JUDGMENT OF THE COURT OF FIRST INSTANCE
(Eighth Chamber, Extended Composition)

11 June 2009 *

In Case T-301/02,

AEM SpA, established in Milan (Italy), represented by A. Giardina, C. Croff, A. Santa Maria and G. Pizzonia, lawyers,

applicant,

supported by

ASM Brescia SpA, established in Brescia (Italy), represented by G. Caia, V. Salvadori, N. Pisani and F. Capelli, lawyers,

intervener,

* Language of the case: Italian.

Commission of the European Communities, represented by V. Di Bucci, acting as Agent,

defendant,

APPLICATION for annulment of Articles 2 and 3 of Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ 2003 L 77, p. 21),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber, Extended Composition),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 April 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, AEM SpA, is a limited company, quoted on the stock exchange, 51% owned by the municipality of Milan (Italy). It was formed in 1996 on the restructuring of the municipal undertaking bearing the same name. The applicant's chief activities are the distribution of electricity and the distribution and sale of natural gas and thermal power in the territory, in particular, of the city of Milan.

National legal context

2 Legge n. 142 ordinamento delle autonomie locali (Law No 142 on the organisation of local authorities of 8 June 1990, GURI No 135 of 12 June 1990) ('Law No 142/90') brought about a reform in Italy of the legal arrangements available to municipalities for the management of public services, in particular in the water, gas and electricity distribution sectors and in the transport sector. Under Article 22 of that law, as amended, municipalities can set up companies in a variety of legal forms to provide public services. Those include joint stock companies and limited liability companies with a majority public shareholding ('companies set up under Law No 142/90'). The applicant is such a company set up under Law No 142/90.

3 In that context, under Article 9a of legge n. 488 di conversione in legge, con modificazioni, del decreto legge 1° luglio 1986, n. 318, recante provvedimenti urgenti per la finanza locale (Law No 488 of 9 August 1986 converting and amending Decree-Law No 318 of 1 July 1986 and introducing urgent provisions for financing local authorities, GURI No 190 of 18 August 1986), loans were granted between 1994 and 1998 at a preferential rate of interest by the Cassa Depositi e Prestiti ('the CDDPP') to companies set up under Law No 142/90 providing public services ('the CDDPP loans').

4 Moreover, under Article 3(69) and (70) of legge n. 549 (su) misure di razionalizzazione della finanza pubblica (Law No 549 on measures to rationalise public finances of 28 December 1995, Ordinary Supplement to GURI No 302 of 29 December 1995) ('Law No 549/95'), in conjunction with decreto legge n. 331 (su) armonizzazione delle disposizioni in materia di imposte sugli oli minerali, sull'alcole, sulle bevande alcoliche, sui tabacchi lavorati e in materia di IVA con quelle recate da direttive CEE e modificazioni conseguenti a detta armonizzazione, nonché disposizioni concernenti la disciplina dei centri autorizzati di assistenza fiscale, le procedure dei rimborsi di imposta, l'esclusione dall'ILOR dei redditi di impresa fino all'ammontare corrispondente al contributo diretto lavorativo, l'istituzione per il 1993 di un'imposta erariale straordinaria su taluni beni ed altre disposizioni tributarie (Decree-Law No 331 harmonising tax provisions in various fields of 30 August 1993, GURI No 203 of 30 August 1993) ('Decree-Law No 331/93'), the following measures were introduced for the benefit of companies set up under Law No 142/90:

— exemption from all transfer taxes in connection with the conversion of special and municipal undertakings into companies set up under Law No 142/90 ('the transfer tax exemption');

— a three-year income tax exemption, namely in respect of the tax on the incomes of legal persons and local income tax, up to the tax year 1999 ('the three-year income tax exemption').

Administrative procedure

5 After receiving a complaint concerning those measures, the Commission asked the Italian authorities for information in that regard by letters of 12 May, 16 June and 21 November 1997.

6 By letter of 17 December 1997, the Italian authorities provided some of the information requested. A meeting was then held at the request of the Italian authorities on 19 January 1998.

7 By letter of 17 May 1999, the Commission informed the Italian authorities that it had decided to initiate the procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 1999 C 220, p. 14).

8 After receiving comments from interested parties and the Italian authorities, the Commission asked the latter for additional information on a number of occasions. Meetings were also held between the Commission and, respectively, the Italian authorities and the interested parties involved.

9 Certain companies set up under Law No 142/90, including the applicant and ACEA SpA and Azienda Mediterranea Gas e Acqua SpA (AMGA), which also instigated proceedings for the annulment of the decision at issue in this case (Cases T-297/02 and T-300/02 respectively), argued in particular that the three types of measure in question did not constitute State aid.

10 The Italian authorities and the Confederazione Nazionale dei Servizi (Confservizi), a confederation of, inter alia, companies set up under Law No 142/90 and special municipal undertakings in Italy, essentially supported that position.

11 On the other hand, the Bundesverband der deutschen Industrie eV (BDI), a German association for industry and suppliers of related services, was of the view that the measures in question could bring about distortions of competition not only in Italy but also in Germany.

12 Similarly, Gas-it, an Italian association of private operators in the gas distribution sector, stated that the measures in question, in particular the three-year income tax exemption, constituted State aid.

13 On 5 June 2002, the Commission adopted Decision 2003/193/EC on State aid granted by Italy in the form of tax exemptions and subsidised loans to companies set up under Law No 142/90 (OJ 2003 L 77, p. 21) ('the contested decision').

The contested decision

14 The Commission points out, first of all, that its analysis concerns only the aid schemes of general application introduced by the contested measures and not individual grants of aid to particular undertakings. It states that the Italian Republic 'did not grant the tax advantages on an individual basis or notify any individual cases to [it], together with all the information necessary for the Commission to assess it'. The Commission states that it therefore considered itself bound to carry out a general and abstract examination of the schemes in question in order to determine both whether they constituted State aid and whether such aid was compatible with the common market (recitals 42 to 45 in the preamble to the contested decision).

15 According to the Commission, the CDDPP loans and the three-year income tax exemption (together, 'the contested measures') are State aid. The effect of such advantages being conferred through State resources on companies set up under Law No 142/90 is to strengthen their competitive position by comparison with that of all other undertakings wishing to supply the same services (recitals 48 to 75 in the preamble to the contested decision). The contested measures are incompatible with the common market because they meet the requirements of neither Article 87(2) and (3) EC nor Article 86(2) EC and, furthermore, infringe Article 43 EC (recitals 94 to 122 in the preamble to the contested decision).

16 On the other hand, according to the Commission, the transfer tax exemption does not constitute State aid within the meaning of Article 87(1) EC, since such taxes are payable on the creation of a new economic entity or the transfer of assets between different economic entities. Municipal undertakings and the companies set up under Law No 142/90 are, substantially, the same economic entities. Exemption from those taxes for such companies is therefore justified by the nature or general scheme of the system (recitals 76 to 81 in the preamble to the contested decision).

17 The enacting terms of the contested decision are worded as follows:

'*Article 1*

The exemption from transfer tax … does not constitute aid within the meaning of Article 87(1) [EC].

Article 2

The three-year exemption from income tax … and the advantages resulting from [CDDPP] loans constitute State aid within the meaning of Article 87(1) [EC].

Such aid is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the [contested] 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.

…'

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 30 September 2002, the applicant brought the present action.

19 By document lodged at the Registry of the Court of First Instance on 2 January 2003, ASM Brescia SpA applied for leave to intervene in the proceedings in support of the form of order sought by the applicant. By order of 12 May 2003, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance (former composition) granted that application. The intervener submitted its statements in intervention and the other parties their observations thereon within the prescribed time-limits.

20 By separate document lodged at the Registry of the Court of First Instance on 6 January 2003, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

21 On 27 February 2003, the applicant submitted its observations on the plea of inadmissibility.

22 On 8 August 2002, the Italian Republic also brought an action for annulment of the contested decision before the Court of Justice, which was registered as Case C-290/02. The Court of Justice considered that that action and those in Cases T-292/02, T-297/02,

T-300/02, T-301/02 and T-309/02 concerned the same subject-matter, namely the annulment of the contested decision, and were connected, since the pleas put forward in each of the cases overlapped to a very large extent. By order of 10 June 2003, the Court of Justice stayed the proceedings in Case C-290/02, in accordance with the third paragraph of Article 54 of its Statute, pending the final decision of the Court of First Instance in Cases T-292/02, T-297/02, T-300/02, T-301/02 and T-309/02.

23 By order of 8 June 2004, the Court of Justice decided to refer Case C-290/02 to the Court of First Instance, upon which jurisdiction has been conferred to adjudicate on actions brought by Member States against the Commission, in accordance with Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5). That case was registered at the Registry of the Court of First Instance under reference T-222/04.

24 By order of 5 August 2004, the Court of First Instance decided to reserve its decision on the plea of admissibility raised by the Commission until the judgment in the main proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the parties, to which they replied within the prescribed period.

26 By order of the President of the Eighth Chamber, Extended Composition, of the Court of First Instance of 13 March 2008, Cases T-292/02, T-297/02, T-300/02, T-301/02, T-309/02, T-189/03 and T-222/04 were joined for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

27 The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 16 April 2008.

28 The applicant, supported by the intervener, claims that the Court should:

— declare the action admissible;

— annul Article 2 of the contested decision whereby the Commission declared the three-year income tax exemption incompatible with the common market;

— annul Article 3 of the contested decision in so far as it requires the Italian Republic to recover the aid granted under the three-year income tax exemption;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— dismiss the action as unfounded;

— order the applicant and the intervener to pay the costs.

Admissibility

Arguments of the parties

30 The Commission denies that the applicant has *locus standi*. It considers that the contested decision is not of individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC.

31 The Commission submits, in essence, that the contested decision is to be regarded as a measure of general application since it concerns an aid scheme and, therefore, an indeterminate and indeterminable number of undertakings defined by reference to a general criterion, such as the fact that they belong to a particular category of undertakings. In its view, the general applicability, and thus the legislative nature, of a measure are not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, so long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose.

32 According to the Commission, in order for a person to be individually affected by a measure of general application, that measure must adversely affect that person's specific rights or the institution which adopted the measure must be under an obligation to take account of the effects of the measure on that person's situation. However, the Commission is of the view that that is not the case here. The contested decision has had an impact on the situation of all the undertakings which benefited from the contested measures. Consequently, the decision has not infringed rights which are specific to certain undertakings that can be distinguished from any other undertaking which benefited from the contested measures. Moreover, in adopting the contested decision, the Commission neither should nor could have taken account of the

effects of its decision on the situation of a particular undertaking. Neither the declaration of incompatibility nor the order for recovery in the contested decision referred to the situation of individual beneficiaries.

33 According to the Commission, its analysis is confirmed by the existing case-law on State aid, which establishes that the fact that an undertaking has received State aid that has been declared incompatible with the common market is not sufficient to demonstrate that the undertaking is individually concerned for the purpose of the fourth paragraph of Article 230 EC.

34 A number of more recent cases do not call into question the established case-law. According to the Commission, the approach adopted in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855 ('the judgment in *Sardegna Lines*') cannot be applied to all actions brought by recipients of an aid scheme that has been declared unlawful and incompatible and in respect of which an order for recovery has been made. That is the inevitable conclusion in particular where, as in the present case, the aid scheme in question has been analysed in an abstract manner. Furthermore, in the case which gave rise to the judgment in *Sardegna Lines*, the applicant was an actual beneficiary of individual aid since an advantage was conferred on it by virtue of a measure adopted on the basis of a regional law which allowed for a wide margin of discretion. Moreover, that situation was closely scrutinised in the course of the formal investigation procedure.

35 The facts of the case also differ from those which gave rise to the judgment in Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087 ('the judgment in *Alzetta*') in so far as, in the present case, the Commission was unaware of either the exact number or the identity of the beneficiaries of the aid in question, did not have available to it all the relevant information and was unaware of the amount of aid granted in each case. Moreover, in the present case, the three-year income tax exemption applied automatically, whereas the aid in question in the case which gave rise to the judgment in *Alzetta* was granted under a later measure.

36 Contrary to the applicant's submissions, what matters for the purpose of examining admissibility is not knowledge of the identity of an undertaking but the fact that the Commission's attention has been drawn to specific features of the case which justify individual scrutiny. The Commission stated in the contested decision that it had not been provided with any information to demonstrate that, as regards the applicant, the measure at issue did not constitute aid or constituted existing aid or aid compatible with the common market.

37 In any event, neither the fact that it participated in the formal investigation procedure laid down in Article 88(2) EC nor the order for recovery in the contested decision is sufficient, in the Commission's view, to distinguish the applicant individually. Given that actions brought by potential beneficiaries of a notified aid scheme are inadmissible for the purpose of Article 230 EC, the same should apply to actions brought by beneficiaries of an unnotified aid scheme.

38 Lastly, the Commission maintains that if the action brought by the applicant in the present case were to be declared inadmissible, that would not infringe the principle of effective judicial protection, since the remedies provided for in Articles 241 EC and 234 EC would be sufficient (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677).

39 The applicant claims to be individually concerned by that part of the contested decision relating to the three-year income tax exemption. It is a company set up under Law No 142/90, therefore an undertaking covered by the aid scheme at issue, and it benefited from the three-year income tax exemption recovery of which has been ordered.

40 The intervener in essence concurs with the position and most of the arguments of the applicant.

Findings of the Court

41 According to the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him.

42 According to established case-law, natural or legal persons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 7 and 28).

43 The Court of Justice has held that an undertaking cannot, as a general rule, bring an action for the annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of the fact that it belongs to the sector in question and is a potential beneficiary of the scheme. Such a decision is, vis-à-vis the applicant undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15, and the judgment in *Alzetta*, paragraph 35 above, paragraph 37 and the case-law cited).

44 However, the Court of Justice also held, at paragraphs 34 and 35 of the judgment in *Sardegna Lines*, paragraph 34 above, that, since the undertaking Sardegna Lines was concerned by the decision at issue in that case not only as an undertaking in the shipping sector in Sardinia and a potential beneficiary of the aid scheme for Sardinian shipowners but also as an actual recipient of individual aid granted under that scheme, recovery of which had been ordered by the Commission, it was individually concerned

by the decision and the action which it brought against it was admissible (see also, to that effect, the judgment in *Alzetta*, paragraph 35 above, paragraph 39).

45 Accordingly, it is appropriate to determine whether the applicant is an actual recipient of individual aid granted under a sectoral aid scheme, recovery of which has been ordered by the Commission (see, to that effect, Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 70).

46 It should be pointed out, first, that it is apparent from the applicant's answer to the written questions put by the Court on this subject that it is an actual recipient of individual aid granted under the aid scheme in question. In fact, the applicant confirms that it enjoyed the three-year income tax exemption from 1996 to 1999. The Italian Republic has not contradicted that statement.

47 Secondly, it is apparent from Article 3 of the contested decision that the Commission ordered the recovery of the aid in question.

48 It follows that the applicant is individually concerned by the contested decision.

49 As to whether the applicant is directly affected, since Article 3 of the contested decision requires the Italian Republic to take all necessary measures to recover from the beneficiaries the aid referred to in Article 2 of the decision and unlawfully made available to them and the applicant received aid and is obliged to reimburse it, it must be regarded as being directly concerned by the decision (see, to that effect, *Salvat père & fils and Others* v *Commission*, paragraph 45 above, paragraph 75).

50 It follows from all the foregoing considerations that the present action is admissible in so far as concerns the part of the contested decision which has regard to the three-year income tax exemption.

Substance

51 In support of its action, the applicant puts forward five pleas in law, alleging, respectively:

— infringement of Article 87(1) EC and Article 253 EC as regards the classification of the three-year income tax exemption as State aid;

— infringement of Article 88(1) EC and Article 253 EC on the basis that the three-year income tax exemption was classified as new aid;

— infringement of Article 87(3)(c) EC and Article 253 EC;

— breach of the principles of non-discrimination and freedom of establishment and failure to state reasons;

— the unlawfulness of the recovery order.

The first plea, alleging infringement of Article 87(1) EC and Article 253 EC as regards the classification of the three-year income tax exemption as State aid

Arguments of the parties

52 In this plea, the applicant maintains that the three-year income tax exemption does not constitute State aid within the meaning of Article 87(1) EC. The plea falls into three parts, alleging that no adequate investigation was made, that there was no distortion of competition and that there was no effect on intra-Community trade, respectively.

— The first part of the plea, alleging that no adequate investigation was made

53 First of all, the applicant argues that the contested decision is vitiated by a general lack of investigation with regard to the risks to competition caused by the existence of the three-year income tax exemption on the various local public services markets. Unlike the Commission, it takes the view that there is no 'global local public services market' and that the Commission ought to have carried out an analysis of the market by product and/or by geographical area, which would then have enabled it to evaluate the effects of the three-year income tax exemption on every market taken separately. The market for concessions for local public utilities, mentioned at recital 68 in the preamble to the contested decision, differs from the market for public services. The applicant also claims a failure to state reasons for the Commission's decision to undertake a general and abstract examination.

54 The applicant also refers to Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region (OJ 1998 L 66, p. 18). In that decision, the system created by

domestic legislation was classified as State aid only in respect of certain sectors. In addition, some of the aid was, depending on the activity of the recipient undertakings, considered compatible with the common market. That decision shows, in the applicant's opinion, that it is possible to make a more thorough analysis of the various sectors of a whole system of aid.

55 The Commission remarks that, because the issue in this case is an aid scheme, it had necessarily to undertake a general and abstract evaluation. Moreover, the Italian authorities did not make it clear to the Commission which services, of those in question, were closed to Community competition.

— The second part of the plea, alleging that there was no distortion of competition

56 The applicant's line of reasoning turns on three main arguments.

57 First, the applicant maintains that companies set up under Law No 142/90 did not operate on competitive markets and that the three-year income tax exemption which they enjoyed was not, therefore, capable of distorting competition on local public services markets.

58 The electrical power production sector was liberalised only in 1999 as a result of the transposition of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). Moreover, before 31 December 1999 the applicant carried on no activity on the market of final customers free to choose their own power supplier. The distribution of electrical power fell, therefore, outside the field of competition, in so far as the legislative provisions organising the supply of those services led to a situation of a monopoly for every territorial area.

59 Distribution of gas was not liberalised until 2000 by the transposition in Italy of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p 1).

60 In the applicant's view, the Commission ought in the circumstances of this case to have followed the approach adopted in its Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994-December 1996) (OJ 1998 L 329, p. 23), in which it declared that measures did not constitute State aid because there was no competition.

61 Secondly, the applicant asserts that the contested decision is based on a misappraisal of the facts with regard to the opportunity for companies set up under Law No 142/90 to operate on markets beyond the territory in which their controlling municipality is competent.

62 Companies set up under Law No 142/90 did not enjoy free access to the local public services of other municipalities. The direct concession path was made subject to agreement between those municipalities and that controlling the company set up under Law No 142/90 in question and to the general condition that the requirements of the local authority of origin should be satisfied.

63 In any event, the applicant states that it took part in no call for tenders for the award of local public services during the period for which the three-year income tax exemption applied. It did not, therefore, receive any advantage over undertakings not enjoying that exemption. What is more, all undertakings operating in those sectors held exclusive long-term concessions.

64 Thirdly, the applicant maintains that, although the companies set up under Law No 142/90 took the form of joint stock companies most of whose capital was publicly owned, guided in this manner by the criteria adopted in respect of private undertakings, they were set up for the sole purpose of ensuring the provision of local public services. Their sphere of activity was therefore restricted to local public services. Consequently, there was no justification for claiming, as the Commission did, that while the municipalities' special undertakings were bound to operate solely on local public services markets, the companies set up under Law No 142/90 were free to operate on other markets. The content and object of the activities of companies set up under Law No 142/90 remained broadly the same as those of the special municipal undertakings. The applicant states that until 1999 it carried on activity only in the reserved gas and electricity sectors and that it was only after 1999 that it was active in the telecommunications sector.

65 According to the applicant, because the companies set up under Law No 142/90 were formed for the purpose of running public services, they did not take part in tender procedures for the award of those services. It follows, in the applicant's submission, that the Commission's argument that there was competition for the award of the contracts is not convincing, for there was no market open to competition in the public services sector.

66 Judgment No 4989 of 6 May 1995 of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), sitting in full court, cited by the Commission at footnote 61 (recital 92) to the contested decision does no more, according to the applicant, than recognise the private law nature of companies set up under Law No 142/90, but does not rule on the question whether they may operate freely on different markets. That judgment also confirms that the effect of a decision to set up a company under Law No 142/90 was automatically to entrust local public services exclusively to that company.

67 In any event, the use by an undertaking of the profits from the exclusive supply of a service of public economic interest in order to extend its activity to a neighbouring market open to competition does not, in itself, amount to infringement of the competition rules. In consequence, the opportunity for companies set up under Law No 142/90 of operating on other markets cannot constitute an argument for classifying the three-year income tax exemption as State aid.

68 With regard to Article 253 EC, the applicant emphasises that the obligation to state reasons is especially important in the general framework of State aid and becomes essential when, as in the instant case, State measures conferring a tax advantage concern a large number of private persons. The requirement of adequate reasons is all the more imperative because in issue in this case are particular markets, such as those of local public services, which sometimes involve a monopoly situation.

69 The applicant maintains that, while analysis of the actual competition conditions may be unnecessary so far as normal commercial and industrial sectors are concerned, that cannot be the case in respect of sectors regulated to a considerable extent and reserved to particular undertakings, as were local public services in Italy during the 1990s.

70 With regard to the three-year income tax exemption's anti-competitive effect on other markets, the Commission has not, in the applicant's opinion, shown that competition was *in posse* or *in esse* distorted, has not identified the markets concerned and has not demonstrated either that the alleged distortion is ascribable to the three-year income tax exemption. The Commission contented itself with a general reference to 'markets for other products traded between Member States' and to 'sectors other than utilities' (recital 74 in the preamble to the contested decision). The Commission ought to have carried out an analysis, broader and more exhaustive, of the impact of the three-year income tax exemption on competition in other sectors.

71 The contested decision is also marred by want of reasoning in that it distinguishes companies set up under Law No 142/90 from municipal undertakings possessing legal personality, belonging to those same local authorities and enjoying the benefit of the three-year income tax exemption, without explaining why.

72 The intervener in substance endorses the applicant's standpoint and arguments with regard to infringement of Article 87 EC.

73 The Commission contests all the arguments pleaded.

— The third part of the plea, alleging that there was no effect on intra-Community trade

74 The applicant argues, essentially, that there was in the instant case no effect on intra-Community trade. On this point, it puts forward the fact that local public services are directly entrusted to companies set up under Law No 142/90. Selection procedures were not organised save in territories where no municipal undertaking or company set up under Law No 142/90 operated. The applicant dismisses the Commission's view that the very existence of the three-year income tax exemption gave municipalities an incentive to entrust local public services directly to companies set up under Law No 142/90, instead of organising calls for tenders. It maintains, to the contrary, that no municipality, being unable to award public services contracts by way of direct concession, would have agreed to set up companies under Law No 142/90. Were it not so, municipalities would be exposed to the danger that 'their' companies set up under Law No 142/90 would find themselves competing against other operators in the tendering procedures.

75 What is more, the applicant refers to the Commission's communication of 20 September 2000 on services of general interest in Europe (OJ 2001 C 17, p. 4), in which that institution stated that the rules on competition were applicable only if the activities in question could affect trade between Member States. For example, according to a general rule set out at paragraph 32 of the communication, activity affecting the market only insignificantly, as is the case for numerous public interest services of local character, will not normally affect trade between Member States. The Commission has not supplied the reasons why the instant case should depart from the general rule.

76 The applicant considers that the Commission has not given sufficient reasons, in the contested decision, for its evaluation of the effect of the three-year income tax exemption on intra-Community trade. The Commission made no reference to the conditions intrinsic in each of the local public services markets, merely asserting that 'it cannot be ruled out that the very existence of the aid for the joint stock companies encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure'.

77 The intervener in substance concurs with the applicant's views on the infringement of Article 87 EC.

78 The Commission considers that intra-Community trade is, in the circumstances, affected, and that in that respect sufficient reasons have been supplied for the contested decision.

Findings of the Court

79 As a preliminary point, it should be noted that classification as aid within the meaning of Article 87(1) EC requires all the conditions set out in that provision to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('the judgment in *Altmark*'), paragraphs 74 and 75, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27).

80 In this case, the applicant in substance challenges the classifying of the three-year income tax exemption as State aid. It argues, first, that the Commission ought to have

conducted an analysis by market and, secondly, that two of the four conditions laid down in Article 87(1) EC, relating to the effect on intra-Community trade and the effect on competition, have not in the present case been satisfied. Moreover, the contested decision is marred for want of any, or any sufficient, reasoning regarding the examination of those conditions.

— The first part of the first plea, alleging that no adequate investigation was made

81 As regards an analysis by market, it must be stated that the measure at issue is directed at a particular class of undertakings, namely companies set up under Law No 142/90. Just being such a company is the only condition necessary in order to be eligible for the scheme.

82 It is also to be noted that application of the three-year income tax exemption scheme is not restricted to particular services and that the activities of the companies covered by the scheme are not confined to the public services sector. What is at issue is a single aid scheme and not various aid schemes classified according to the activity or market concerned.

83 It follows that, in the circumstances of this case, the Commission was not bound to conduct an examination by sector in order to evaluate the effects of the three-year income tax exemption.

84 As regards the reference to Decision 98/182, it must be held that in the instant case, unlike the case giving rise to that decision, which concerned one sector only, a great variety of sectors are in question.

85 With regard to the finding that the concessions market differed from the public services market, it is to be observed that, in order to ensure the provision of public services, local authorities may use the legal form of concessions and that the concessions market in that sector is open to Community competition and subject to the rules of the EC Treaty.

86 Lastly, with regard to the alleged failure to state reasons, at recitals 42 to 45 in the preamble to the contested decision, the Commission set out its reason for conducting a general and abstract examination of the scheme at issue.

87 In view of the foregoing, the first part of this plea in law must be rejected.

— The second and third parts of the first plea, alleging that there was no distortion of competition or effect on intra-Community trade

88 It is to be borne in mind that, in its assessment of the second and fourth conditions mentioned at paragraph 79 above, the Commission is required not to establish that the 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 (see Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54 and the case-law cited).

89 It is also to be recalled that, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the grounds of its decision, whether, by reason of the terms of that scheme, it is likely to benefit in particular undertakings engaged in trade between Member States (Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289).

90 A further point to be made is that any grant of aid to an undertaking pursuing its activities in the Community market is liable to cause distortion of competition and affect trade between Member States (see Joined Cases T-92/00 and T-103/92 *Diputación Foral de Álava* v *Commission* [2002] ECR II-1385, paragraph 72 and the case-law cited).

91 Moreover, there is no threshold or percentage below which trade between Member States can be said not to be affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42; and the judgment in *Altmark*, paragraph 79 above, paragraph 81).

92 Furthermore, the Court of Justice stated that it was not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States within the meaning of Article 87(1) EC. Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (the judgment in *Altmark*, paragraph 79 above, paragraphs 77 and 78).

93 With regard in the instant case to the condition relating to effects on competition, while it is true that the applicant maintains that the companies set up under Law No 142/90 did not operate in competitive markets, with reference in particular to the sectors in which it itself operated, it has failed to adduce any valid evidence to support its claim that the economic sectors of the public services concerned were not open to competition during the period in question. It must be borne in mind that what is at issue in the present case is an aid scheme encompassing a whole range of sectors and not a number of aid schemes each of which relates to a specific sector.

94 The fact that the aid scheme at issue applies only to companies set up under Law No 142/90, whatever their activity, and the fact that those undertakings in fact operate in different sectors of the economy, as noted earlier at paragraphs 81 to 83 above, are sufficient for it to be concluded that the measure at issue is capable of influencing competition and trade between Member States.

95 As the Commission stated at recitals 73 and 84 in the preamble to the contested decision, there was a certain amount of competition in some of the sectors concerned, such as the pharmaceutical products, waste, gas, electricity and water sectors, when the measure at issue was put into effect.

96 Moreover, the activities of companies set up under Law No 142/90 are not confined to the local public services sector. The measure in question can therefore facilitate the expansion of those companies in other markets which are open to competition and thus distort competition even in sectors other than local public services sectors. It is apparent from Law No 142/90, as interpreted by the Corte suprema di cassazione in Judgment No 4989 of 6 May 1995 and by the Consiglio di Stato (Council of State, Italy) in Judgment No 4586 of 3 September 2001, that it is permissible for companies set up under Law No 142/90 to operate in other geographical areas both within Italy and abroad and in fields other than that of public utilities stipulated in their articles of association, unless that deprives them to a significant extent of resources and means and is liable adversely to affect the controlling local authorities.

97 In this regard, the applicant's articles of association take the same direction. They show that the applicant may set up principal offices, representations, subsidiaries and branches in Italy and abroad. It is apparent from the articles of association also that the objects of the company's activities span a broad range. It is moreover provided that the applicant may acquire holdings and interests in other companies or undertakings, both Italian and foreign, with similar, related or complementary company objects.

98 So far as concerns the applicant's argument that the rules of competition do not of themselves prevent profits made from the supplying of a public service from being used to extend activity on another market, it is to be pointed out that if a company which has received State aid and thereby has increased its profits extends its activity onto another market open to competition, an unquestionable effect on competition cannot possibly be ruled out.

99 Lastly, it must be found, as the Commission has done, that in the sectors in which the companies set up under Law No 142/90 operate, undertakings compete for the award of concessions to provide local public services in the various municipalities and the market for those concessions is open to competition (recitals 67 and 68 in the preamble to the contested decision). It is of no consequence that the applicant played no part in any tendering procedure for the award of local public services contracts in other geographical areas during the period in which the three-year income tax exemption applied.

100 The argument based on the claim that there is no competition and therefore no effect on inter-State trade because contracts for the services in question are in fact directly awarded to the companies set up under Law No 142/90 must be rejected. First, the fact that contracts are awarded directly does not affect the finding made in the preceding paragraphs that there was, at the very least, a certain amount of competition on the market in question. Secondly, that argument serves, rather, to demonstrate the restrictive effects of the measure in question on competition and not the absence of competition on that market. As the Commission stated at recital 71 in the preamble to the contested decision, it cannot be ruled out that the very existence of the aid for companies set up under Law No 142/90 encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure.

101 With regard, specifically, to whether the measure in question distorted or threatened to distort the level of competition on the market, it must be noted that that measure strengthened the competitive position of the companies set up under Law No 142/90 by comparison with that of any other Italian or foreign undertaking operating on that market. As the Commission correctly pointed out at recital 62 in the preamble to the contested decision, undertakings that are not joint stock companies and a majority of

whose shares are not held by local authorities find themselves in a disadvantaged position if they intend to compete for the granting of a licence to provide a particular service in a given territory.

102 It follows from the foregoing that the measure concerned distorts or threatens to distort competition within the meaning of Article 87(1) EC.

103 As regards, secondly, the condition relating to the effect on inter-State trade, it should be pointed out, first of all, that the fact that companies set up under Law No 142/90 operate only on their national market or in their territory of origin is not decisive. Inter-State trade is affected by the measure in question when undertakings established in other Member States have less chance of providing their services in the Italian market (see paragraph 92 above).

104 Accordingly, the Commission was correct in stating at recital 70 in the preamble to the contested decision that the measure concerned could create an obstacle for foreign firms wishing to establish themselves or sell their services in Italy and therefore affect trade between Member States within the meaning of Article 87(1) EC.

105 First, the contested measure adversely affects foreign companies bidding for local public services concessions in Italy, since the public undertakings benefiting from the scheme in question can bid at more competitive prices than national or Community competitors not benefiting from it. Secondly, the measure in question makes it less attractive for companies from other Member States to invest in the utilities sector in Italy (for example, by acquiring majority holdings), since any companies acquired would not be entitled to (or may lose) the benefit of the measure because of the nature of their new shareholders (see recital 69 in the preamble to the contested decision).

106 As regards the allegation that sufficient reasons are not given in the contested decision regarding those two conditions, the Commission adequately explained, at recitals 62 to 64, 69, 73 and 74 respectively in the preamble, the reasons for which it considered that the aid at issue was likely to distort competition and affect trade between Member States. Moreover, as has already been stated, the Commission is not required to demonstrate the real effect of aid which has already been granted (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

107 It follows from the foregoing that the classification in the contested decision of the three-year income tax exemption as State aid is not vitiated by error and that the second and third parts of this plea must, consequently, be rejected.

108 That plea in law must, therefore, be rejected in its entirety.

The second plea, alleging infringement of Article 88(1) EC and Article 253 EC on the basis that the three-year income tax exemption was classified as new aid

Arguments of the parties

109 The applicant's subsidiary plea is that the three-year income tax exemption is pre-existing aid and that in consequence the Commission has, by its contested decision, infringed Article 88(1) and (2) EC.

110 It maintains that the income tax exemption pre-dates the entry into force of the EC Treaty. The exemption had in fact already been provided for municipal and special undertakings since the beginning of the last century and had been extended in favour of companies set up under Law No 142/90 in the form of the three-year income tax exemption.

111 In further support of its line of argument, the applicant makes reference to Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 33, and to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, from which it is clear that, in the applicant's opinion, the Commission is bound to examine the new features of an altered aid scheme. In the present case, however, the sphere of activity of the undertakings responsible for public services has not changed. In fact, the applicant states that Law No 142/90 was intended to enable local bodies to organise their own local services in a legal form other than that of the municipal undertakings.

112 According to the applicant, the reasoning contained in the contested decision is illogical and inconsistent. On the one hand, the Commission, in examining the transfer tax exemption, acknowledged that municipal undertakings and companies set up under Law No 142/90 are, in essence, embodiments of the same economic entity. On the other hand, for the purpose of evaluating the three-year income tax exemption, the Commission took the view that companies set up under Law No 142/90 constitute entities economically and substantially distinct from municipal authorities. In its contested decision, it concluded that the transfer tax exemption did not amount to State aid. Given that the conditions for eligibility for that exemption and those for eligibility for the three-year income tax exemption were the same, the Commission ought to have considered that the latter did not constitute State aid either.

113 In addition, the applicant argues that Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides that when 'certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'. That means that, for the

period until liberalisation of the sectors under consideration, the three-year income tax exemption cannot be regarded as new aid, for it operates in sectors not open to competition.

114 For those reasons, the applicant also alleges a failure to state grounds.

115 The intervener in essence endorses the applicant's view and line of argument.

116 The Commission challenges that line of argument, referring to recitals 86 to 91 in the preamble to the contested decision. It adds that the conclusion in the contested decision is now borne out by Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1).

Findings of the Court

117 In *Namur-Les assurances du crédit*, paragraph 111 above (paragraph 13), the Court of Justice held that it is clear from both the terms and purposes of Article 88 EC that aid which existed before the entry into force of the EC Treaty and aid which could be properly put into effect in accordance with the conditions laid down in Article 88(3) EC, including those arising from the interpretation of that article given by the Court in its judgment in Case 120/73 *Lorenz* [1973] ECR 1471, paragraphs 4 to 6, is to be regarded as existing aid within the meaning of Article 88(1) EC while, on the other hand, measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 88(3) EC.

118 As regards existing aid, Article 1(b) of Regulation No 659/1999 reproduced and affirmed the rules established in the case-law.

119 According to that provision, existing aid means:

(i) all aid which existed prior to the entry into force of the EC Treaty in the respective Member States;

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

(iii) all aid deemed to have been authorised without the Commission adopting a decision within a period of two months, in principle beginning on the day following the receipt of a complete notification of that aid, being the time available to the Commission for the purposes of carrying out a preliminary examination;

(iv) all aid in respect of which the 10-year limitation period for recovery has expired;

(v) all aid deemed to be existing aid because it can be established that, although it did not constitute aid at the time it was put into effect, it subsequently — without being altered by the Member State — became aid owing to the evolution of the common market. Where certain measures become aid following the liberalisation of an activity by Community law, such measures are not to be considered as existing aid after the date fixed for liberalisation.

120 Next, under Article 1(c) of that regulation, any existing aid that is altered is to be regarded as new aid.

121 Essentially, measures intended to grant aid or alter existing aid constitute new aid. In particular, where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme. However, there can be no question of such a substantive alteration where the new element is clearly severable from the original scheme (*Government of Gibraltar* v *Commission*, paragraph 111 above, paragraphs 109 to 111).

122 In the present case, it is accepted that the exemption does not fall within the second, third or fourth situations set out in Article 1(b) of Regulation No 659/1999, under which an aid measure may be regarded as existing aid. Furthermore, the applicant has not claimed that those situations are applicable.

123 As regards the first of the situations referred to in Article 1(b) of Regulation No 659/1999, it should be noted, first of all, that the three-year income tax exemption was introduced by Decree-Law No 331/93 and Law No 549/95. In 1990, when Law No 142/90 reformed the legal arrangements available to municipalities for the purpose of managing local public utilities, which included the possibility of setting up limited liability companies with a majority public shareholding, no exemption from income tax was envisaged for such companies.

124 In fact, all companies set up under Law No 142/90 which were created between 1990 and the entry into force on 30 August 1993 of Article 66 of Decree-Law No 331/93 were liable to income tax.

125 Therefore, as the Commission correctly stated at recital 91 in the preamble to the contested decision, in order to extend to companies set up under Law No 142/90 the

same tax treatment as that for local authorities, the Italian legislature had to enact new legislation several decades after the entry into force of the EC Treaty.

126 Moreover, even if it is accepted that the income tax exemption for municipal undertakings was introduced before the entry into force of the EC Treaty and remained in force until 1995, the fact remains that the companies set up under Law No 142/90 are substantially different from municipal undertakings. The extension of existing tax advantages enjoyed by municipal and special undertakings to a new class of beneficiaries, such as companies set up under Law No 142/90, constitutes an alteration that is severable from the initial scheme. As stated in Judgment No 4586 of the Consiglio di Stato of 3 September 2001, there are statutory differences between companies set up under Law No 142/90 and municipal undertakings on account of the fact, in particular, that the former are not subject to the strict limitations as to geographical area imposed on the latter and the former's sphere of activity is much wider. Accordingly, as already stated at paragraph 96 above, companies set up under Law No 142/90 can operate outside their reference territory, both in Italy and abroad, and in fields other than that of public services stipulated in their articles of association, unless that deprives them to a significant extent of resources and means and is liable adversely to affect the controlling local authorities.

127 Consequently, even though companies set up under Law No 142/90 assumed the rights and obligations of municipal undertakings, the legislation which defined their substantive sphere of activity and the geographical area in which they could operate changed substantially.

128 It must therefore be concluded that the three-year income tax exemption introduced by Article 3(70) of Law No 549/95 in conjunction with Article 66(14) of Decree-Law No 331/93 does not fall within Article 1(b)(i) of Regulation No 659/1999.

129 As regards the applicant's second argument, based on Article 1(b)(v) of Regulation No 659/1999, it is to be noted that that provision can apply only to measures that did not constitute aid when they were put into effect. It is sufficient to state that the measure in

question was introduced at a time when the markets were in any event, albeit almost certainly to differing degrees, open to competition. The three-year income tax exemption cannot therefore be regarded as falling within Article 1(b)(v) of Regulation No 659/1999.

130 Accordingly, it is not possible to conclude that there is a failure to state reasons. The Commission rejected the argument that the measure in question was to be regarded as existing aid because there was a degree of competition in the sectors in which the companies set up under Law No 142/90 operate (recitals 82 to 85 in the preamble to the contested decision).

131 Lastly, with regard to the alleged contradiction between, on the one hand, the examination of the transfer tax exemption on account of the fact that, in essence, municipal undertakings and companies set up under Law No 142/90 embody the same legal entity and, on the other, the examination of the three-year income tax exemption on account of the fact that the two kinds of undertaking constitute economically and substantially distinct entities, it is to be noted that the Commission, in the contested decision, on the basis of information supplied by the Italian Government, considered that the first exemption was warranted by the nature and general scheme of the system in question. It being unnecessary to rule on the merits of that assessment, it is to be stated that the fact that the Commission may possibly have made an error in respect of the transfer tax exemption does not mean that any other part of the contested decision must be annulled.

132 In view of the foregoing, the measure at issue must be considered not to constitute existing aid. The second plea in law must consequently be rejected.

The third plea, alleging infringement of Article 87(3)(c) EC and Article 253 EC

Arguments of the parties

133 The applicant submits that the Commission erred in not considering that the three-year income tax exemption was State aid compatible with the common market under Article 87(3)(c) EC.

134 It argues that the three-year income tax exemption enabled the restructuring of the undertakings concerned and the transition from a monopolist market economy to a competitive market economy. The Commission ought, therefore, to have applied the same reasoning as it had in its decision of 10 November 1999 concerning the transitional rules to abolish the exemption from corporation tax for municipal transport undertakings (OJ 1999 C 379, p. 11), and in its Decision 2000/410/EC of 22 December 1999 on the aid scheme which France is planning to implement in favour of the French port sector (OJ 2000 L 155, p. 52). In those two decisions, the application of Article 87(3)(c) EC to State measures was intended merely to ensure transition from a monopoly system to a liberalised system by means of a process of privatising the companies holding shares in the companies concerned.

135 The applicant argues that, if the three-year income tax exemption had not been introduced, the municipalities would never have turned their municipal undertakings into companies set up under Law No 142/90. Furthermore, by reason of that measure the transparency of financial relations between the public authorities and the companies set up under Law No 142/90 was guaranteed, and a transition period provided for in order to allow for the restructuring of the undertakings, without, however, disturbing the continuity of public service. In addition, the undertakings in question were subject to strict constraints in respect of the territory and sphere in which they might operate. Given that the spheres of operation of the companies set up under Law No 142/90 were restricted, the three-year income tax exemption was justified.

136 With regard to its own situation, the applicant states that after it was privatised in 1998 it undertook a fundamental reorganisation and restructuring of its plant, which has been of great benefit to the city of Milan.

137 The intervener in essence endorses the applicant's view and line of argument.

138 The Commission, making reference to recital 97 et seq. in the preamble to the contested decision, challenges the merits of this plea.

Findings of the Court

139 First of all, the Commission enjoys wide discretion as regards Article 87(3) EC (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18). Any review by the Community judicature is therefore necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.

140 In the instant case, with regard first to the statement of reasons, it is apparent from the contested decision that on the basis of Article 87(3)(c) EC the Commission determined whether the aid might be considered compatible with the common market, first in the light of the relevant guidelines and secondly without regard to those guidelines. In that regard, it set out the reasons why it had reached a negative conclusion (recital 97 et seq. in the preamble to the contested decision).

141 Next, it is evident from the documents before the Court that the conditions under which the three-year income tax exemption may have been eligible for the derogation provided for in Article 87(3)(c) EC were not satisfied. The three-year income tax exemption was not intended to restore the beneficiaries to viability and was not restricted to undertakings in difficulty. Even if that had been the case, no restructuring plan was submitted, or any measures designed to offset the distortions of competition that may have arisen as a result of the grant of the aid in question. According to case-law, in order to be declared compatible with the common market under Article 87(3)(c) EC, aid to undertakings in difficulty must be linked to a comprehensive restructuring plan, which must be submitted in all relevant detail to the Commission (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 45).

142 As regards the argument that the measure in question facilitated the transition from a monopolistic market economy to a competitive one, the applicant has failed to show how the measure would have led to more vigorous competition. As already stated, there was already a certain amount of competition on the markets in question and, therefore, the measure at issue could have distorted competition.

143 With regard to the alleged contradiction with other Commission decisions authorising a transitional system, it is evident from both the decisions to which the applicant refers that the decisions are not comparable. As regards the decision of 10 November 1999, as the Commission correctly pointed out, the beneficiaries of the tax exemption in that case were prohibited from participating in tendering procedures outside their reference territory until their own domestic markets were opened up. The aid at issue in Decision 2000/410 was to be granted subject to investments being made for the transfer and replacement of existing equipment.

144 The third plea in law must therefore be rejected.

The fourth plea, alleging breach of the principles of non-discrimination and freedom of establishment and failure to state reasons

Arguments of the parties

145 The applicant denies any breach of the principles of non-discrimination and freedom of establishment, as claimed by the Commission in the contested decision, and alleges failure to state reasons in this connection.

146 The applicant argues, first, that the principle of non-discrimination, which is general in nature, is to be distinguished from the principle of freedom of establishment, which is particular in nature. It takes the view that neither of those two principles is infringed by the three-year income tax exemption.

147 The applicant denies that either undertakings of other Member States or Italian undertakings not issuing from the conversion of a municipal undertaking into a company set up under Law No 142/90 satisfy the conditions necessary in order to be eligible for the three-year income tax exemption. The exemption was not, therefore, applied in discriminatory fashion so as to favour Italian undertakings.

148 Eligibility for the three-year income tax exemption depends neither on the nationality of the undertaking nor on the nature of its members for, as the Commission indicated at recital 121 in the preamble to the contested decision, an undertaking's eligibility for that exemption depends solely on its legal form (that is to say, a former public entity transformed into a joint stock company) and on its shareholdings (public sector majority). For that reason too, the applicant claims that the contested decision is contradictory.

149 Moreover, because the direct and exclusive operation, within the relevant municipality, of local public services was entrusted to companies set up under Law No 142/90, it was impossible for any other undertaking, Italian or of another Member State, to operate on the market for those services.

150 What is more, according to the applicant, undertakings of other Member States with a minority holding in a company set up under Law No 142/90 could profit indirectly from the three-year income tax exemption.

151 It is also a requirement of the principle of non-discrimination that different situations should not be treated in the same way. Given, therefore, that companies set up under Law No 142/90 were not in the same situation as 'ordinary' companies by reason of their restricted field of operation, the three-year income tax exemption was justified.

152 The intervener in essence supports the applicant's position.

153 The Commission regards this plea as unfounded. It points out, in this regard, that, according to settled case-law, State aid contravening provisions of the EC Treaty other than Article 87 EC cannot be declared compatible with the common market.

Findings of the Court

154 First of all, it is to be borne in mind that the first and third pleas were rejected inasmuch as the three-year income tax exemption constitutes aid and as the conditions for qualifying for the derogation under Article 87(3)(c) EC have not been satisfied. By the same token, the declaration that the three-year income tax exemption is incompatible with the common market by reason of the breach of the principles of non-discrimination and freedom of establishment is based on secondary reasoning in the contested decision. In consequence, the fourth plea is ineffective.

155 The fourth plea in law must therefore be rejected.

The fifth plea, alleging the unlawfulness of the recovery order

Arguments of the parties

156 The applicant claims that the recovery order contravenes the EC Treaty and the rules of law relating to its application. According to the applicant, in the contested decision the Commission in an unconditional and general fashion orders the Italian Republic to recover all the benefits received by companies set up under Law No 142/90, even though the Commission has recognised that certain aid, which it does not, however, identify, may possibly be compatible with the EC Treaty. In the contested decision, the Commission continued to consider it possible that certain special cases could be covered by the *de minimis* rule or regarded as existing aid, depending on the beneficiary's situation, or yet be compatible with the common market for reasons particular to the circumstances of the case.

157 The contested decision is therefore, according to the applicant, vitiated by unlawfulness on two counts: first, because the Commission orders the recovery of aid that might possibly be compatible with the common market and, secondly, because it requires the Italian Republic to determine which specific measures constitute aid. The cooperation that the Commission is bound to offer cannot mitigate the uncertainty involved in the recovery process in this case.

158 The intervener concurs with the applicant's arguments.

159 The Commission rejects the applicant's argument that abstract evaluation of an aid scheme, with no detailed examination of individual cases in which it is applied, cannot give rise to an order for recovery.

Findings of the Court

160 As has been noted at paragraph 89 above, it has consistently been held that, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question.

161 It is also evident from the case-law that there is no need for a negative decision concerning an aid scheme to provide an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (*Italy* v *Commission*, paragraph 89 above, paragraph 91).

162 Next, according to settled case-law, abolishing unlawful aid by means of recovery, together with the payment, where appropriate, of interest accruing thereon, is the logical consequence of its being found to be incompatible with the common market (*Tubemeuse*, paragraph 91 above, paragraph 66; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47; and Case C-110/02 *Commission* v *Council* [2004] ECR I-6333, paragraph 41).

163 It is also to be noted here that that case-law applies to both individual aid and to aid paid as part of an aid scheme.

164 However, where an aid scheme has been analysed in a general and abstract manner, the possibility cannot be ruled out that, in an individual case, the amount granted under the scheme escapes the prohibition laid down in Article 87(1) EC, for example, because the grant of individual aid is covered by the *de minimis* rules. That explains the reservations expressed at recitals 72, 85 and 126 in the preamble to the contested decision.

165 Undoubtedly, when the Commission takes a decision declaring aid incompatible with the common market, the role of the national authorities is confined to implementing that decision and they do not enjoy any discretion in that regard (Case 78/76 *Steinicke & Weinlig* [1977] ECR 595, paragraph 10). That does not, however, prevent the national authorities, when implementing that decision, from taking such reservations into account. Therefore, contrary to the applicant's submissions, the Commission orders only recovery of aid within the meaning of Article 87 EC and not of amounts which, while paid under the scheme in question, do not constitute aid or constitute existing aid or aid that is compatible with the common market under a block exemption regulation or another Commission decision.

166 Next, as regards the claim that the contested decision is unlawful because it obliges the Italian Republic to determine which specific measures constitute aid, it is to be observed that aid is a legal concept which must be interpreted on the basis of objective factors. In this respect, the competent authority enjoys no discretion in the application

of Article 87(1) EC. Furthermore, the national court has jurisdiction to interpret the concepts of aid and existing aid and can adjudicate on any particular circumstances in which they may apply, where necessary by referring a question to the Court of Justice for a preliminary ruling.

167 Moreover, to accept the applicant's argument that an abstract assessment of an aid scheme which does not entail a detailed examination of the individual instances of application cannot give rise to a recovery order would amount to automatically excluding the possibility of recovering unlawfully paid aid and thus depriving Articles 87 EC and 88 EC of any meaning. In such a case, it would be impossible for the Commission, which alone has competence to determine whether aid is compatible with the common market, to examine the numerous cases in which aid schemes apply.

168 It follows from all the foregoing that the fifth plea in law must be rejected.

169 In the light of all the foregoing considerations, the action must be dismissed.

Costs

170 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission..

171 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the intervener must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders AEM SpA to bear its own costs as well as those incurred by the Commission;

3. Orders ASM Brescia SpA to bear its own costs.

Martins Ribeiro Šváby Papasavvas

Wahl Dittrich

Delivered in open court in Luxembourg on 11 June 2009.

[Signatures]