

23 As regards difficulty in obtaining capital and credit, the Commission states in point 41 of the contested decision that, in the documents on which the Italian Republic based its examination of the application for aid, it is stated that Solar Tech will be able to raise the funds needed by it on the basis of Permasteelisa's financial standing.

24 Likewise, according to point 42 of the contested decision, thanks to its economic, financial and organisational ties with Permasteelisa, Solar Tech does not have to overcome the entry barriers to the relevant market:

— first, it has access to partners with the necessary technology, and

— second, as regards product distribution, the Italian Republic has stated that Solar Tech will sell part of its production (20 to 30%) to Permasteelisa and will be able to benefit from the latter's contacts with a number of clients in the property sector, which will enable Solar Tech to supply the worldwide market.

25 The Commission concludes in point 50 of the contested decision that 'in the light of the foregoing, Solar Tech does not qualify for the bonus for SMEs because, thanks to its economic, financial and organisational links with Permasteelisa, it does not suffer from the typical handicaps of SMEs to which the SME guidelines refer. Consequently, the bonus of 15% gge [gross grant equivalent] for SMEs cannot be applied in the case in point'.

26 Article 1 of the operative part of the contested decision states:

'The State aid which Italy is planning to grant to Solar Tech Srl, amounting to EUR 42 788 290, is incompatible with the common market in so far as its intensity exceeds the maximum allowable in the case in point (40% nge [net grant equivalent]).

The aid may accordingly not be implemented by Italy to the extent that it exceeds an intensity of 40% nge.'

Forms of order sought

27 The Italian Republic claims that the Court should:

— annul the contested decision, in so far as it did not allow the bonus of 15% gross grant equivalent provided for for SMEs to be applied to the aid granted;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the Italian Republic to pay the costs.

The action

29 By its sole plea in law, the Italian Republic contests the Commission's finding that Solar Tech does not qualify for the bonus of 15% gross grant equivalent for SMEs.

30 This sole plea is broken down into three branches, based on infringement of the Community rules governing State aid to SMEs, infringement of Article 88(1) EC and infringement of the principles of protection of legitimate expectations and legal certainty.

Community rules governing State aid to SMEs

Arguments of the parties

31 The Italian Republic submits that the Commission relied on a definition of an SME which does not correspond to that provided for in the SME Guidelines or the SME Recommendation.

32 Solar Tech fulfils all of the conditions laid down in Article 1(1) and (3) of the Annex to the SME Recommendation and in the first and third paragraphs of point 3.2 of the SME Guidelines, a point expressly acknowledged by the Commission in point 44 of the contested decision, where it states that 'purely formal' compliance with the Community rules does not constitute sufficient justification for allowing the bonus for SMEs.

33 In basing the contested decision on a definition of an SME which does not take account solely of the conditions laid down in the rules governing State aid to SMEs, the Commission infringed those rules, which have been held in the Court's case-law to have binding effect (see, in particular, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 65). The conditions laid down in those rules for defining such aid to SMEs are worded so as not to give the Commission, for the purposes of defining an SME and applying the bonus, the slightest possibility of carrying out any additional assessment beyond the limits fixed by those rules as regards either the economic, financial and organisational links of the SME in question or as regards the positive external effects or disadvantages typical of the sector considered.

34 The Community rules governing State aid to SMEs, in contrast to other Community provisions governing mergers and control of undertakings, definitively preclude holdings of under 25% or holdings by persons who cannot be regarded as an enterprise, such as individuals, to whom the definition of SME makes no reference, from having any negative bearing on classification as an SME.

35 Moreover, the interpretation of 'SME' in the statement of reasons for the contested decision cannot be based on the 18th, 19th and 22nd recitals of the SME Recommendation, because the principles, aims and remarks therein serve merely to foreshadow the content of the operative part of the SME Recommendation and its Annex and to state the reasons for the choice of the criteria laid down in the Annex. They cannot serve as the basis for a broader or narrower interpretation of those criteria.

36 Regarding the Commission's argument based on the fourth paragraph of point 4.2.1 of the SME Guidelines, to the effect that it 'may' approve a bonus of 15%, the Italian Republic submits that the ensuing discretionary power does not relate to the determination of the limit beyond which a holding in the capital of an enterprise means that it can no longer be regarded as an SME, but at most to the considerations which come into play for other assessments which must be carried out pursuant to Article 87(3)(c) EC.

37 The Commission states that it based its refusal to allow the bonus of 15% gross grant equivalent for SMEs on two grounds which are interrelated and which both contributed to the refusal. First of all, Solar Tech is not an SME for the purposes of the Community rules in force, given the need to prevent improper legal arrangements aimed at circumventing the definition of an SME given in the SME

Recommendation. Secondly, and regardless of the fact that Solar Tech might formally satisfy the definition of an SME, there is no reason to grant the bonus provided for by the SME Guidelines in its case, because it does not suffer from the disadvantages typical of SMEs.

38 Turning to the definition of an SME, the first ground for the refusal to grant the bonus, the Commission maintains that it is clear from the contested decision that Solar Tech does not satisfy the independence criterion and that, in point 35 of the statement of reasons for that decision, it interprets that criterion with reference to both the underlying objective of the rules in question and the recitals to the SME Recommendation. With regard to the underlying objective, it is necessary to ensure carefully in each case that the enterprise does indeed suffer from the disadvantages attributable to its being an SME and that it actually does play the positive role SMEs are regarded as playing in the economy of the European Union. With regard to the SME Recommendation, it is necessary to take into account the 22nd recital of the preamble thereto, referred to in the contested decision, as well as the 19th recital thereof, which is just as important.

39 In this case, the device used for the setting-up of Solar Tech and for the composition of its share capital is clearly aimed at obtaining the compensatory benefits intended for SMEs for a company which is part of a large-scale group and which does not suffer from any of the disadvantages that are typical of SMEs. Solar Tech is in fact controlled by a large undertaking and, accordingly, even if it met the formal conditions laid down in Article 1 of the Annex to the SME Recommendation, it is evident that this is a case of misuse of the rules.

40 Turning to the question of approval of the bonus provided for SMEs, the second ground for the refusal by the Commission to grant the bonus, the Commission points out that, in assessing the compatibility of planned State aid with the common market, it has a wide discretion, the exercise of which involves economic and social assessments which must be carried out in a Community context. The existence of guidelines does not in any way change the nature of that discretion.

41 In regard to the present case, the Commission also observes that, as stated in point 1.4 of the Multisectoral Framework, it decides on a case-by-case basis a maximum allowable aid intensity for projects which are subject to the notification requirement, which might lead to aid intensity below the applicable regional ceiling. With respect to the SME Guidelines, under point 4.2.1 it may approve a bonus of 15%, although it is not bound to do so.

42 Regarding the discretionary power conferred by that provision, the Commission maintains that the market situation must be assessed in order to adjust the intensity of regional aid allowable. There are imperative reasons for limiting the amount of the aid in question, because aid granted to a large enterprise, albeit disguised as an SME, would have the effect of distorting competition to a much greater extent than aid granted to an SME.

Findings of the Court

43 It should be borne in mind that, according to settled case-law, the Commission, in the application of Article 87(3)(c) EC, has a wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context (see, inter alia, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18). Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give 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 (Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 74, and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 93).

44 Articles 87(3)(c) and 88 EC expressly state that the Commission 'may' consider aid covered by the first of those two provisions to be compatible with the common market. Accordingly, whilst the Commission must always determine whether State aid subject to review by it is compatible with the common market, even if that aid has not been notified to it (see Case C-301/87 *France* v *Commission* (the '*Boussac Saint Frères*' case) [1990] ECR I-307, paragraphs 15 to 24), it is not bound to declare such aid compatible with the common market (see Case C-409/00 *Spain* v *Commission*, cited above, paragraph 94).

45 However, as was rightly pointed out by the Italian Republic, the Commission is bound, first, by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (see, in particular, Case C-409/00 *Spain* v *Commission*, cited above, paragraph 95).

46 Point 1.2 of the SME Guidelines states that the favourable consideration given by the Commission to State aid to SMEs is justified by the imperfections in the market which lead to their having to suffer a number of handicaps and which thus limit the socially and economically desirable development of such enterprises.

47 Point 3.2 of the SME Guidelines states that, in order to qualify as an SME under those guidelines, an enterprise must satisfy three tests: number of persons employed, the financial test and the independence test.

48 Regarding the last test, the third paragraph of Article 1 of the Annex to the SME Recommendation defines independent enterprises as those which are not owned as to 25% or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.

49 The Court observes, however, that, contrary to the argument put forward by the Italian Republic, the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

50 The 18th, 19th and 22nd recitals of the SME Recommendation, as well as point 3.2 of the SME Guidelines, make it clear that the purpose of the independence criterion is to ensure that the measures intended for SMEs genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size. It also follows that, in order to ensure that only genuinely independent SMEs are included, there has to be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than such an SME. It must also be ensured that the definition is not circumvented on formal grounds.

51 Accordingly, the independence criterion must be interpreted in the light of that purpose, as stated by the Advocate General in point 33 of his Opinion, so that an enterprise which is owned as to less than 25% by a large enterprise and thus formally meets the criterion, but in reality belongs to a large group of enterprises, may not nevertheless be regarded as meeting the criterion.

52 In the present case, the Commission, without being contradicted by the Italian Republic, found in point 37 of the contested decision that the reasons for the investment in Solar Tech by the Permasteelisa Group, a world leader in the production and installation of innovative cladding materials for large civil infrastructure works, is that it wishes through this project to extend its range of products. In points 38 and 39 of the contested decision, the Commission, again without being contradicted, found that, apart from the 24% of the shares in Solar

Tech held by Permasteelisa, the founder and reference shareholder of the Permasteelisa Group, who acts as the group's chief executive officer, holds 46% of the shares in Solar Tech and is the sole director of that company, the chairman of the Permasteelisa Group holds 15% of the shares in Solar Tech, and one of the members of the board of directors of Permasteelisa, who is also chairman of one of the companies in the group, holds the remaining 15% of the shares.

53 Accordingly, the Commission quite rightly found in point 36 of the contested decision that, from an economic standpoint, Solar Tech has to be regarded as belonging to the Permasteelisa Group, a large firm, despite the fact that the latter holds only 24% of the shares in Solar Tech.

54 Moreover, as is clear from paragraph 44 of this judgment, the fourth paragraph of point 4.2.1 of the SME Guidelines and point 1.4 of the Multisectoral Framework, the Commission is not bound to approve aid to SMEs which exceeds the level of regional investment aid it has authorised for large enterprises in the area. Accordingly, if an enterprise concerned does not in reality suffer from the handicaps typical of an SME, the Commission is entitled to refuse such increased aid. Approving increased aid for enterprises which, although meeting the formal criteria defining an SME, do not suffer from the handicaps typical of an SME would be contrary to Article 87 EC, since, as pointed out by the Advocate General in point 43 of his Opinion, such an increase in aid is likely to produce more severe distortions of competition and thus adversely affect trading conditions to an extent contrary to the common interest within the meaning of Article 87(3)(c).

55 In points 41 and 42 of the statement of reasons for the contested decision, the Commission found that, in the documents on which the Italian Republic based its examination of the application for aid, it is stated that, as far as capital is concerned, Solar Tech will be able to raise the funds it needs on the basis of Permasteelisa's financial standing, that Solar Tech has access to partners with the necessary technology via the three individuals who own shares in it and who are also executives of the Permasteelisa Group and that, as regards product

distribution, Italy has stated that Solar Tech will sell part of its production (20 to 30%) to Permasteelisa and will be able to benefit from the latter's contacts with a number of clients in the property sector, which will enable it to supply the worldwide market. The Italian Republic has not adduced any evidence calling those statements into question.

56 Accordingly, as the Commission found in point 36 of the contested decision, thanks to the economic, financial and organisational links between Permasteelisa and Solar Tech, the latter does not have to contend to any great extent with the handicaps from which SMEs usually suffer and which constitute one of the fundamental justifications for granting an increase in the maximum amount of aid allowable for such enterprises.

57 It follows that the Commission was entitled to find in point 36 of the contested decision that Solar Tech did not fulfil the necessary conditions to qualify for the bonus for SMEs and, in point 50, that the bonus of 15% gross grant equivalent for SMEs could not be applied in the case in point.

58 It follows that the first branch of the sole plea in law relied on by the Italian Republic in support of its action must be dismissed.

Article 88(1) EC

Arguments of the parties

59 The Italian Republic states that Article 88(1) EC provides that the Commission, in cooperation with Member States, is to keep under constant review all systems of

aid existing in those States and to propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market. In applying the Community rules for State aid to SMEs in a manner different from that provided for thereby, the contested decision derogates from those rules without any prior review of them having been conducted with the Member States. That decision is therefore also invalid because it is in breach of the obligation of regular, periodic cooperation (see, with respect to acts of the same legal nature, inter alia *Germany* v *Commission*, cited above, paragraphs 64 and 65).

60 The Commission contends that it did not derogate from the SME Guidelines and therefore did not tacitly amend them.

Findings of the Court

61 It follows from the Court's assessment of the first branch of the sole plea in law relied on by the Italian Republic in support of its action that the contested decision did not derogate either from the SME Recommendation or the SME Guidelines. The second branch of the plea cannot, therefore, be upheld.

The principles of protection of legitimate expectations and legal certainty

Arguments of the parties

62 The Italian Republic submits that the definition of an SME, which is based on the precise and specific conditions contained in the Community rules governing State aid to SMEs, was such as to create an expectation among the enterprises

concerned, including Solar Tech, that their applications for increased aid would be approved, thereby inciting them to put in place organisational and corporate structures which would comply with the rules. The different interpretation of the definition of an SME in the contested decision undermined that expectation and also created a situation of uncertainty surrounding the conditions of application of the bonus of 15% gross grant equivalent for SMEs. That interpretation is, accordingly, contrary to the principles of protection of legitimate expectations and legal certainty.

Findings of the Court

63 First, it is common ground that, under the Multisectoral Framework, the aid planned by the Italian Republic was subject to mandatory notification.

64 Second, it follows from paragraphs 43 to 58 of this judgment that the Commission merely applied the SME Recommendation and the SME Guidelines correctly.

65 In any event, in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article (see Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51).

66 It follows that, so long as the Commission has not taken a decision approving aid and also so long as the period for bringing an action against such a decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part (see, to that effect, Case C-169/95 *Spain* v *Commission*, cited above, paragraph 53, and Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 42).

67 It follows that the Commission did not infringe the principles of protection of legitimate expectations and legal certainty and that the third branch of the sole plea in law relied on by the Italian Republic in support of its action must also be dismissed.

68 Since none of the branches of that plea can be upheld, the action must be dismissed in its entirety.

Costs

69 Under Article 69(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 Commission has applied for costs and the Italian Republic has been unsuccessful, the latter should be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Italian Republic to pay the costs.**

Timmermans Rosas von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President