COMMISSION

COMMISSION DECISION
of 22 August 2002
on the tax measures for banking foundations implemented by Italy
C 54/2000/EC (ex NN 70/2000)

(notified under document number C(2002) 3118)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/146/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above and having regard to their comments [1],

Whereas:

I. PROCEDURE

(1) By letter dated 24 March 1999, the Commission, after receiving a Parliamentary question on the subject, asked the Italian authorities to provide information in order to assess the scope and effects of Law No 461 of 23 December 1998 (hereinafter Law No 461/98). By letters dated 24 June and 2 July 1999, the Italian authorities provided the Commission with information on the Law and on Legislative Decree No 153 of 17 May 1999, which followed it (hereinafter Decree No 153/99). Having examined the information received, the Commission advised the Italian authorities on 23 March 2000 that the aforementioned Law and Decree were likely to contain aid elements and asked them to halt implementation of the measures. By letter dated 12 April 2000, the Italian authorities informed the Commission that they had suspended the implementation of the measures. Further information was provided to the Commission by letter of 14 June 2000.

(2) By letter dated 25 October 2000, the Commission informed the Italian Government that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received comments from interested parties. On 18 June 2001 it forwarded them to the Italian authorities, which were given the opportunity to react; their comments were received by letter dated 25 July 2001.

II. DETAILED DESCRIPTION OF THE AID

(5) Law No 461/98 and Decree No 153/99 introduced the following tax advantages for banking foundations:

1. Foundations that alter their statutes in line with the Decree will be designated as non-commercial bodies (Article 12(1) of Decree No 153/99). They will then be entitled to the 50 % reduction in corporation tax (IRPEG) provided for in Article 6 of Presidential Decree No 601 of 29 September 1973 for bodies active in the social assistance, health, education or similar sectors (Article 12(2) of Decree No 153/99).

[1] OJ C 44, 10.2.2001, p. 2.

[2] See footnote 1.

2. Capital gains arising from the transfer of holdings in banks are not counted for the purposes of corporation tax (IRPEG) or the regional tax on production (IRAP) where the transfers are made by the foundations themselves or by the companies to which they transfer their holdings pursuant to Law No 218 of 30 July 1990. This measure applies provided that the transfer is made within four years of the date on which the Decree came into force (Article 13 of Decree No 153/99).

3. Tax neutrality of transactions by which goods and holdings in ancillary banking activities transferred to banks or other companies pursuant to Law No 218 of 30 July 1990 are returned to the transferring body, and fixed amount payments of certain indirect taxes (Articles 16(4), (5) and (6) and 17 of Decree No 153/99).

4. Tax neutrality of transactions by which holdings in the capital of the Banca d'Italia transferred to banks or other companies pursuant to Law No 218 of 30 July 1990 are returned to the transferring body (Article 27(2) of Decree No 153/99).

(6) Law No 461/98 and Decree No 153/99 also introduce tax advantages for bank mergers and restructuring operations. The measures applying to banks are dealt with in the Commission Decision of 11 December 2001 in Case C 54/A/2000/EC.

(7) Formerly State-owned banks in Italy which did not have the status of public limited companies were gradually converted into public limited companies (this was made compulsory in 1993). Their shares were either placed on the market or transferred to non-profit bodies called 'banking foundations'. The measures described in recital 5(2) above lay down the conditions under which foundations may transfer over a four-year period the holdings they still have in banks. Foundations are obliged eventually to give up control of commercial banks.

(8) Law No 218 of 30 July 1990 introduced special tax rules whereby the banking foundations that owned or controlled the newly created banks could transfer certain assets to the banks. The measures described in recital 5(3) and (4) above refer to those same assets and lay down the conditions under which they may be returned to the banking foundation.

(9) The Commission found that tax advantages granted by Law No 461/98 and Decree No 153/99 to banking foundations may constitute State aid within the meaning of Article 87 of the Treaty, for the following reasons:

— Law No 461/98 and Decree No 153/99 grant tax advantages specifically to banking foundations. This is a selective measure which confers an economic advantage by forgoing tax revenue, i.e. through State resources,

— although banking foundations are non-profit-making bodies bound by corporate objectives laid down by law and cannot pass on tax advantages to their members or to others, they can still be described as economic actors exercising an activity in commercial sectors and may therefore fall within the scope of Article 87 of the Treaty,

— since they are able to keep their holdings in banks or to become shareholders in other undertakings, foundations operate in the market for the ownership and control of undertakings. The aid could therefore bring about distortions in that market. In addition, it cannot be ruled out that the tax advantages might eventually benefit the banks and the undertakings in which they have holdings. This could constitute State aid to these undertakings, in particular where the foundations in question are subject to the influence of the public authorities, with distortions thus being caused in the markets in which they operate,

— the Italian authorities state that the tax advantages apply only if the foundations decide to cede control of their banks. This is likely to facilitate the privatisation process, which is in the general interest. Nevertheless, it can be argued, as the Italian Competition and Market Authority (Autorità garante della concorrenza e del mercato) has done, that the definition of control laid down by Article 6 of Decree No 153/99 is too narrow and will enable foundations to retain de facto control of their banks. A wider definition of control, as provided for in banking legislation, would be more in line with the general interest.

On these grounds, the Commission initiated the procedure laid down in Article 88(2) of the EC Treaty.

III. COMMENTS FROM INTERESTED PARTIES

(10) The Commission has received a number of comments from beneficiaries of the aid mainly repeating the arguments put forward by the Italian authorities.

(11) The point is made that, if the problem is distortion of the market for the control of undertakings, then all differential tax arrangements granted to different categories of investor, including other non-profit bodies, should be called into question.

(12) It is also pointed out that the tax benefits are aimed at offsetting the effect of a policy which forced on the foundations a radical change in their statutes, a withdrawal from banking activity and the sale of controlling shareholdings in commercial companies.

(13) The tax advantages granted to foundations cannot in any way be transferred to the transferee banks or to commercial undertakings, but only have the effect of increasing the resources that the foundations can devote to pursuing their social goals. As such, these advantages do not distort competition.

(14) As for the reduced rate of corporation tax, similar tax advantages are very common in the Member States for associations and foundations.

(15) If the measures did constitute aid (an assumption that is contested), then they would be compatible under Article 87(3)(d). Information on the foundations in 1998 shows that 56 % of their activities are devoted to cultural and environmental promotion and conservation. In fact, this is one of the few areas in which foundations are allowed and indeed obliged to operate.

(16) It is also pointed out that the Commission did not contest Law No 218 of 30 July 1990, which granted similar benefits. The Commission was aware of the content of Law No 218/90, having dealt with it — albeit indirectly — in the cases of aid to Banco di Napoli, Banco di Sicilia and Sicilcassa ([3]). Should the measures in Decree No 153/99 be considered as incompatible aid, this would breach the principle of equal treatment. The Court of Justice has ruled that: 'for the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences' ([4]). This would be the case if Decree No 153/99 were to be assessed differently from Law No 218/90.

(17) Furthermore, the fact that the Commission did not find Law No 218/90 incompatible has created a legitimate expectation on the part of the recipients, which means that, even if the aid were judged to be incompatible, it could not be recovered.

([3]) Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid granted to Banco di Napoli (Case C 40/96; OJ C 328, 1.11.1996, page 23), Commission Decision 99/288/EC of 29 July 1998 (OJ L 116, 4.5.1999, p. 5) and Commission Decision 2000/600/EC (OJ L 256, 10.10.2000, p. 21).

([4]) Case 250/83 *Finsider v Commission* [1985] ECR 131, paragraph 8.

([5]) Case C-80/95 *Harnas & Helm CV v Staatssecretaris van Financiën* [1997] ECR I-745, paragraph 15.

IV. **COMMENTS FROM ITALY**

(18) In its response to the initiation of the procedure, the Italian Government replied that banking foundations cannot be considered 'undertakings' for the purposes of the competition rules. Legislative Decree No 356 of 20 November 1990 (hereinafter Decree No 356/90) introduced precise limits on the activities of foundations, which had to be in the public interest, have a social function and could operate only in certain well-identified areas. Decree No 356/90 further required foundations to treat their holdings in banks as a purely financial investment. The Court of Justice has ruled that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity ([5]).

(19) Decree No 153/99 confirms this approach. Article 1(d) identifies the sectors (relevant sectors) in which foundations can operate: scientific research, education, art, environmental and cultural promotion and conservation, health care and assistance for socially vulnerable groups. Article 6(1) stipulates that foundations can control or directly manage only undertakings active in those sectors (instrumental undertakings). Article 3(2) prohibits foundations from financing in any way, directly or indirectly, bodies operating for profit or undertakings of any kind, except for 'instrumental' undertakings. Instrumental undertakings must have a field of activity and statutory objective consistent with those of the foundation and may not pursue a purely 'commercial' policy.

(20) In fact, foundations can only donate funds or perform activities in the social interest and must devote not less than 50 % of their annual income to those activities. The Italian authorities refer to the judgment by the Court in Poucet and Pistre, which states that: 'Sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions. Accordingly, that activity is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 85 and 86 of the Treaty' ([6]). The Italian authorities believe that similar arguments should apply to foundations.

([6]) Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 18 and 19.

(21) Foundations cannot be considered undertakings on the grounds of their shareholdings in banks. Decree No 153/99 obliges foundations to withdraw from control within four years. The concept of control is wider than that laid down in the Civil Code because it also covers control exercised via agreements with other shareholders. It is also wider than the concept of control used in Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [7]. Moreover, Decree No 153/99 stipulates that managerial positions in the foundation are incompatible with managerial positions in the 'transferee' bank.

(22) As in the case of foundations, 'instrumental undertakings' cannot be considered undertakings within the meaning of Article 87(1) since they have to operate exclusively in the relevant sectors and be directly involved in pursuing the statutory object of the foundation.

(23) The measure described in recital 5(1) does not represent a derogation from the normal tax rules, but simply confirms the application to foundations of a general provision in Italian tax legislation. Presidential Decree No 601 of 29 September 1973 grants a reduction in corporation tax to all legal persons operating in the social assistance, health, education or similar sectors.

(24) The measures described in recital 5(2) do not confer an advantage on foundations, but merely prevent them from being further penalised by the forced sale of shares. Indeed, any capital gains would not arise from an ordinary transaction decided by the operator but from an event imposed by law: application of the ordinary tax rules would not be justified.

(25) The measures described in recital 5(3) and (4) concern goods and holdings in instrumental activities transferred to banks pursuant to Law No 218 of 30 July 1990. When the public banks were converted into public limited companies owned by banking foundations, operators transferred those assets to the banks rather than the foundations in order to avoid taxation on revaluation of the assets. In the case of holdings in the capital of the Banca d'Italia, the choice of placing them in the foundation was not even available. Under Law No 141 of 7 March 1938, the newly created foundations were not among the bodies eligible to be shareholders in the Banca d'Italia. Decree No 153/99 modified those rules and allowed foundations to hold shares in the Banca d'Italia.

(26) According to the Italian authorities, the measures described in recital 5(3) and (4) do not involve the use of state resources. The tax advantage is not automatic but conditional upon the carrying out of specific transactions. If those transactions had attracted tax, it is unlikely that they would have taken place.

(27) It is also argued that the measures described in recital 5(3) and (4) introduce a derogation from the normal rules only in some instances. Demergers already benefited from tax neutrality as regards all companies in all sectors, whereas certain indirect taxes were already calculated on a fixed basis in a number of instances.

(28) Furthermore, the measures do not necessarily confer an economic advantage. They provide for a tax-neutral transfer of the assets in question to the foundations, which means that any capital losses would not give rise to a tax credit. Moreover, tax neutrality is not a tax exemption: the tax burden is shifted onto the new owner of the assets who, in the cases laid down by tax law, will have to pay the tax on the total amount of capital gains.

(29) In any event, even if the measures resulted in exemption from a tax that should have otherwise been paid, the particular nature of the transactions justifies special tax treatment. These are not ordinary sales of assets but transactions that correct the effects of previous non-voluntary transfers. The assets involved should have remained in the foundations but were temporarily transferred to the 'transferee' companies, either because of a legal obligation (in the case of holdings in the Banca d'Italia) or in order to avoid tax payments (in the case of instrumental assets).

(30) The measures under Decree Law No 153/99 do not distort competition in a market where there is trade between Member States. The sale of shareholdings must take place in a non-discriminatory fashion and is subject to control by the supervisory authority, which assesses the fairness of the selling price with a view to preserving the assets of the foundation. Accordingly, the tax advantages for the foundations do not alter the conditions of competition in the market for company shareholdings.

(31) The tax advantages cannot benefit, either directly or indirectly, any body other than the foundation itself or the instrumental undertakings. The latter must pursue the same statutory objective as the foundations and do not operate according to normal market criteria. They cannot be considered 'undertakings' within the meaning of Article 87(1). In any event, their activity is local in nature: 93,8 % of the projects financed by foundations take place in the foundation's own region. Foundations respond to needs that are typically of a local nature and would not be satisfied by operators in other Member States. Moreover, in the fields of scientific research, education, art, cultural and environmental promotion and conservation, health care and assistance for socially vulnerable groups, there are few market operators.

[7] OJ L 195, 29.7.1980, p. 35. Last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

(32) If the measures did constitute State aid (an assumption that is contested), they would have to be declared compatible with Article 87(3)(c). The measures do not adversely affect trading conditions to an extent contrary to the common interest and are aimed at facilitating a process, the reduction of State involvement in the economy, which has on many occasions been supported and encouraged by the EU.

V. ASSESSMENT OF THE MEASURES

The rules on banking foundations

(33) Banking foundations are subject to supervision by a specific authority that is aimed at ensuring compliance with the law and statutes, sound and prudent management, adequate return on investments and protection of actual and potential beneficiaries. To this end, the supervisory authority can enact administrative provisions laying down in particular rules on asset management, investments, use of revenue and annual accounts. Where serious and repeated irregularities are found, the supervisory authority can dissolve the statutory bodies of a foundation and appoint a special administrator; where a foundation is no longer able to purse its objectives the authority may order it to be wound up. In special cases the supervisory authority may also prescribe the forced administrative liquidation (liquidazione coatta amministrativa) of a foundation ([8]). Lastly, the supervisory authority can exercise powers with regard to the divestment of controlling shareholdings.

(34) Banking foundations are allowed to operate only in the so-called 'admitted sectors'. The admitted sectors are listed in Article 1(1)(c-*bis*) of Legislative Decree No 153 of 17 May 1999 (Decree No 153/99), as amended by Law No 448 of 28 December 2001 (Law No 448/01) ([9]). The list is divided into four broad areas: 1. protection and development of individuals; 2. social security; 3. scientific and technological research, environmental protection; 4. art, preservation of cultural heritage and promotion of cultural activities ([10]). However, banking foundations are required to concentrate their activity in the so-called 'relevant sectors'. 'Relevant sectors' are the 'admitted sectors' in which each foundation actually chooses to operate. Foundations are required to select up to three relevant sectors every three years. Relevant sectors are the priority area of activity of banking foundations, who must devote to these sectors at least 50 % of their annual net income.

(35) 'Relevant sectors' also restrict the areas in which banking foundations are authorised to carry out business activities and hold controlling stakes in commercial companies. Article 3(1) of Decree No 153/99 states that banking foundations may run commercial undertakings only where they are directly 'instrumental' to their statutory objectives and operate exclusively in the relevant sectors. Article 3(2) stipulates that banking foundations may not finance or subsidise, directly or indirectly, bodies or undertakings of any other kind.

(36) Controlling shareholdings in other companies must be sold or divested. Article 6 of Decree No 153/99 states that control must be established in accordance with Article 2359, first and second subparagraphs, of the Civil Code. Hence, control exists when a foundation:

(a) by way of agreements of any kind with other shareholders, has the right to appoint the majority of the executives or holds the majority of the voting rights at the ordinary general meeting;

(b) by way of agreements of any kind with other shareholders, may make the appointment or dismissal of the majority of members of the executive conditional on its approval;

(c) by way of financial or organisational links, is able to exercise the rights described in (a) and (b).

In addition, Law No 448/01 stipulates that a bank is deemed to be controlled by a foundation even where control can be traced back, directly or indirectly, to more than one foundation, in whatever way this is determined.

([8]) 'Forced administrative liquidation' (liquidazione coatta amministrativa) is a special winding-up procedure that replaces application of the ordinary rules on bankruptcy.

([9]) Law No 448/01 introduced the distinction between 'admitted' and 'relevant' sectors. Originally, Decree No 153/99 covered only 'relevant sectors', more generally defined as scientific research, education, art, health, cultural and environmental promotion and conservation, and assistance for vulnerable social groups. The difference between the past and the present rules is that the new provisions tend to force banking foundations to define more accurately their scope of activity. Some new areas of activity can now be chosen as 'relevant sectors'.

([10]) Within the area of protection and development of individuals, the Law lists: family and related values, growth and development of young people, education and training, including the acquisition of publications for schools, voluntary and charity work, religion and spiritual development, assistance to the elderly and civil rights. The area of social security includes: crime prevention, public safety, food security and high-quality agriculture, local development and public housing, consumer protection, civil protection, public health, preventive and rehabilitative medicine, sport, prevention of drug addiction and rehabilitation of addicts, and psychological and mental conditions.

(37) Banking foundations are allowed to retain shareholdings in banks for a period of four years from the entry into force of Decree No 153/99. Law No 448/01 has now stipulated that banking foundations may retain controlling shareholdings in banks for a further period of three years provided that management of shareholdings in transferee banks is entrusted to an independent asset management company (società di gestione del risparmio — SGR). The asset management company would exercise in its own name all the shareholding rights, except for voting at extraordinary general meetings (i.e. meetings called to approve structural changes). The supervisory authority should adopt special provisions aimed at ensuring transparency and fairness in the choice of asset management companies and avoiding conflicts of interest.

(38) Other, non-authorised controlling shareholdings must be divested by the deadline set by the supervisory authority and, in any case, within four years from the entry into force of Decree No 153/99. If foundations do not meet these deadlines, the supervisory authority will take direct measures to ensure divestment of controlling shareholdings, possibly by appointing a special officer.

(39) Members of the internal bodies and executives of banking foundations must satisfy the requirements of professional integrity and experience. These requirements are established by the supervisory authority and are taken to mean the experience and ethical standards required to perform planning, administrative, managerial and supervisory duties in not-for-profit bodies. Banking foundations cannot distribute profits to members of internal bodies, executives or employees. Law No 448/01 provides that members of internal bodies and executives cannot perform administrative, managerial or supervisory duties in the 'transferee' bank or any other undertaking operating in the banking, financial or insurance sector. Decree No 153/99, in its original wording, simply prohibited members of the management body of a foundation from being on the board of directors of the transferee bank.

(40) The assets of banking foundations are devoted entirely to the pursuit of their statutory objectives and are managed in a manner consistent with their status as non-profit bodies operating in accordance with principles of transparency and morality. In managing their assets, foundations must observe prudential risk criteria in order to preserve their value and obtain an adequate return. In addition, they are required to diversify their investments with a view to avoiding risk arising from investment concentration and to invest their assets in a manner consistent with their institutional aims and, in particular, with the promotion of local development.

(41) Article 4(1)(c) of Decree No 153/99, as amended by Law No 448/01, states that the local authorities must appoint a majority of the members of the governing body of foundations.

Economic activity

(42) To sum up, the activity of banking foundations consists in directing the revenue they obtain from their assets to the promotion of actions in the social field. There are four main aspects to this activity: (i) the management and investment of their assets; (ii) the giving of grants to not-for-profit bodies operating in the social field; (iii) the carrying out of activities in the social field, and (iv) the control of 'instrumental undertakings'.

Management and investment of own assets

(43) As to the first activity, Decree No 153/99 specifies that the assets of the foundations are tied entirely to the pursuit of their statutory objectives. Foundations have to seek an adequate return on their investments but must also respect prudential risk criteria in order to preserve their value ([11]). They cannot use their capital to acquire control of commercial undertakings: Decree No 153/99 introduced specific safeguards in this respect (see recitals 36 and 39). Law No 448/01 has further strengthened these safeguards with regard to banks by explicitly ruling out the possibility of joint control and widening the scope of the ban on the cumulation of responsibilities. Law No 448/01 has, therefore, reinforced the separation between foundations and financial institutions. In so doing, it has helped to allay the corresponding concerns expressed in the decision to initiate the procedure.

([11]) Law No 448 of 28 December 2001 has added that the capital has to be managed in a way that is consistent with the nature of the foundations as non-profit bodies that operate according to principles of transparency and morality.

(44) The management of capital, when performed by the foundation itself ([12]), does not result in the provision of a service on the market. In the field of VAT, the Court has consistently held that a holding company whose sole purpose is to acquire holdings in other undertakings, without involving itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not perform an economic activity. This is not the case where the holding is accompanied by direct or indirect involvement in the management of the companies in which a holding has been acquired, without prejudice to the rights held by the holding company as shareholder. Involvement of that kind in the management of controlled undertakings must be regarded as an economic activity in so far as it results in the sale of goods or the provision of services ([13]). The Commission considers that these principles are relevant in assessing whether foundations exercise an economic activity and can therefore be considered as undertakings within the meaning of Article 87(1).

(45) In addition, the management of capital cannot be seen as an activity independent of, and separate from, that of using its proceeds to promote measures in the social field. The profits derived from the management of assets cannot be distributed to the foundations' members or associates and can be used only for making grants. Accordingly, the in-house management of a foundation's assets cannot be described as an 'economic activity' in itself but has to be seen in the context of its overall activity.

The making of grants to not-for-profit bodies operating in the social field

(46) The revenue that foundations derive from their assets is used to make grants to non-profit bodies operating in the fields laid down by law (see recital 34). Decree No 153/99 expressly prohibits banking activity and foundations cannot receive any form of compensation for their grants. Quoting some of the wording used by the Court of Justice in its judgment in Poucet and Pistre (see recital 19) this type of activity 'fulfils an exclusively social function', 'is based on the solidarity principle' and 'is entirely non-profit-making'. In addition, benefits granted by foundations have nothing to do with any possible return for the foundations themselves: the foundations do not operate according to normal market criteria, and a market does not exist for this particular type of activity.

(47) Accordingly, the Commission considers that the management of own assets and use of the proceeds for making grants to not-for-profit entities operating in the social field is not an economic activity and therefore does not make foundations undertakings within the meaning of Article 87(1) of the Treaty.

Activities in the social field and control of 'instrumental undertakings'

(48) Banking foundations are not authorised to have controlling stakes in undertakings or to fund commercial activities in any way, except in the circumstances stipulated by law. These are cases where foundations directly carry out an activity in the 'relevant' sectors or control bodies operating in those fields (*instrumental undertakings*). In any event, neither the foundations nor the instrumental undertakings can operate for profit.

(49) In assessing whether the activities in the fields indicated by law are to be considered 'economic', it should be reminded that, according to established case law, 'the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and that any activity consisting in offering goods and services on a given market is an economic activity' ([14]). The Court of Justice has also held, in the case of a sectoral pension fund, that the fact that it is non-profit-making, the pursuit of a social objective, manifestations of solidarity and restrictions or controls on investments do not prevent the activity engaged in by the fund from being regarded as an economic activity ([15]). Indeed, for an activity consisting in offering goods or services to be considered as not economic, it must be possible to rule out the existence of a market for comparable goods or services. In most of the fields indicated by law (education, culture,

([12]) Law No 448 of 28 December 2001 allows foundations to entrust their holdings in the 'transferee' bank to an outside company specialised in investment management (società di gestione risparmio — SGR). They can thus delay the sale of their controlling stake in the bank by three years. A foundation cannot interfere in the management of its assets and, regarding its shareholding rights, can only give indications regarding the decisions of the extraordinary general meeting where provided for under Article 2365 of the Italian Civil Code.

([13]) See Cases C-60/90 *Polysar Investments Netherlands v Inspecteur der Invoerrechten* [1991] ECR I-3111, C-333/91 Sofitam [1993] ECR I-3513 and C-142/99 Floridienne and Berginvest [2000] ECR I-9567.

([14]) Case C-35/96 *Commission of the European Communities v Italian Republic* [1998] ECR I-3851, paragraph 36.

([15]) Joined cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025, paragraphs 85 and 86.

health care, conservation, scientific research and assistance for vulnerable social groups) it is possible to find operators exercising a similar activity for profit purposes. Unlike the activity of making outright grants, for which a 'market' does not exist, the activity of providing the services of a clinic, an art gallery or a care agency involves economic transactions. In those markets the direct presence of foundations or their ability to control undertakings is liable to distort competition and their activities cannot be entirely immune to competition control.

(50) This is not to say that all the activities performed in the 'relevant sectors' are of an 'economic nature'. Similarly, some of the activities, although 'economic', might not be such as to affect trade between Member States. The exact identification of the activities for the purpose of State aid control can take place only on a case-by-case basis.

(51) The Italian authorities have stated that, for the time being, none of the foundations is taking advantage of the possibility, provided for by law, of directly carrying out an activity in the 'relevant' sectors ([16]). It would therefore appear that none of the foundations can be described as an 'undertaking' for the purposes of Article 87(1) by virtue of activities carried out directly in the 'relevant' sectors. If they did carry out such activities, Article 9(3) of Decree No 153/99 requires foundations to keep separate accounts.

(52) As to the possibility of acquiring control of instrumental undertakings, this would not make foundations undertakings in so far as it does not imply direct involvement in the activity of the controlled undertaking. Legal separation, as well as accounting separation, exists between the foundations and the 'instrumental undertakings' they are authorised to control.

(53) Accordingly, the Commission considers that banking foundations which are not directly involved in activities in the 'relevant' sectors are not undertakings for the purposes of Article 87(1). On the other hand, foundations are to be considered undertakings when directly involved in activities of an economic nature, even within the 'relevant' sectors.

(54) The information provided by the Italian authorities to the effect that foundations carry out no direct activities in the 'relevant' sectors has, therefore, led the Commission to revise its preliminary view, as expressed in its decision to initiate the procedure, regarding the nature of foundations as undertakings.

Possible presence of aid elements

(55) If foundations are directly involved in economic activities, even in the 'relevant' sectors, where there is trade between Member States, any tax advantage that may benefit these activities is likely to constitute State aid and must therefore be notified pursuant to Article 88(3).

([16]) Letter of 16 January 2001 in reply to the Commission's letter of 25 October 2000 informing the Italian Government that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

(56) Similarly, because the majority of members of the foundations' governing bodies are appointed by the local authorities (see recital 41), foundations are to be considered publicly controlled bodies. The public authorities control their resources and the way in which they are used. Accordingly, whenever banking foundations grant funds or other forms of support to undertakings, even in the 'relevant' sectors, this is likely to constitute State aid in so far as it distorts or threatens to distort competition and affects trade between Member States. Such aid must be notified pursuant to Article 88(3).

Other transferee companies established pursuant to Law No 218 of 30 July 1990

(57) Decree No 153/99 grants the tax advantages described in recital 5(2) and (3) to other transferee companies (established pursuant to Law No 218/90) to which foundations transferred their holdings in banks. Where these companies carry out banking activities, they are excluded from the scope of the present decision and are caught by the Commission Decision of 11 December 2001 in Case C 54/A/2000/EC. However, Article 16(6) of Decree No 153/99 explicitly provides for the case of transferee companies which do not carry out banking activities and are entirely owned by foundations. In so far as these companies merely administer the financial holdings of foundations, do not offer any service to third parties and are entirely owned by foundations, the tax advantages described in recital 5(2) and (3) will ultimately accrue to the foundations. As long as the foundations that own the conferee companies in question are not undertakings within the meaning of Article 87(1), the measures in recital 5(2) and (3) will not confer advantages on any undertaking.

(58) Accordingly, the Commission considers that tax advantages granted under Articles 13 and 16 of Decree No 153/99 to transferee companies which do not carry out banking activities and are entirely owned by foundations do not constitute State aid within the meaning of Article 87(1).

VI. CONCLUSIONS

(59) The Commission considers that the management of own assets and the use of the proceeds for making grants to not-for-profit bodies operating in the social field is not an economic activity and therefore does not make foundations undertakings within the meaning of Article 87(1) of the Treaty.

(60) The Italian authorities have stated that no foundation is directly engaged in activities of an economic nature in the fields where this possibility is granted by law.

(61) Accordingly, the measures intended for foundations under Article 12(2), Article 13, Article 16(4) and (5) and Article 27(2) of Decree No 153/99 do not constitute State aid since they are not intended for undertakings within the meaning of Article 87(1) of the Treaty.

(62) The measures introduced under Article 13, Article 16(6) and Article 17 of Decree No 153/99 for transferee companies that do not carry out banking activities, do not offer any service to third parties and are entirely owned by foundations, do not constitute State aid since they are not intended for undertakings within the meaning of Article 87(1).

(63) If foundations are directly involved in an economic activity, even in the 'relevant' sectors, where there is trade between Member States, any tax advantage that may benefit this activity is likely to constitute State aid and must therefore be notified pursuant to Article 88(3). Similarly, because the majority of members of foundations' governing bodies are appointed by the local authorities, the public authorities control their resources and the way in which they are used. Accordingly, whenever foundations grant funds or other forms of support to undertakings, this is likely to constitute State aid in so far as it distorts or threatens to distort competition and affects trade between Member States. Such aid has to be notified pursuant to Article 88(3). Lastly, if transferee companies offer services to third parties, any tax advantage granted to them is likely to constitute State aid and has therefore to be notified pursuant to Article 88(3),

HAS ADOPTED THIS DECISION:

Article 1

The measure which Italy has implemented under Article 12(2), Article 13, Article 16(4) and (5) and Article 27(2) of Legislative Decree No 153 of 17 May 1999 for foundations which do not directly carry out activities in the sectors listed in Article 1(1)(c-*bis*) of that Decree, as amended by Law No 448 of 28 December 2001, does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

The measure which Italy has implemented under Article 13, Article 16(6) and Article 17 of Legislative Decree No 153 of 17 May 1999 for transferee companies which do not carry out banking activities, do not offer any service to third parties and are entirely owned by the foundations referred to in Article 1 of the present decision does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 3

If foundations are directly involved in an economic activity, even in the 'relevant' sectors, where there is trade between Member States, any tax advantage that may benefit these activities is likely to constitute State aid and must therefore be notified pursuant to Article 88(3) of the EC Treaty. Where the majority of members of foundations' governing bodies are appointed by the local authorities, any funds or other forms of support granted to undertakings is likely to constitute State aid and must therefore be notified pursuant to Article 88(3) of the EC Treaty. Where transferee companies offer services to third parties, any tax advantage granted to them is likely to constitute State aid and must therefore be notified pursuant to Article 88(3) of the EC Treaty.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 22 August 2002.

For the Commission

Mario MONTI

Member of the Commission