Case C-66/02

Italian Republic

v

Commission of the European Communities

(Action for annulment – State aid – Decision 2002/581/EC – Tax advantages granted to banks – Statement of reasons for a decision – Categorisation as State aid – Conditions – Compatibility with the common market – Conditions – Important project of common European interest – Development of certain economic activities)

Summary of the Judgment

1. *Actions for annulment – Pleas in law – Lack of or inadequate statement of reasons – Plea distinct from that relating to substantive legality (Arts 230 EC and 253 EC)*

2. *State aid – Definition – Fiscal measures granting tax exemptions or tax reductions or allowing deferral of payment in respect of certain restructuring operations in the banking sector – Included*

(Art. 87(1) EC)

3. *State aid – Examination by the Commission – Examination of an aid scheme taken as a whole – Lawfulness – Consequence*

(Art. 87(1) EC)

4. *State aid – Definition – Selective nature of the measure – Tax measure benefiting only undertakings in the banking sector carrying out certain transactions – Included*

(Art. 87(1) EC)

5. *State aid – Effect on trade between Member States – Impairment of competition – Criteria for assessment*

(Art. 87(1) EC)

6. *State aid – Prohibited – Exceptions – Aid contributing to the execution of an important project of common interest – Aid concerning the development of a sector of economic activity – Discretion of the Commission – Judicial review – Limits*

(Art. 87(3)(b) and (c) EC)

1. In an action for annulment, the question whether the reasons given for a measure are correct goes to the substantive legality of that measure. It follows that a challenge to the validity of those reasons cannot be examined when the point under consideration is whether or not the obligation laid down under Article 253 EC has been complied with.

(see paras 26, 55)

2. The definition of aid is more general than that of a subsidy, because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 87(1) EC. Similarly, a measure which grants to certain undertakings a tax reduction or a deferral of liability to tax that would otherwise be payable may constitute State aid.

That is the case, in the context of a tax rule which applies to banking restructuring operations, of measures which comprise either a tax reduction in the form of the application of tax at a reduced rate, or the substitution of a fixed-rate levy for the taxes that would otherwise be payable, or an exemption from tax where a gain arises on the return of ancillary property by a bank to a banking foundation which had previously transferred those assets to it, or in the case of the transfer by a bank of its shareholdings in the central bank of the Member State to the banking foundation which had previously transferred those shareholdings to it, particularly where the shareholding was originally acquired for no consideration and is transferred to the foundation for value or is revalued.

That finding is not called into question, as regards the measures providing for the fiscal neutrality of transactions involving the return of property, by the argument that payment of the tax that would otherwise be due is deferred only until such time as that property may be disposed of. It is not only the deferral of payment of a tax liability that may constitute State aid, but also, in particular, a return of property, such as that covered by the present case, which transfers ownership of such an asset from one legal person to another, so that for the bank which returns the asset to a banking foundation, which is a separate legal person, the exemption is permanent.

(see paras 77-82)

3. In the case of an aid scheme, the Commission may, in order to assess whether that scheme comprises aid elements, confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies. Accordingly, where it is not disputed that the tax provision under consideration operates to the benefit of certain undertakings, the fact that, in some circumstances, it may also benefit entities which are not undertakings does not call into question that finding, which is sufficient for Article 87(1) EC to apply to an aid scheme.

(see paras 91-92)

4. Article 87(1) EC prohibits aid which ‘[favours] certain undertakings or the production of certain goods’, that is to say aid which is selective. Aid may be selective for the purposes of that provision even if it concerns a whole economic sector.

That is the case with fiscal measures which comprise either a reduction or a exemption from tax, or which allow liability to tax to be deferred, and which apply solely to the banking sector and, within the banking sector, apply only for the benefit of undertakings carrying out certain operations. As they do not apply to all economic operators, and which are, in fact, an exception to the general tax scheme, they cannot be considered as general measures of fiscal or economic policy.

Such tax measures must therefore be prohibited under Article 87(1) EC, since they do not represent an adaptation of the general system to meet particular characteristics of banking

undertakings but were conceived as a means of improving the competitiveness of certain undertakings at a given time in the development of the sector.

(see paras 94-101)

5. Article 87(1) EC prohibits aid which affects trade between Member States and which distorts or threatens to distort competition. In assessing those two conditions, the Commission is required, not to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.

It is in short the case that aid is incompatible with the common market where it has or is liable to have an impact on intra-Community trade and distorts or is liable to distort competition in that field. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid. In that regard, the fact that an economic sector has been the subject of liberalisation at Community level will suffice to indicate the real or potential effect of the aid on competition and its effect on trade between Member States. Furthermore, it is not necessary that the beneficiary undertaking should itself participate in the intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are reduced as a result. Furthermore, the strengthening of an undertaking which has not previously participated in intra-Community trade may place it in a position which enables it to penetrate the market of another Member State.

Therefore, tax benefits must be prohibited which strengthen the position of the beneficiary undertakings in relation to undertakings which are active in intra-Community trade, particularly in the context of a significant liberalisation process at Community level in the financial services sector which has intensified the competition which may already have resulted from the freedom of movement of capital provided for under the Treaty.

(see paras 110-111, 114-119)

6. In applying Article 87(3) EC, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Community judicature, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers.

In failing to apply the classification of 'project of common European interest' within the meaning of Article 87(3) EC to certain measures which are essentially aimed at improving the competitiveness of operators established in a Member State in order to strengthen their position on the internal market, the Commission does not commit a manifest error of assessment. It cannot properly be criticised on the ground that those measures are part of the completion of a privatisation process, since a privatisation process undertaken by a Member State cannot, of itself, be considered as constituting a project of common European interest.

Nor does it commit a manifest error of assessment in holding that measures, the principal effect of which is to improve the competitiveness of the beneficiaries in a sector where international competition is strong, and are in fact intended to strengthen the position of the beneficiaries of the aid with regard to competitors which do not benefit from it, do not satisfy the condition that the aid is not adversely to affect trading conditions to an extent contrary to the common interest, which

must be satisfied by aid to facilitate the development of certain activities within the meaning of Article 87(3)(c) EC.

(see paras 135, 138-140, 142, 144, 147-149)

JUDGMENT OF THE COURT (Second Chamber)

15 December 2005 (*)

(Action for annulment – State aid – Decision 2002/581/EC – Tax advantages granted to banks – Statement of reasons for a decision – Categorisation as State aid – Conditions – Compatibility with the common market – Conditions – Important project of common European interest – Development of certain economic activities)

In Case C-66/02,

ACTION for annulment under Article 230 EC, brought on 21 February 2002,

Italian Republic, represented initially by U. Leanza, and subsequently by I.M. Braguglia, acting as Agents, and by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klu?ka, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 February 2005,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 By its application, the Italian Republic seeks the annulment of Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (OJ 2002 L 184, p. 27) (‘the contested decision’).

National legal framework

2 In Italy, a reform of the banking system was undertaken by Law No 218 of 30 July 1990 on the capital restructuring and consolidation of credit institutions governed by public law (GURI No 182 of 6 August 1990, p. 8) (‘Law No 218/90’).

3 That law enabled credit institutions governed by public law to be converted into companies limited by shares. For that purpose, a public bank was authorised to transfer the banking institution to a company limited by shares, with the result that the transferor, called in practice a ‘banking foundation’ (a ‘banking foundation’), which owned the shares became legally distinct from the transferee company (a ‘banking company’), which was the sole owner of the banking activity. The banking foundation administered the shareholding in the banking company and used the income arising from it for social purposes.

4 On the transfer of banking undertakings, non-profit-making assets, that is to say those which were not directly used in the production process, were also transferred to the banking companies. Those assets increased their capital. The effect was that, where the operating results of banks were the same, the banking companies were less profitable than the banks which competed with them.

5 The shareholdings of credit institutions governed by public law in the Banca d’Italia were also transferred to the banking companies. They could not be placed in the banking foundations, as the latter were not among the institutions eligible to hold such shares.

6 Article 2 of Law No 489 of 26 November 1993 extending inter alia the period laid down by Article 7(6) of Law No 218/90 (GURI No 284 of 3 December 1993, p. 4) (‘Law No 489/93’) made the conversion of public banking institutions into companies limited by shares compulsory by no later than 30 June 1994.

7 Law No 461 of 23 December 1998 delegating powers to the government to revise the civil and tax provisions applicable to the entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990 as well as the tax provisions applicable to restructuring operations in the banking sector (GURI No 4 of 7 January 1999) (‘Law No 461/98’) delegated power to the Italian Government to undertake further reform of the provisions applicable to the banking sector, in particular as regards restructuring.

8 Article 2(1)(m) of Law No 461/98 allowed the banking foundations which had implemented the statutory modifications provided for by that reform to hold shares in the Banca d’Italia for the first time.

9 Legislative Decree No 153 of 17 May 1999 on the civil and tax rules applicable to the organisations covered by Article 11(1) of Legislative Decree No 356 of 20 November 1990 and the tax provisions applicable to restructuring operations in the banking sector in accordance with Article 1 of Law No 461 of 23 December 1998 (GURI No 125 of 31 May 1999, p. 4) (‘Decree No 153/99’) gave effect to the delegation under Law No 461/98 by introducing the following tax advantages:

– a reduction to 12.5% in the rate of income tax (IRPEG) for banks which merge or engage in similar restructuring for five years after the operation, provided that the profits are paid into a special reserve which may not be distributed for three years; the profits paid into the special reserve may not exceed 1.2% of the difference between the sum of the credits and debits of the post?merger bank and the sum of the credits and debits of the largest pre-merger bank (Articles

22(1) and 23(1));

– tax neutrality for transactions in which property and assets in ancillary activities transferred to banking companies pursuant to Law No 218/90 are returned to the transferring institution (Article 16(3));

– the imposition of a fixed-rate levy in place of the taxes otherwise payable in connection with the operations referred to in the two preceding indents (Articles 24(1) and 16(5));

– fiscal neutrality in relation to the local tax on capital gains on immovable property in connection with those operations (Articles 24(1) and 16(5));

– exemption from tax for the transfer to banking foundations by the banking companies of their shareholdings in the Banca d'Italia (Article 27(2)).

The contested decision

10 Following a parliamentary question, the Commission of the European Communities, by letter of 24 March 1999 sent in the context of its powers in relation to State aid, requested the Italian authorities to supply information in order to assess the scope and effects of Law No 461/98.

11 By letters of 24 June and 2 July 1999, the Italian authorities provided information to the Commission on that law and on Decree No 153/99.

12 By letter of 23 March 2000, the Commission advised the Italian authorities that it was of the view that Law No 461/98 and Decree No 153/99 might contain elements of aid and requested them to halt any measures implementing them. On 12 April 2000, the Italian authorities replied to the Commission that they had suspended the implementation of the measures and on 14 June 2000 they provided it with further information.

13 The maximum theoretical amount of the tax advantages obtained by virtue of the reduction in income tax to 12.5% granted under Articles 22(1) and 23(1) of Decree No 153/99 was put by the Italian authorities at ITL 5 358 000 million (EUR 2 767 million) in respect of 76 transactions carried out during 1998, 1999 and 2000.

14 By letter of 25 October 2000, the Commission informed the Italian Government that it had decided to initiate the procedure laid down under Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 2001 C 44, p. 2).

15 At the close of the procedure, the Commission found that the Italian Republic had unlawfully implemented Law No 461/98 and Decree No 153/99, in breach of Article 88(3) EC. It took the view that, except for the exemption from tax in respect of certain transfers of shareholdings in the Banca d'Italia under Article 27(2) of Decree No 153/99, the tax measures implemented constituted a State aid scheme that was incompatible with the common market. The measures conferred an advantage on the banks inasmuch as they enabled them to increase their own size and benefit from economies of scale at a lower cost.

16 The Commission accordingly adopted the contested decision, in which it held that Law No 461/98 and Decree No 153/99 also introduced tax advantages for banking foundations, but that those advantages were not dealt with in that decision.

17 The contested decision is worded as follows:

‘*Article 1*

Without prejudice to Article 2, the State aid scheme which Italy has granted under [Law No 461/98] and [Decree No 153/99], and in particular on the basis of Articles 16(3) and (5), 22(1), 23(1), 24(1) and 27(2) of [Decree No 153/99], is incompatible with the common market.

Article 2

The advantages provided for in Article 27(2) of [Decree No 153/99] do not constitute State aid in so far as the joint operation of assigning the shares in the capital of the Banca d’Italia to the bank and transferring them to the foundation has no impact on the bank’s balance sheet.

Article 3

Italy shall withdraw the scheme referred to in Article 1.

Article 4

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

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

…’

Forms of order sought

18 The Italian Republic claims that the Court should:

– annul the contested decision in that the conditions for holding that the tax measures accompanying the reform of the Italian banking system may be categorised as ‘State aid’ are not satisfied;

– order the Commission to pay the costs.

19 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

The other proceedings pending before the Community Courts

20 By applications lodged at the Registry of the Court of First Instance of the European Communities on 21 February 2002 and 11 April 2002, the Associazione bancaria italiana (ABI) (Case T-36/02), the Banca Sanpaolo IMI SpA (Case T-37/02), the Banca Intesa Banca Commerciale italiana SpA (Case T-39/02), the Banca di Roma SpA (Case T-40/02), the Mediocredito Centrale SpA (Case T-41/02), the Banca Monte dei Paschi di Siena SpA (Case T?42/02), and the Compagnia di San Paolo Srl (Case T-121/02) also brought actions against the Commission for annulment of the contested decision in the present case. The Commission has

raised an objection of inadmissibility before the Court of First Instance, based on a lack of any individual interest on the applicants' part, as it claims that the aid in question is not individual aid but forms part of an aid scheme. By orders of 9 July 2003, the Court of First Instance stayed the seven proceedings pending the delivery by the Court of Justice of its judgment in the present case. Appeals were brought by the applicants against the orders staying proceedings in Cases T-36/02, T-37/02, T-39/02, T-40/02, T?41/02 and T-42/02. By order of the Court of Justice of 26 November 2003 in Joined Cases C-366/03 P to C-368/03 P, C-390/03 P, C-391/03 P and C-394/03 P *ABI and Others* v *Commission* [2003], not published in the ECR, the appeals were rejected as being manifestly inadmissible.

21 By order of 11 February 2004, received at the Court on 23 March 2004 (Case C-148/04 *Unicredito Italiano*), the Commissione tributaria provinciale di Genova (Provincial Tax Court of Genoa, Italy) made a reference to the Court for a preliminary ruling on the validity of the contested decision and on the interpretation of Article 87 EC et seq., Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), and the general principles of Community law. The Court will give its ruling in that case by way of a separate judgment to be delivered of even date with this judgment.

The action

22 The Italian Republic raises five pleas in law, alleging infringement of Article 253 EC, of the principle of the right to a fair hearing, of Article 87(1) EC, of Article 87(3)(b) EC and of Article 87(3)(c) EC.

The plea alleging infringement of Article 253 EC

Arguments of the parties

23 The Italian Republic contends that the Commission infringed the obligation to state reasons laid down under Article 253 EC.

24 The plea is divided into three parts:

– the contested decision is affected by a lack of reasoning as regards the assessment of the promotion of competition in the banking sector;

– it considers, but fails to distinguish between, the arguments put forward by the Italian Government on the question whether the tax measures at issue fall to be categorised as State aid within the meaning of Article 87(1) EC and on the separate question whether a declaration of compatibility in terms of Article 87(3) EC might fall to be made;

– it adopts reasoning which is inadequate, incorrect and contradictory in order to hold that the tax measures at issue cannot be considered to be compatible with the EC Treaty pursuant to Article 87(3) EC.

25 The Commission disputes the applicant's claims. It argues that the contested decision satisfies the conditions laid down under case-law as regards the obligation to state reasons.

Findings of the Court

26 It is settled case-law that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. 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 question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. That requirement must be appraised by reference to 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 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48).

– The first part of the plea

27 In the first part of its plea, the Italian Republic alleges a lack of adequate reasoning in the contested decision as regards the assessment of the promotion of competition in the banking sector.

28 That general claim is followed by arguments which essentially do no more than describe the development of the rules governing the Italian banking sector, without providing detailed information as to the substance of the ground of challenge.

29 The detailed description of the history of the applicable rules gives particular emphasis to Law No 218/90.

30 That law is described as having instigated a fundamental change to the Italian banking system, of which the main feature at the time was a substantial public sector, by prescribing the legal instruments which allow public banks to be converted into companies limited by shares.

31 For its part, Law No 461/98 is described as being the final stage in the process of reform of the Italian credit system.

32 It had become necessary, above all, so that the presence of the public sector in the banking field could be eliminated or, at the very least, be permanently reduced, and so that the process of privatising and restructuring the Italian banking system instigated by Law No 218/90 could be finally completed.

33 It aimed in particular to:

– encourage operations intended to increase the size of banks or banking groups;

– allow for the return to banking foundations, under fiscally neutral arrangements, of non-profit-making assets belonging to the banking companies which had been transferred to them pursuant to Law No 218/90.

34 The requirement to complete the privatisation process went hand in hand with a plan to implement fiscal reforms intended generally to reduce the tax burden on productive activities.

35 As framed, and having regard to the whole of the parties' written pleadings, the first part of the plea is to be understood as comprising a complaint based on a failure to set out in the contested decision the grounds on which the Commission categorised Law No 461/98 and Decree No 153/99 as State aid when they did no more than carry forward the provisions of Law No 218/90 which, for its part, had not been challenged by the Commission under the rules relating to State

aid.

36 It should be noted in that regard that in recitals 16, 30 and 32 in the contested decision the Commission:

– summarised the description given by the Italian Government in the proceedings of the development of the rules governing the Italian banking sector;

– noted the Italian Government's claim that Law No 218/90 and Decree No 153/99 should be seen as part of the same process aimed at modernising the Italian banking sector;

– noted the objective pursued by the Member State concerned of consolidating and restructuring that sector.

37 It must be noted that in recitals 51 to 54 in the contested decision the Commission sets out the reasons why it took the view that the fact that Law No 218/90 was not objected to under the rules relating to State aid has no bearing on its categorisation of Law No 461/98 and Decree No 153/99 under the same rules.

38 It points out, first of all, with regard to the fact that it did not challenge Law No 218/90, that that law was not notified to it by the Italian Government. It adds that it considered only certain aspects of the law in connection with individual cases and that the justification accepted in relation to those aspects does not apply to the measures at issue in the present case.

39 The Commission also notes that by the end of 1992 the public banks had, with very few exceptions, been converted into public limited companies and that such conversion was made compulsory by Law No 489/93.

40 Furthermore, the fact that it did not at the time object to the other measures, which are perhaps more similar to those implemented by Decree No 153/99, does not mean that it should give favourable consideration to the latter. Thus, a tax exemption on the transfer of assets from a banking foundation to a banking company does not necessarily have to be assessed in the same way as an exemption for a similar transfer from the banking company back to the foundation. The transfer of assets to the banking company could have had the effect of facilitating the conversion of public banks into public limited companies, while the return of those assets to the foundations, possibly revalued, on a tax?exempt basis, has the object and effect of improving the profitability indicators of the bank.

41 The Commission lastly maintains that Law No 218/90 remains an ad hoc measure capable of being justified in principle by the specific circumstances in which it was adopted. However, the measures at issue in the present case could at no stage be considered to be compatible with the common market.

42 It thus appears that, contrary to what the Italian Republic contends, the Commission provided reasons in the contested decision in reply to the arguments that had been put to it.

43 Irrespective of the question of whether they are correct, those reasons were sufficient to enable the persons concerned to ascertain the reasons in the contested decision relating to those arguments and to enable the Court to exercise its power of review.

44 The first part of the plea must accordingly be rejected.

– The second part of the plea

45 In the second part of its plea, the Italian Republic complains that the Commission did not set out its reasons separately as regards the categorisation of the tax measures at issue under Article 87(1) EC and the separate question whether a declaration of compatibility in terms of Article 87(3) EC might fall to be made.

46 It must be pointed out in that regard that compliance with the obligation to state reasons must be assessed with regard principally to the substance of those reasons rather than to their form.

47 In any event, it is sufficient to hold that in the present case that the Commission considered, in recitals 32 to 43 in the contested decision, the categorisation of the tax measures at issue in the light of Article 87(1) EC and, separately, in recitals 45 to 48 in the decision, the question of the possible application of Article 87(3) EC.

48 In those circumstances, the second part of the plea must be rejected.

– The third part of the plea

49 In the third part of its plea, the Italian Republic complains that the Commission's reasoning in the contested decision is inadequate, incorrect and contradictory as regards the application of Article 87(3)(b) and (c) EC.

50 It should be pointed out in that regard that, in recitals 45 to 48 in the contested decision, the Commission sets out the reasoning which led it to conclude that the tax measures at issue cannot be declared to be compatible with the Treaty pursuant to those provisions.

51 It states in particular that the strengthening of the Italian banking system cannot be considered to be a 'project of common European interest' for the purposes of Article 87(3)(b) EC, since the principal beneficiaries are the economic operators of one Member State and not the Community as a whole and that the promotion of a concrete, precise and well-defined project is not involved.

52 As regards the compatibility of the tax measures at issue with Article 87(3)(c) EC, as the ‘development of certain economic activities’, the Commission states that in its view the conditions for applying the Community guidelines set out in its information notice 1999/C 288/02 on Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) are not satisfied. The scheme is not limited to small and medium?sized enterprises. The aid was not notified individually to the Commission and no restructuring plan was submitted. The banks that benefit from the aid are not normally in difficulty and the aid is not intended to restore their long-term viability. The guidelines require that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. In the present case, the aid is intended instead to strengthen the position of the beneficiaries in relation to competitors which do not benefit from the measures. The benefits cannot be categorised as investment aid or aid to expenditure that can otherwise be considered to be compatible. No other feature of the scheme allows it to be held to be compatible on other grounds under Article 87(3)(c) EC. Moreover, the requirement under that provision that the aid ‘[should] not adversely affect trading conditions to an extent contrary to the common interest’ is not satisfied. Unlike previous measures stemming, in particular, from Law No 218/90, which might have made it easier for public banks to adopt the status of public limited companies, thereby placing them on a more level playing field in competitive terms with other banking institutions, the measures at issue essentially have the effect of improving the competitiveness of the beneficiaries in a sector where international competition is strong.

53 It must be recognised that, irrespective of the question whether it is correct, the reasoning thus put forward by the Commission was sufficient to enable the persons concerned to ascertain the reasons in the contested decision in relation to the matter under consideration and to enable the Court to exercise its power of review.

54 As to the remainder, the Italian Republic’s complaint as to the incorrect and contradictory nature of the reasoning contains, in fact, a challenge to its validity, as well as a claim that there is inadequate reasoning in relation to a change to a position previously adopted by the Commission. The Italian Government argues, in particular, that the Commission’s observation in the contested decision that the principal beneficiaries of the scheme in question will be the economic operators of one Member State, and not the Community, ‘appears completely simplistic and groundless’. It goes on to assert that the Commission’s observation that the scheme in question does not involve the promotion of a concrete, precise and well-defined project is ‘wholly without foundation and contradictory’. Lastly, as regards the compatibility of aid intended to assist the development of certain activities, it submits that the Commission’s reasoning is ‘contradictory’ and is ‘wholly inconsistent’ with the findings made by it in other cases and from which it departed very significantly in the present case.

55 As was pointed out in paragraph 26 of this judgment, the question whether the reasons given for a measure are correct goes to the substantive legality of that measure. It follows that a challenge to the validity of those reasons cannot be examined when the point under consideration is whether or not the obligation laid down under Article 253 EC has been complied with.

56 In addition, as regards the reasons for the Commission’s adoption of a different position than it adopted in previous cases, recitals 51 to 54 in the contested decision set out the factors on which the Commission based its finding that the present case differed from those under comparison and, accordingly, justify that position.

57 In those circumstances, the third part of the plea must also be rejected.

58 It follows from the above that the plea alleging infringement of Article 253 EC must be

rejected in its entirety.

The plea alleging infringement of the principle of the right to a fair hearing

Arguments of the parties

59 The Italian Republic claims that it was only in the contested decision that the Commission set out specific objections to the fiscal measures at issue which involved indirect taxes. It failed to give the Italian Government and the beneficiaries a prior opportunity of providing their comments. In so doing, the Commission infringed the principle of the right to a fair hearing.

60 The Commission considers that that argument constitutes a new plea which is inadmissible by virtue of Article 42(2) of the Rules of Procedure as having been put forward for the first time at the stage of the reply.

Findings of the Court

61 Article 42(2) of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure.

62 In its application, the Italian Republic raises no plea in law alleging an infringement of the right to a fair hearing committed in the course of the procedure leading to the contested decision.

63 It was only at the stage of the reply that it invoked such a plea, without basing it on matters of law or fact which have come to light in the course of the procedure.

64 The plea in question is therefore a new plea which must, as such, be declared to be inadmissible.

The plea alleging infringement of Article 87(1) EC

Arguments of the parties

65 The Italian Republic maintains that the Commission has infringed Article 87(1) EC by categorising the tax measures at issue as State aid.

66 The plea is divided into six parts.

67 In the first part, the applicant argues that the contested decision is founded on a false premiss as regards the reduction to 12.5% for income tax on banks which merge or engage in similar restructuring. That reduction applies, not to the overall income of the bank which merges or engages in similar restructuring, but only on the part of the income which is paid into a special reserve. In addition, the tax reduction cannot exceed the overall limit of 1.2% of the aggregate amount referred to in Articles 22(1) and 23(1) of Decree No 153/99. Lastly, the Commission failed to have regard to the condition that the special reserve could not be distributed to shareholders for three years.

68 In the other five parts of the plea, the Italian Republic contends that the measures at issue:

– give rise to no transfer of State resources and to no renunciation on its part of any specific tax revenue;

– do not constitute State aid, because they also benefit entities such as holding companies which are not undertakings for the purposes of Article 87(1) EC;

– are not, as the Commission claims, selective in nature, but, on the contrary, of a general character, as the requirements they contain are neither discriminatory nor discretionary in their application;

– do not affect trade between Member States or, at the most, affect it only in part, in which case only a partial recovery of the aid should have been ordered;

– do not distort competition.

69 With more particular regard to the measures contained in Article 16(3) of Decree No 153/99 which provide for the fiscal neutrality of transactions involving the return of ancillary property and assets, those measures did not give rise to an economic advantage consisting in an exemption from tax for the company making the return, but merely to a transfer of the charge to tax from that company to the beneficiary and to an extension in the period for payment of the tax on the return of the property until its subsequent disposal.

70 The Commission argues that it was only at the stage of the reply that the Italian Republic put forward the argument that, inasmuch as Article 16(3) of Decree No 153/99 provides for the fiscal neutrality of the return of ancillary property and assets, it also benefits entities that are not undertakings for the purposes of Article 87(1) EC. That argument constitutes a new plea, which is inadmissible by virtue of Article 42(2) of the Rules of Procedure.

71 In the same way, it was only at the stage of the reply that the applicant put forward the argument that aid may affect trade between Member States only in part and therefore be only partially repayable. It considers that the request for a reduction in the amount to be recovered constitutes a new claim which alters the subject-matter of the proceedings in breach of Article 19 of the EC Statute of the Court of Justice (now Article 21 of the Statute of the Court of Justice) and Article 38 of the Rules of Procedure.

72 As to the remainder, the Commission considers that the plea alleging infringement of Article 87(1) EC is without foundation.

Findings of the Court

– The first part, alleging a false premiss as regards the reduction in income tax

73 Contrary to what the Italian Republic maintains, the Commission did not refer to a reduction in the rate of tax on the overall income of the bank. In recital 5 in the contested decision, it described the reduction in question by reference to profits placed in a special reserve, that being a condition for entitlement to the reduction. In any event, were a reduction applicable to the bank’s overall income to have been taken into consideration, it would have had an impact on the contested decision as regards the analysis of the extent of the aid but not as to its existence.

74 Furthermore, in the same recital in the contested decision, the Commission expressly referred to the overall limit of 1.2% and the requirement that there should be no distribution for three years invoked by the Italian Republic and laid down under Decree No 153/99.

75 The first part of the plea must therefore be rejected.

– The second part, relating to the question whether the measures at issue are funded by the

State or through State resources

76 Article 87(1) EC applies to ‘aid granted by a Member State or through State resources in any form whatsoever’.

77 According to settled case-law, the definition of aid is more general than that of a subsidy, because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, inter alia, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38, and Case C?501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90 and the case-law cited there).

78 It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 87(1) EC (see Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14). Similarly, a measure which grants to certain undertakings a tax reduction or a deferral of liability to tax that would otherwise be payable may constitute State aid.

79 In the present case, the measures at issue comprise:

– a reduction in the rate of income tax;

– exemptions from tax granted under provisions which ensure the fiscal neutrality of the transactions concerned, that is to say that for fiscal purposes the presence of conditions that would give rise to a charge to tax are disregarded, as payment of the tax is deferred until such time as a subsequent transaction of the same kind may take place;

– the imposition of a fixed-rate levy in place of the taxes that would otherwise be payable in connection either with a merger or similar restructuring or with a return of ancillary property and assets;

– an exemption from tax on the transfer by the banking companies to the banking foundations of their shareholdings in the Banca d’Italia.

80 They thus comprise either a tax reduction in the form of the application of tax at a reduced rate, or the substitution of a fixed-rate levy for the taxes that would otherwise be payable, or an exemption from tax where a gain arises on the return of ancillary property or, as is mentioned at the end of recital 39 in the contested decision, where a banking company which transfers to a banking foundation its shareholding in the Banca d’Italia makes a profit on the transaction, particularly where the shareholding was originally acquired for no consideration and is transferred to the foundation for value or is revalued.

81 In those circumstances, the tax benefits in question are granted through State resources for the purposes of Article 87(1) EC.

82 That finding is not called into question, as regards the measures providing for the fiscal neutrality of transactions involving the return of property, by the argument that payment of the tax that would otherwise be due is deferred only until such time as that property may be disposed of. It is not only the deferral of payment of a tax liability that may constitute State aid, but also, in particular, a return of property, such as that covered by the present case, which transfers ownership of such an asset from one legal person to another, so that for the bank which returns

the asset to a banking foundation, which is a separate legal person, the exemption is permanent.

83 The second part of the plea must therefore be rejected.

– The third part, relating to the identity of the parties benefiting from the measure providing for the fiscal neutrality of transactions involving the return of ancillary property and assets

84 The Italian Republic argued in its reply that the argument that the measure providing for the fiscal neutrality of transactions involving the return of ancillary property and assets also benefits entities which are not undertakings for the purposes of Article 87(1) EC.

85 It must be pointed out that Article 42(2) of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

86 However, it must also be pointed out that a plea which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application must be considered admissible (Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9, and Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 169).

87 In its application, the Italian Republic raised the plea already considered above alleging infringement of Article 87(1) EC and argued that the Commission had failed to have regard to a number of the requirements set out in that provision.

88 The claim in the reply that the measures also benefit entities which are not undertakings constitutes an amplification of the original plea. It relates to one of the cumulative conditions to which the application of Article 87(1) EC is made subject. The argument in question is implicitly contained in the plea raised.

89 The Commission's objection as to inadmissibility must accordingly be rejected.

90 In substance, the measures at issue form part of an aid scheme.

91 In the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies (see, inter alia, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 51, and Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24) in order to establish whether the scheme involves elements of aid.

92 In the present case, it is not disputed that the tax provision under consideration operates to the benefit of banking undertakings. The fact that, in some circumstances, it may also benefit entities which are not undertakings does not call into question that finding, which is sufficient for Article 87(1) EC to apply to an aid scheme.

93 The third part of the plea must therefore be rejected.

– The fourth part, relating to the selective nature of the measures at issue

94 Article 87(1) EC prohibits aid which '[favours] certain undertakings or the production of certain goods', that is to say aid which is selective.

95 Aid may be selective for the purposes of that provision even if it concerns a whole economic sector (see, inter alia, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33).

96 In the present case, the tax measures at issue apply to the banking sector. They do not benefit undertakings in other economic sectors. In that regard, it must be observed that in its application the Italian Republic itself pointed out that the operations to which the measures apply may also involve other companies, such as finance companies, service companies and insurance companies but that, 'in any event, the benefits provided for extend only to banks which are a party to the operations'.

97 In addition, within the banking sector, the measures at issue benefit only the undertakings carrying out the operations covered by the measures.

98 Without it being necessary also to determine whether, as the Commission maintains in recital 33 in the contested decision, the tax reduction applying to mergers or similar restructuring operations is of greater benefit to large undertakings participating in them, it must therefore be held that the measures at issue are selective in relation to other economic sectors and within the banking sector itself.

99 As they do not apply to all economic operators, they cannot be considered as general measures of fiscal or economic policy.

100 They are, in fact, an exception to the general tax scheme. The undertakings which benefit from them are entitled to tax advantages to which they would have no right under the normal rules of application of that scheme and to which undertakings in other sectors carrying out similar operations or undertakings in the banking sector not carrying out operations such as those to which the rules apply have no right.

101 The measures at issue are not justified by the nature and the general scheme of the tax system in question (see, by way of analogy, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33). They do not represent an adaptation of the general system to meet particular characteristics of banking undertakings. It is clear from the documents before the Court that they were explicitly put forward by the national authorities as a means of improving the competitiveness of certain undertakings at a given time in the development of the sector.

102 The fourth part of the plea must therefore be rejected.

The fifth and sixth parts, relating to the question whether there is an effect on trade between Member States and distortion of competition

103 In the application, the Italian Republic denied that the requirement that there be no effect on trade between Member States was infringed. In its reply, it criticised the Commission for failing to investigate whether, if they did not fully affect trade between Member States, the measures at issue affected it only in part. Had such a finding been made, that would have been reflected in the extent to which the aid was recoverable, by virtue of the principle of proportionality.

104 The Commission is of the view that that argument represents a new claim which alters the subject-matter of the dispute. It is therefore inadmissible pursuant to Article 21 of the Statute of the Court of Justice and Article 38 of the Rules of Procedure.

105 It must be pointed out in that regard that those provisions do not allow new claims which were not contained in the application to be put forward.

106 The argument which is alleged to be inadmissible is put forward in support of the claim for annulment of the contested decision, which is contained in the application. It is not linked to any variation of that claim, nor does it add to it in any way.

107 Accordingly, it cannot be considered to be a new claim.

108 The argument in fact amplifies a plea raised in the original application, so that it cannot be considered as a new plea for the purposes of Article 42 of the Rules of Procedure (see *Verros* v *Parliament*, paragraph 9, and *Netherlands* v *Council*, paragraph 169).

109 Accordingly, a plea of inadmissibility cannot be put forward against it.

110 As regards the substance, Article 87(1) EC prohibits aid which affects trade between Member States and which distorts or threatens to distort competition.

111 In assessing those two conditions, the Commission is required, not to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44).

112 In that context, the concept of an ‘effect’ on trade between Member States, which must be understood as requiring that there be an impact on such trade, or at least that there be the possibility of such an impact, means that an interpretation which renders the recovery of the whole of the aid subject to a criterion that trade should be ‘fully’ affected, in contrast to a ‘partial’ effect on it, where only a proportion of the aid would be recoverable by virtue of the principle of proportionality, is unfounded.

113 With respect to the last-mentioned point, it should, moreover, be noted that the withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful and that such recovery for the purpose of re-establishing the situation which previously existed cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid (see Case C-372/97 *Italy* v *Commission*, paragraph 103 and the case?law cited there).

114 It is in short the case that aid is incompatible with the common market where it has or is liable to have an impact on intra-Community trade and distorts or is liable to distort competition in that field.

115 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid (see, inter alia, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11; Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and Case C-372/97 *Italy* v *Commission*, paragraph 52).

116 In that regard, the fact that an economic sector has been the subject of liberalisation at Community level will suffice to indicate the real or potential effect of the aid on competition and its effect on trade between Member States (see Case C-409/00 *Spain* v *Commission* [2003] ECR I?1487, paragraph 75).

117 Furthermore, it is not necessary that the beneficiary undertaking should itself participate in the intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are reduced as a result (see, to that effect, inter alia Case C-310/99 *Italy* v *Commission*, paragraph 84). Furthermore, the

strengthening of an undertaking which has not previously participated in intra-Community trade may place it in a position which enables it to penetrate the market of another Member State.

118 In the present case, it must be held that the tax benefits provided by the measures at issue in cases of merger, the return of certain property and assets and in certain cases involving the transfer of shareholdings in the Banca d'Italia (see paragraph 80 of this judgment) strengthen the position of the beneficiary undertakings in relation to undertakings which are active in intra-Community trade.

119 It must also be noted that the financial services sector has been the subject of a significant liberalisation process at Community level, which has intensified the competition which may already have resulted from the freedom of movement of capital provided for under the Treaty.

120 It is clear from the documents before the Court that, at the time when they were adopted, the measures at issue were presented in the explanatory notes to the draft law which formed the basis of Law No 461/98 as a means of ensuring that the fact that the Italian banking system was significantly less well developed than its European competitors did not mean that the attainment of monetary union would result in the erosion of the Italian system to the benefit of the strongest European banks.

121 The competitive benefit conferred by the measures at issue on operators established in Italy is such as to make the penetration of the Italian market by operators from other Member States more difficult and indeed to facilitate the penetration of other markets by operators established in Italy.

122 The fact, invoked by the Italian Republic, that the aid scheme is also available in Italy to branches of banks from other Member States does not preclude such effects arising.

123 It must accordingly be held that the aid in question is liable to affect trade between Member States and to distort competition.

124 The fifth and sixth parts of the plea must therefore be rejected.

125 It follows from the above that the plea alleging infringement of Article 87(1) EC must be rejected in its entirety.

The pleas alleging infringement of Article 87(3)(b) and (c) EC

Arguments of the parties

126 The Italian Republic argues, as regards its two pleas based on Article 87(3) EC, that the failure to give prior notification of the aid scheme did not entitle the Commission to conclude that that scheme could not be declared to be compatible with the common market under that provision of the Treaty.

127 The applicant contends, in the first place, that the Commission infringed Article 87(3)(b) EC by refusing to declare the aid to be compatible with the common market as being ‘aid to promote the execution of an important project of common European interest’ for the purposes of that provision. It argues that the objective of Law No 461/98 and Decree No 153/99 was to complete the privatisation of Italian banking institutions in encouraging a withdrawal or a reduction of public capital and capital which did not belong to private investors in Italian banking institutions. The result of that action was not to distort competition, but, on the contrary, to reduce the imbalances which existed before the introduction of the scheme in question between banks that were truly private and those which were only so in name and not in terms of their controlling capital.

128 The Italian Republic argues that the full and permanent privatisation of Italian banking institutions may constitute a ‘project of common European interest’, forming part in turn of the Community project of the attainment of the euro zone and of the internal market. In the light of Article 295 EC, the privatisation project could be carried through only by the Member States, each acting in its own sphere. Privatisation strengthens competition on an important financial market such as the Italian market, which benefits the Community as a whole.

129 The Italian Republic considers, in the second place, that the Commission infringed Article 87(3)(c) EC by failing to declare the measures at issue to be compatible with the common market as being ‘aid to facilitate the development of certain economic activities’, in the present case, banking activity.

130 It complains that the Commission considered the question of the application of Article 87(3)(c) EC only in the light of its information notice 1999/C 288/02 on Community guidelines on State aid for rescuing and restructuring firms in difficulty and its information notice 96/C 213/04 on Community guidelines on State aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4), which the contested decision implicitly adopts. It states that it has never maintained that the aid scheme could be considered as providing aid to firms in difficulty or small and medium-sized enterprises. According to the applicant, the assessment of the compatibility of the aid should be made directly on the basis of Article 87(3)(c) EC, as the scheme under consideration does not correspond to either of the ‘codified’ situations covered by the two Commission information notices.

131 The Italian Republic criticises the Commission for departing very significantly from the position it adopted in its Decision 1999/288/EC of 29 July 1998 giving conditional approval to the aid granted by Italy to Banco di Napoli (OJ 1999 L 116, p. 36) and its Decision 2000/600/EC of 10 November 1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa (OJ 2000 L 256, p. 21).

132 Those decisions related to aid which was similar in many respects to that granted by the measures at issue, in particular as they were based in part on Law No 218/90. That aid was never notified. The Commission, while imposing certain conditions, ultimately declared it to be compatible with the common market pursuant to Article 87(3)(c) EC.

133 The reduction in the rate of income tax provided for under Articles 22 and 23 of Decree No 153/99 is consistent with the similar, if not more favourable, fiscal measure laid down in Article 7(3) of Law No 218/90. The latter provision granted to credit institutions resulting from mergers and those which were the recipients of transfers, where those transfers gave rise to issues of concentration, the right to deduct for five years payments made to a special reserve, subject to a specific maximum limit. The Commission did not adopt the same position with regard to that earlier measure.

134 The Commission submits that the two pleas are without foundation.

Findings of the Court

135 The first point to note is that, in applying Article 87(3) EC, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers (see Case C-456/00 *France* v *Commission* [2002] ECR I-11949, paragraph 41 and the case-law cited there).

136 In addition, it must be stated at the outset that in the contested decision, contrary to what the applicant contends, the Commission did not infer in any way from the absence of prior notification of the aid scheme that it could not be declared to be compatible with the common market pursuant to Article 87(3) EC.

– The concept of aid 'to promote the execution of an important project of common European interest'

137 Article 87(3)(b) EC allows the Commission to declare aid to promote the execution of an important project of European interest to be compatible with the common market.

138 In recital 45 in the contested decision, the Commission stated that the measures at issue are intended to strengthen the Italian banking system by benefiting mostly the economic operators of one Member State and not the Community as a whole.

139 It is sufficient to hold in that regard that, as is shown by consideration of the plea based on Article 87(1) EC and, in particular, the explanatory notes to the draft law on which Law No 461/98 is based, that the measures at issue are essentially aimed at improving the competitiveness of operators established in Italy in order to strengthen their position on the internal market.

140 Accordingly, in failing to apply the classification of 'project of common European interest', the Commission did not commit a manifest error of assessment.

141 The Italian Republic cannot validly argue that the measures at issue form part of a full and permanent privatisation process which might constitute a project of common European interest.

142 First, the tax benefits do not have the necessary connection with a privatisation process. Secondly, and most importantly, a privatisation process undertaken by a Member State cannot, of itself, be considered as constituting a project of common European interest.

143 It follows that the plea alleging infringement of Article 87(3)(b) EC must be rejected.

– The concept of 'aid to facilitate the development of certain economic activities'

144 Article 87(3)(c) EC allows the Commission to declare aid to facilitate the development of certain economic activities to be compatible with the common market.

145 Contrary to what the applicant contends, the Commission did not consider the application of that provision only in the light of its information notices 1999/C 288/02 and 96/C 213/04.

146 In recital 47 in the contested decision, after analysing the measures at issue in the light of

the criteria set out in its two information notices, it states that no feature of the aid scheme under consideration allows it to be held to be compatible on other grounds for the purposes of Article 87(3)(c) EC.

147 In addition, it states that in its view the criterion laid down under that provision that the aid is not adversely to affect trading conditions to an extent contrary to the common interest is not satisfied.

148 In stating, as regards the last-mentioned point, that the principal effect of the measures at issue is to improve the competitiveness of the beneficiaries in a sector where international competition is strong, and having previously noted that it was in fact intended to strengthen the position of the beneficiaries of the aid with regard to competitors which do not benefit from it, the Commission implicitly rejected the possibility that the objective of the aid scheme under consideration might be the 'development' of banking activity in general.

149 Taking into consideration the reasons set out in the examination of the previous pleas as regards the nature of the measures at issue, it must be held that the Commission's analysis is not based on a manifest error of assessment.

150 The Italian Republic cannot validly argue that the Commission departed from the position adopted in relation to the measures contained in Law No 218/90 and, in particular, the position adopted in its Decisions 1999/288 and 2000/600.

151 It is not in dispute that the measures contained in Law No 218/90 were never notified to the Commission. Accordingly, as regards the Italian Republic's claim that a measure laid down under Article 7(3) of Law No 218/90 was closely connected with the reduction in income tax provided for by Articles 22 and 23 of Decree No 153/99, it is sufficient to hold that the measure referred to was not investigated by the Commission. Furthermore, even if the two successive measures represent a common thread, the fact that the Commission took no steps in relation to the first of them is of no relevance, as the scheme at issue in the present case, viewed independently from its predecessor, favours certain undertakings (see, to that effect, Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 10).

152 As regards Decisions 1999/288 and 2000/600, it should be observed that they relate to aid in respect of which the beneficiaries were individual banks and concern different measures from those at issue in the present case, namely increases in share capital, advances made by the Banca d'Italia, the injection of a Treasury contribution to a bank and tax benefits for measures primarily involving the transfer of undertakings, branches of undertakings and assets.

153 Accordingly, the plea alleging infringement of Article 87(3)(c) EC must be rejected.

154 In the event, none of the pleas for annulment raised by the Italian Republic is well founded.

155 The application must therefore be dismissed.

Costs

156 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 Italian Republic has been unsuccessful and the Commission has applied for costs, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the action;**

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

[Signatures]

* Language of the case: Italian.