

## Pleas in law and main arguments

The pleas in law and main arguments are similar to those put forward in Case T-109/05 *Navigazione Libera del Golfo v Commission*.<sup>(1)</sup>

It should, however, be stated that the contested decision in Case T-109/05 is based on Article 4(2) of Regulation No 1049/2001, whereas the decision at issue in this case is based on Article 4(4) and (5) of that regulation. Accordingly, it was not Caremar that was consulted, as 'third party author' of the documents/data to which access was requested, but rather it was the Italian authorities, which did not issue the documents of the case and had no concerns relating to commercial interests, that were consulted.

Further, that consultation was carried out in an artificial manner, given that the Member States have exclusive competence together with a right of veto which is binding on the Commission.

<sup>(1)</sup> OJ C 106 of 30.04.2005, p. 43.

## Action brought on 19 December 2005 — Associazione italiana del risparmio gestito and Fineco Asset Management v Commission of the European Communities

(Case T-445/05)

(2006/C 48/78)

Language of the case: Italian

### Parties

*Applicants:* Associazione italiana del risparmio gestito and Fineco Asset Management SpA (Italy) (represented by: Gabriele Escalar and Giuseppe Maria Cipolla, lawyers)

*Defendant:* Commission of the European Communities

### Form of order sought

The applicants claim that the Court should:

- annul Commission Decision No C(2005) 3302 of 6 September 2005 which brought proceedings C-19/2004 (ex NN 163/03) to a close;
- order the defendant to pay the costs.

## Pleas in law and main arguments

This action concerns the same decision as that challenged in Case T-424/05 *Italian Republic v Commission*.<sup>(1)</sup>

In support of their pleas, the applicants allege:

- inadequacy and inconsistency of the contested decision, in that it concerns, first, the existence of an economic advantage which is selective, as it is not clear from its wording what economic advantage is conferred by the tax measures at issue and what beneficiaries there are. Secondly, the statement of reasons for the decision is also to be regarded as inadequate as to the existence of a distortion of competition which may affect trade between the Member States;
- infringement of Article 87(1) of the EC Treaty, since the reduction in the tax applicable to the income of undertakings for collective investment in transferable securities (UCITS) specialising in shares of small or medium-sized capitalisation companies (SMCC) does not give rise to State aid. In that regard it is claimed, in particular, that the tax reduction in question constitutes an economic advantage for all the relevant stakeholders, not a selective one for the managers of the undertakings. In fact, all Italian and Community independent asset management companies (*società di gestione del risparmio*; SGR) may manage UCITS and all Italian or Community open-ended investment companies (SICAV) may act as SICAV specialising in SMCC. Further, even if the measures at issue were to result in an economic advantage for UCITS, they would not, however, give rise to State aid, given that the investment funds consist of collections of assets that do not exist as independent entities, do not have their own management bodies and do not pursue economic objectives, and accordingly have no organs which can manifest intent. Finally, the tax measures at issue do not constitute economic advantages of a selective nature for the SMCC.

In the alternative, the applicants claim that:

- the tax measures in question must be regarded as compatible with the common market, pursuant to Article 87(2)(a) of the Treaty; and
- the contested decision infringes Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 since recovery was ordered from the investment vehicles in the form of companies and from the undertakings managing the investment instruments that are established by contract.

<sup>(1)</sup> Not yet published in the OJ.