JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

11 February 2009 *

In Case T-25/07,

Iride SpA, established in Turin (Italy),

Iride Energia SpA, established in Turin,

represented by L. Radicati di Brozolo, M. Merola and C. Bazoli, lawyers,

applicants,

v

Commission of the European Communities, represented by E. Righini and G. Conte, acting as Agents,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision 2006/941/EC of 8 November 2006 on State aid C 11/06 (ex N 127/05) which Italy is planning to implement for AEM Torino (OJ 2006 L 366, p. 62), in the form of grants to reimburse the stranded costs in the energy sector, in so far as (i) it contains a finding of State aid and (ii) it makes compatibility of that aid with the common market conditional upon repayment by AEM Torino of earlier unlawful aid granted under the scheme for 'municipalised' undertakings,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 July 2008,

gives the following

Judgment

Background to the dispute

1 Iride SpA and Iride Energia SpA — the applicants — are, respectively, the holding company of the Iride group and its subsidiary, active in the electrical and thermal energy sectors. The Iride group arose from the merger on 31 October 2005 between AEM Torino SpA and AMGA SpA. The applicants came to be recipients of the measures at issue in the present case in consequence of the contributions to the merger made by AEM Torino, which owned the plants targeted by those measures.

Earlier aid

2 On 5 June 2002, following a complaint lodged in 1997, the Commission adopted Decision 2003/193/EC on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding ('"municipalised" undertakings') (OJ 2003 L 77, p. 21; 'the tax exemptions decision'). In that decision, the Commission found that the tax exemptions and loans granted by the Italian Republic to those 'municipalised' undertakings were unlawful and incompatible with the common market and ordered the recovery of that aid from the recipient undertakings. In Case C-207/05 *Commission* v *Italy* (not published in the ECR), the Court of Justice held that, by not implementing the tax exemptions decision, the Italian Republic had failed to comply with its obligations.

3 On 18 July 2000, the Italian authorities notified the Commission, in accordance with Article 88(3) EC, of State aid concerning compensation for stranded costs — which are non-recoverable, following 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) — to be granted to the ENEL group and other companies to which ENEL's former plants had been transferred. AEM Torino held 8% of the capital of one of those companies, Edipower SpA. The Commission declared that aid compatible with the common market, in accordance with Article 87(3)(c) EC, by decision of 1 December 2004 ('the ENEL decision'), applying its communication relating to the methodology for analysing State aid linked to stranded costs.

The measure at issue

4 On 21 March 2005, the Italian authorities notified the Commission, in accordance with Article 88(3) EC, of new State aid granted to AEM Torino, relating to compensation for stranded costs ('the measure at issue').

5 The measure at issue was set out in a series of national legislative provisions. Thus, Article 2(1)(a) of the Decree of the Minister for Industry, Commerce and Trades of 26 January 2000 (GURI No 27 of 3 February 2000), concerning the general costs relating to the electricity network, provides that 'the compensation of undertakings involved in electricity production or distribution for stranded costs' constitutes part of those general costs.

6 As regards the financing of the compensation for stranded costs, the Autorità per l'energia elettrica e il gas ('the Electricity and Gas Authority') opened — by Decision No 238/00 of 28 December 2000 (Ordinary Supplement to GURI No 4 of 5 January

2001) — a special account within the State Equalisation Fund for the Electricity Sector ('the Equalisation Fund'), to be funded by the revenue accruing from the application to all final consumers of fixed component A.6 of the electricity tariff.

7 Lastly, by Decree of the Minister for Economics and Finance of 10 March 2005, the stranded costs for AEM Torino were set at EUR 16 338 000.

Pre-litigation procedure

8 In the months following the notification of the measure at issue, the Commission made a number of requests for information to the Italian authorities in order to ascertain whether AEM Torino had received unlawful State aid which was incompatible with the common market and, if so, whether AEM Torino had complied with its obligation to repay that aid. Those requests made reference, in particular, to the aid covered by the tax exemptions decision.

9 On the view that there had been no satisfactory response, the Commission, by decision of 4 April 2006, initiated with regard to the measure at issue the procedure laid down in Article 88(2) EC ('the decision initiating the procedure'). In that decision, the Commission pointed out, first, that, in its view, the measure at issue constituted State aid within the meaning of Article 87(1) EC; secondly, that that aid satisfied the criteria set out in the communication on stranded costs; but, thirdly, that, as matters then stood, that aid could not be declared compatible with the common market, in so far as

AEM Torino had probably received State aid which was unlawful and incompatible with the common market and which had not yet been repaid.

10 The decision initiating the procedure was published in the *Official Journal of the European Union* on 17 May 2006 (OJ 2006 C 116, p. 2). In that decision, the Commission called on interested parties to submit their comments within one month of the date of that publication. However, no comments were submitted to the Commission, whether by the Italian authorities, AEM Torino or interested third parties.

11 By Decision 2006/941/EC of 8 November 2006 on State aid C 11/06 (ex N 127/05) which Italy is planning to implement for AEM Torino (OJ 2006 L 366, p. 62; 'the contested decision'), the Commission closed the procedure under Article 88(2) EC. In that decision, it found, essentially, that the measure at issue constituted aid which was compatible with the common market, but that the aid could not be approved unless and until the Italian Republic had provided the Commission with proof that (i) AEM Torino had not received any of the aid covered by the tax exemptions decision or (ii) AEM Torino had repaid any such aid, together with default interest.

Procedure and forms of order sought

12 By application lodged at the Registry of the Court of First Instance on 30 January 2007, the applicants brought the present action.

13 The applicants claim that the Court should:

— annul the contested decision in so far as it categorises the measure at issue as State aid, and 'suspends payment of the aid' until the Italian Republic has proved that AEM Torino has repaid any aid covered by the tax exemptions decision;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

15 The applicants rely on two pleas in law, respectively alleging infringement of Article 87(1) EC and the unlawfulness of the 'suspension of payment of the aid'.

The first plea in law, alleging infringement of Article 87(1) EC

16 The first plea in law is divided into two branches. The applicants contest the categorisation of the measure at issue as State aid, since the conditions relating to financing through State resources and the grant of an advantage to the recipients are not satisfied.

17 In addition, the applicants make two further complaints in the context of their first plea in law: lack of a prior investigation and failure to state sufficient reasons for the contested decision. However, since those complaints do not in fact relate to the alleged infringement of Article 87(1) EC, they will be examined separately, as the third and fourth pleas in law respectively.

The first branch of the first plea in law, concerning the condition relating to financing through State resources

— Arguments of the parties

18 The applicants maintain, essentially, that the measure at issue does not involve State resources; rather, it entails only transfers between economic actors in the private sector, that is to say, between final consumers, on the one hand, and electricity distributors, on the other.

19 In legal terms, the Italian system for covering stranded costs consists in an obligation imposed by the State on a category of private persons (the final consumers of electricity) to transfer certain sums to another category of private persons (the undertakings which receive the compensation for the stranded costs). The applicants maintain that, in that respect, the system in question entails no more than an obligation to purchase at pre-established minimum prices, which falls outside the scope of Article 87 EC, even though, in the present case, the transfer of financial resources between the private persons in question must be carried out through an account opened within the Equalisation Fund, and not directly.

20 According to the applicants, the role of the Equalisation Fund is merely that of an intermediary for accounting purposes between the private persons who are subject to the pecuniary obligation and the persons who receive the corresponding sums, a role which does not enable it — even for a short period — to make use of the sums deposited.

21 The Commission contends that the sums transferred constitute State resources, since the Equalisation Fund, which takes possession of and redistributes those sums, is a public body, and that the State can make use of the sums collected in that way.

— Findings of the Court

22 Article 87(1) EC declares incompatible with the common market, to the extent that it affects trade between Member States, aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

23 In the first place, it follows from the case-law of the Court of Justice that only advantages granted directly or indirectly through State resources are to be treated as aid within the meaning of Article 87(1) EC. The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a Member State — whether financed through State resources or not — constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58 and the case-law cited).

24 In the present case, it is common ground that the sums in question in the context of the measure at issue were first obtained from private persons — that is to say, all electricity consumers — then deposited in an account opened within the Equalisation Fund, before finally being transferred to AEM Torino, which is a private undertaking. It is also common ground that the Equalisation Fund is a public body, appointed by the Italian State to arrange for the recipient undertakings to receive compensation for stranded costs.

25 In the second place, as regards the concept of State resources, it should be noted that it follows from the case-law of the Court of Justice that Article 87(1) EC covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, even though the sums involved in the measure at issue are not held permanently by the public authorities, the fact that they remain constantly under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see, to that effect, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50, and Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 37).

26 In the present case, the applicants maintain that the measure at issue is similar to that at issue in the case which gave rise to the judgment in *PreussenElektra*, in which the Court of Justice held that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity (paragraph 59).

27 It should be pointed out that, in the case which gave rise to the judgment in *PreussenElektra*, apart from the creation of the legal obligation to purchase at a minimum price, the State had not played any role in the collection and/or redistribution of the funds in question: the sums corresponding to the purchase price were transferred directly between the private sector economic actors, that is to say, the electricity distributor undertakings, on the one hand, and the producers of electricity from renewable sources, on the other. In the present case, by contrast, the revenue from the application of component A.6 of the electricity tariff is collected and managed in a special account by the Equalisation Fund — which is a public body — before being redistributed to the recipient, namely AEM Torino.

28 Accordingly, in the light of the case-law cited in paragraph 25 above, the sums in question must be categorised as State resources, not only because they are under constant State control, but also because they are State property.

29 As regards, first, State control, the Commission pointed out, without being contradicted by the applicants, that the Equalisation Fund could use the sums available on its A.6 account to cover temporarily a debit balance on other accounts. In addition, the Commission cited a case in which the Italian authorities had, by ministerial decree, used part of the sums available on that account for purposes other than that for which they had been deposited. The applicants' argument that the role of the Equalisation Fund is

merely that of an intermediary for accounting purposes and that the deposit of the sums in question in the Equalisation Fund account did not enable that body — even temporarily — to make use of them must be rejected. Admittedly, the applicants asserted that the Italian State had not, in the present case, acted on its own initiative, but with the goal of complying with provisions of Community law, and that the change in the way those sums were allocated as compared with their initial allocation had been brought about only as a result of the fact that it was impossible to restore them to those who had paid them out without owing them. Nevertheless, that does not put into question the Commission's conclusion in that regard, according to which the Italian State has the option, should it prove necessary or opportune, to make use of the sums available on the Equalisation Fund's A.6 account, in particular by reallocating them.

30 As regards, secondly, the ownership of the sums deposited in the Equalisation Fund's A.6 account, while the applicants deny that they belong to the Equalisation Fund itself, they have not explained, in their written pleadings, to whom they belong, since the pleadings state only that the sums in question continue to belong to the 'electricity system'. At the hearing, following a question asked by the Court, the applicants specified that it is the final consumers of electricity who remain the owners of those sums.

31 The Corte suprema di cassazione ('the Supreme Court of Cassation') held — in Judgment (joined civil chambers) No 11632/03 of 3 April 2003 — that the Equalisation Fund did not have a legal personality distinct from that of the Italian State and that it was the latter that should be regarded as the owner of the sums transferred to the Equalisation Fund. In paragraphs 4.3 to 4.7 of that judgment, the Supreme Court of Cassation carried out an in-depth analysis of the question of the legal personality of the Equalisation Fund, based on an examination of the applicable statutory provisions, and on the case-law concerning similar cases in Italian law. It concluded that the Equalisation Fund was a State body and that the sums which had been transferred to it, albeit coming from private persons and intended for private undertakings, were State property.

32 The arguments advanced by the applicants in their reply in order to challenge the substance of that judgment and its significance for the present case are not persuasive.

33 In the first place, the applicants claim that the Supreme Court of Cassation was called upon, in the case which gave rise to that judgment, to rule on legal questions different from those under consideration in the present case. According to the applicants, the Supreme Court of Cassation was ruling on the nature of an offence whereby the members of Italy's Interdepartmental Pricing Committee (IPC) had, in the performance of their duties, interfered with public funds held by the Equalisation Fund. In that context, the Supreme Court of Cassation had been motivated by the desire to punish in any case the persons in question. The principles set out by that court cannot therefore apply in an abstract manner to other cases, without account being taken of the context in which they were stated.

34 However, quite independently of the question whether the applicants' assumptions with regard to the reasons underlying the judgment in question are sound, the findings made in that judgment as to the State ownership of the resources in question cannot be regarded as indissociable from the fact that the Supreme Court of Cassation was ruling in a criminal case and not in a case concerning civil or administrative law. Since the aim of criminal law and, in particular, of the provisions concerning accounting fraud — which were those at issue in the case which gave rise to that judgment — is to protect the rights which natural or legal persons derive from civil or administrative law, those with rights over the accounts in question must in any case be determined on the basis of civil or administrative law. In consequence, the findings in that judgment of the Supreme Court of Cassation, concerning the Equalisation Fund's lack of legal personality and the ownership of the funds deposited in the accounts managed by that body, are capable of being applied in a general manner, even outside the criminal law sphere.

35 In the second place, the applicants argue that the legal framework applicable to the case which gave rise to the judgment of the Supreme Court of Cassation has in the meantime been completely altered. In that regard, they refer, in particular, to the creation, by a law of 1995, of the Electricity and Gas Authority, to which the competences formerly exercised by the IPC were transferred, and to Resolution No 70/97 of the Electricity and

Gas Authority, in which it drew a clear distinction, for the first time, between the electricity tariff, including its supplements, and State revenue. According to the applicants, before the liberalisation of the sector which resulted in that change, the various components of the electricity tariff made it possible to fund the budget of ENEL as a State body, which led those components to be regarded as State resources, whereas, pursuant to the 1992 statutory provisions, ENEL had in the meantime been turned into a public limited company.

36 It must be held that those arguments have been rebutted by the arguments put forward by the Commission. As regards the assumption by the Electricity and Gas Authority of the tasks of the IPC, it appears obvious that, since there has been no change in the competences exercised, it is of little relevance to know whether the fixing, management and allocation of the electricity tariff supplements are matters for an independent administrative authority, such as the Electricity and Gas Authority, or an interdepartmental ministerial committee, such as the IPC. As regards the fact that ENEL, as recipient of the electricity tariff supplements at issue in the judgment of the Supreme Court of Cassation, is no longer a public body — as the Commission correctly points out — it must be held that Italy's supreme court has made it clear that the fact that the sums in question are intended to provide compensation for undertakings has no effect at all as regards their State ownership. Similarly, it follows from that judgment that the fact that the Electricity and Gas Authority drew a distinction between the supplements to be allocated to the general State budget and those to be paid into a frozen account with the Equalisation Fund and intended to provide compensation for undertakings does not preclude the latter funds from becoming State property once they are paid into the Equalisation Fund.

37 Finally, the applicants dispute that it can be inferred — as the Supreme Court of Cassation did — from the fact that the Equalisation Fund is subject to State accounting procedures, that the funds available in the A.6 account of the Equalisation Fund are public funds. The legal nature of the funds does not, in their view, depend on the public or private nature of the body with which they are deposited. In any event, the Electricity and Gas Authority, which was free to choose the banking institution with which to entrust the management of the special account, chose the Equalisation Fund for simple reasons of expediency.

38 It suffices to note, in that regard, that the Court does not have jurisdiction to put into question the interpretation of Italian law carried out by the Supreme Court of Cassation.

39 It follows that the sums deposited in the Equalisation Fund A.6 account belong to the Italian State and that the latter can make use of them. Consequently, in accordance with the principles identified by the case-law cited in paragraph 25 above, they must be categorised as State resources.

40 The first branch of the first plea in law must therefore be rejected as unfounded.

The second branch of the first plea in law, concerning the condition relating to the grant of an advantage

— Arguments of the parties

41 The applicants maintain that the measure at issue does not satisfy the condition relating to the grant of an advantage for the recipient undertaking and that the Commission has not given any explanation in that regard in the contested decision.

42 According to the applicants, the measure at issue enables the recipient undertakings to recover costs, which are fixed costs related to investments carried out in compliance with obligations imposed by the State before market liberalisation and which they do not manage to recoup solely through their revenue from the sale of electricity on the liberalised market. Accordingly, what is at issue is not an economic advantage, but a measure designed to prevent undertakings from being penalised simply because they complied, before market liberalisation, with the strategies of the authorities, a situation which would be tantamount to conferring an advantage on rival undertakings which did not have to bear the cost of such unprofitable investments.

43 According to the applicants, the stranded costs are not expenditure which is normally borne by the budget of undertakings, within the meaning of the Community case-law on State aid, since, in the normal conditions of a market open to competition, no undertaking would have carried out the investments which gave rise to the stranded costs. There can be no question, therefore, of an advantage flowing from the measure at issue, but rather of the removal of a competitive disadvantage resulting from the application of the earlier rules.

44 The applicants claim, therefore, that the Commission should have shown that the measure at issue went beyond simply covering the stranded costs and constituted an additional advantage for the recipients. However, that possibility is ruled out in the present case, since the sums to be received by them were calculated on the basis of the difference between the fixed costs of the plant and the revenue which could be obtained from the sale of electricity.

45 The Commission contends that, since the measure at issue consists in the transfer to AEM Torino of the sum of EUR 16 338 000, which does not represent consideration for the services provided to the State or to the community, but which is intended to cover costs which normally have to be borne by that undertaking, there is an advantage for the purposes of Community law on State aid.

— Findings of the Court

46 According to settled case-law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22; and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 66).

47 In the present case, it is common ground that the measure at issue provides for the transfer to AEM Torino of the sum of EUR 16 338 000. The question which arises, therefore, is whether that transfer is an economic advantage which that undertaking would not have obtained under normal market conditions, as argued by the Commission, or whether it in fact represents, for AEM Torino, no more than the restoration of normal market conditions as compared with rival undertakings which did not have to bear the stranded costs, as argued by the applicants.

48 The answer to that question depends on the interpretation given to the notion of 'normal market conditions' in the context of liberalisation of the market in electricity production. According to the Commission, the changes which occurred in that context are among the developments which are only to be expected by economic operators in normal market conditions; or, at the very least, those operators could not have any legitimate expectation that the existing legislative framework would last. By contrast, the applicants maintain, in essence, that normal market conditions imply the stability of the legislative framework, or, at the very least, protection of their expectations regarding such stability, in particular where the undertakings have been encouraged, or even compelled, by the State to carry out certain investments, as was the case here.

49 It must be held that the view of the Commission is the more convincing.

50 In a democratic State, as in a market economy, the legislative framework can be changed at any time. Given the general orientation of European Community economic policy towards the opening-up of national markets and the favouring of trade between Member States, that is all the more so where, as in the present case, the former legislative framework provided for the partitioning of a market along national and/or regional lines, so that monopoly situations arose. It follows that the opening-up of a previously partitioned market — as was carried out under Directive 96/92 — cannot be regarded as anomalous in relation to normal market conditions.

51 It must therefore be held that the alteration of the legislative framework in the electricity sector which occurred as a result of Directive 96/92 is part of normal market conditions and that, when AEM Torino made the investments that gave rise to the stranded costs in question, it was taking the normal risks related to possible legislative amendments, as contended by the Commission.

52 Admittedly, it is true that, in every system governed by the rule of law, undertakings, like every individual, are entitled to protection of their legitimate expectations. Nevertheless, in the present case, it is not necessary to determine whether the applicants could legitimately claim protection of the expectations which they had entertained regarding the stability of the legislative framework for the electricity sector.

53 First, as the Commission correctly pointed out, the applicants have not provided any evidence capable of substantiating their assertion that the Italian authorities had compelled them to make the investments which gave rise to the stranded costs covered by the measure at issue.

54 Secondly, protection of the expectations entertained by the applicants regarding the stability of the legislative framework for the electricity sector was in fact assured in the present case, since the Commission found, in the contested decision, that the measure at issue constituted State aid which was in principle compatible with the common market, making that compatibility subject only to the condition that the aid covered by the tax exemptions decision be reimbursed. That acknowledgement of the compatibility of the measure at issue is in line with the guidance set out by the Commission in its communication relating to the methodology for analysing State aid linked to stranded costs, in which it stated that it may take 'a favourable view of such aid to the extent that the distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a Community objective which market forces could not achieve' and that it considers that 'aid designed to offset stranded costs normally qualifies for the derogation under Article 87(3)(c) [EC]'.

55 Since the applicants received effective protection of the expectations which they had entertained regarding the stability of the legislative framework for the electricity sector, they cannot be allowed to claim that that protection should be implemented by one means rather than another, that is to say, by means of an exclusion of the measure at issue from the concept of aid within the meaning of Article 87(1) EC, rather than by a declaration of the compatibility of that measure, in accordance with Article 87(3)(c) EC.

56 It follows that the second branch of the first plea in law must also be rejected as unfounded.

The third plea in law, alleging lack of a prior investigation

Arguments of the parties

57 The applicants raise a plea alleging failure to carry out a prior investigation as to whether the measure at issue should be categorised as State aid.

58 The Commission objects that the third plea in law is inadmissible.

Findings of the Court

59 Under Article 44(1) of the Rules of Procedure of the Court of First Instance, the application initiating proceedings must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, and a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (see Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 36 and the case-law cited).

60 In the present case, the applicants have not expounded this plea in law either in their written pleadings or at the hearing, which means that the only information that they have provided concerning the third plea in law is its abstract formulation in the heading of their first plea in law. While they stated at the hearing, in response to a question from the Court, that the arguments developing the third plea in law are to be found in the arguments developed in relation to the other pleas in law, it should be borne in mind that it is not the task of the Court to search through all the matters relied on in support of a plea in order to ascertain whether those matters could also be used in support of a second plea (see, to that effect, Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 209).

61 It follows that the third plea in law must be rejected as inadmissible.

The fourth plea in law, alleging failure to state sufficient reasons

Arguments of the parties

62 The applicants claim that the contested decision is unlawful because neither that decision itself nor the decision to initiate the procedure contains an explanation of the reasons which led the Commission to conclude that the measure at issue constitutes State aid within the meaning of Article 87(1) EC. The alleged lacunae in the statement of reasons, which weaken the contested decision, cannot be remedied by the reference made therein to the ENEL decision. The ENEL decision did not concern the measures adopted for the benefit of the 'municipalised' undertakings, which are the measures at issue in the present case.

63 Finally, the applicants maintain that, even if the ENEL decision were to be taken into account as part of the statement of reasons for the contested decision, some serious defects of reasoning remain. In particular, the Italian system for covering stranded costs is analysed in that decision in an imprecise manner and the conclusions reached by the Commission on the basis of the case-law of the Court of Justice concerning parafiscal charges are wrong.

64 For its part, the Commission states, first, that the Italian Government — the addressee of the contested decision — notified the measure at issue under Article 88(3) EC, categorising it as State aid, as in the case of the aid which gave rise to the ENEL decision. In the contested decision, the Commission did no more than confirm the legal categorisation adopted by the Italian Government. Secondly, in the contested decision, the Commission confirmed in their entirety the preliminary conclusions stated in the decision to initiate the procedure, on which neither the Italian Republic nor AEM Torino had submitted comments. Thirdly, the legal framework for the measure at issue is identical to that of the ENEL decision, as the Commission expressly pointed out in the contested decision.

65 Accordingly, the Commission maintains that the context — with which both the Italian Government and AEM Torino are fully conversant — in the light of which the reasons stated for the contested decision must be assessed, comprises not only the decision to initiate the procedure but also the ENEL decision, the statement of reasons for which makes it possible to understand clearly the reasoning which led to the conclusion that the measure at issue was financed through State resources. In addition, since neither the Italian authorities nor AEM Torino submitted comments on the preliminary conclusions contained in the decision to initiate the procedure, the Commission contends that the reasons for the contested decision could quite properly be set out in summary form.

Findings of the Court

66 According to settled case-law, the statement of reasons for a measure must be appropriate to that measure and must disclose clearly the reasoning followed by the institution which adopted it, in such a way as to enable the persons concerned to understand the basis for it and the court to review the justification for it, without being required to go into all the relevant facts and points of law, since the question of compliance with Article 253 EC is assessed by taking the wording of that measure into account as much as its legal and factual context (see Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 73 and the case-law cited).

67 In the present case, as regards the contested decision itself, it is true that, in that decision, the Commission restricts itself, with regard to the categorisation of the measure at issue as State aid, to stating only that 'the measure under assessment should be considered State aid'.

68 However, it must be emphasised that the contested decision was adopted in a context with which both the Italian Government and the applicants were fully conversant and that it reflects settled decision-making practice.

69 In that regard, in the first place, it should be pointed out that the Italian Government itself, in its notification of 21 March 2005 (see paragraph 4 above), categorised the measure at issue as State aid.

70 In the second place, it should be noted that, in the present case, the legal and factual context of the contested decision includes, apart from the decision to initiate the procedure, the ENEL decision, to which express reference is made in paragraph 5 of the 'Text of letter' in the decision to initiate the procedure and in recital 5 of the contested decision. In particular, the Commission stated, in recital 5 of the contested decision, that the measure at issue 'is based on a similar measure approved by the Commission', explaining that this was a reference to the measure which was the subject of the ENEL decision.

71 As it is, Section 3.1 of the ENEL decision contains a detailed statement of the reasons for which the Commission considered that the measures which were the subject of that decision constituted State aid. The Commission explained in that section, by reference to each of the conditions set out in Article 87(1) EC, in what respect it considers those conditions to be satisfied in the case of the measure in question. Those explanations are rather brief concerning the criteria of selectivity, effect on trade between Member States and grant of an advantage to the recipients, but are more extensive concerning the criterion of financing through State resources, which reflects the different levels of difficulty in the assessment of each of those criteria with regard to that measure. The Court considers that those explanations constitute, as such, a sufficient statement of reasons in the light of the case-law referred to in paragraph 66 above.

72 However, since that statement of reasons did not concern the measure at issue, but another measure, albeit of a similar character, the relevance of that statement of reasons for the assessment of the measure at issue must also be ascertained, account being taken of the differences between the two measures at issue. The applicants dispute that the ENEL decision can be taken into consideration for the purposes of appraising the statement of reasons of the contested decision, since it does not concern measures in favour of the 'municipalised' undertakings, which are the measures at issue in the present case, but only measures in favour of other undertakings, that is to say, undertakings belonging to the ENEL group and other companies which took over ENEL's former plants (see paragraph 3 above).

73 In that regard, it should be noted that the measures at issue in the case which gave rise to the ENEL decision and in that which gave rise to the contested decision have the same legal bases in Italian law, as is clear from Section 2.1 of the ENEL decision and from paragraph 4 of the 'Text of letter' in the decision to initiate the procedure. It should also be pointed out that the recipient undertakings belong to the same economic sector, that is to say, that of the production and distribution of electricity; that those measures are intended, in both cases, to cover the stranded costs linked to the liberalisation of the electricity market as a result of the transposition of Directive 96/92; and that the methods of collection and of distribution of the sums in question are identical, since, in both cases, those sums are collected from all the final consumers of energy through the application of the same A.6 component of the electricity tariff, then managed by the Equalisation Fund on a special account, before finally being paid to the recipient undertakings of the measure.

74 Furthermore, the connection between the two measures is also demonstrated by the fact that the Commission pointed out, in Section 2.1 of the ENEL decision, that the stranded costs of the 'municipalised' undertakings — among which it expressly mentioned AEM Torino — were going to be the subject of separate national legislation, which would be the subject of a subsequent notification and decision. Similarly, in paragraph 5 of the 'Text of letter' in the decision to initiate the procedure, the Commission refers expressly to the fact that the stranded costs of the 'municipalised' undertakings had not, at the time, been covered by the ENEL decision.

75 It follows from the foregoing that the two measures are connected and similar to such a degree that the statement of reasons given for categorising the first measure as State aid makes the line of reasoning followed by the Commission in relation to the second measure sufficiently clear, in such a way as to enable the applicants to understand the basis for it and the court to review the justification for it, in accordance with the case-law referred to in paragraph 66 above. It appears moreover that the applicants were in a position to prepare their defence on the basis of the documents and information at their disposal, since they dispute at length, in the application, the grounds of the ENEL decision.

76 Finally, to the extent that the applicants claim that, even if the ENEL decision were to be taken into account as part of the statement of reasons for the contested decision, the Italian system for covering stranded costs is analysed there only in an imprecise way and incorrect inferences are drawn, it should be borne in mind that the absence or inadequacy of a statement of reasons constitutes a plea going to infringement of essential procedural requirements and, as such, is distinct from a plea going to the incorrectness of the grounds of the contested decision, which is reviewed in the context of the question whether a decision is well founded (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47). As it is, the applicants' argument refers only to the substantive correctness of the grounds for the contested decision. Accordingly, it cannot put in question the fact that the Commission fulfilled its obligation to provide a statement of reasons in the contested decision.

77 The fourth plea in law must therefore be rejected as unfounded.

The second plea in law, alleging the unlawfulness of the 'suspension of payment of the aid'

78 The second plea in law raised by the applicants is divided into two branches, respectively alleging lack of relevance to the present case of the judgments in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549 and Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265 ('the *Deggendorf* case-law'), and failure to assess the distortion of competition resulting from the accumulation of earlier aid with the measure at issue.

First branch of the second plea in law, concerning the relevance of the *Deggendorf* case-law

— Arguments of the parties

79 The applicants maintain that, essentially, the 'suspension of payment' of State aid on application of the *Deggendorf* case-law, referred to above, presupposes the fulfilment of three conditions: (i) the aid received must have been declared unlawful; (ii) its recovery must have been ordered; and (iii) the recipient company must have failed to carry out that order. In the present case, in the tax exemptions decision, the Commission merely declared an aid regime unlawful, without however identifying the recipient undertakings and without fixing the precise amounts which they had to repay. There was therefore no recovery order with which the applicants failed to comply.

80 The applicants add that they cannot be held responsible for the possibly unjustified delay by the Italian Republic in ordering the recovery of the aid referred to in the tax exemptions decision. According to the applicants, if it were to be accepted that such a delay could, on application of the *Deggendorf* case-law, justify 'suspension of payment' of new aid which was compatible with the common market, that would be tantamount to giving that measure a clearly 'penal' content which was not at all the intention of the Community judicature, and which lacks any legal foundation in Community law.

81 The Commission contends, first, that the conduct that it has to examine in relation to an order for recovery is not the conduct of the recipient undertaking, but that of the Member State concerned and, secondly, that it considered that, in the present case, AEM Torino had received unlawful aid which was incompatible with the common market and which the Italian State was under an obligation to recover. The

Commission notes, in that regard, that the Italian Republic was held by the Court of Justice to have acted unlawfully in so far as it had not recovered, within the prescribed time-limits, the aid covered by the tax exemptions scheme (*Commission* v *Italy*).

— Findings of the Court

82 It should be noted, first, that the first subparagraph of Article 88(2) EC confers on the Commission the responsibility to implement, subject to review by the Community judicature, a special procedure for the monitoring and constant review of aid which the Member States intend to grant (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 16, and Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraph 10). In particular, with regard to the assessment of the compatibility of aid with the common market under Article 87(3) EC, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (Case C-301/87 *France* v *Commission*, paragraph 49). Where the Commission examines the compatibility of State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State (Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 20).

83 In the *Deggendorf* case-law, the Court inferred from this that the Commission does not exceed the limits of its discretion when, in the case of aid which a Member State proposes to grant to an undertaking, it takes a decision declaring that aid to be compatible with the common market, but subject to the condition of prior repayment by the undertaking of unlawful aid received earlier, by reason of the cumulative effect of the aid in question (see, to that effect, Case C-355/95 P *TWD* v *Commission*, paragraphs 25 to 27).

84 The reasoning followed by the applicants is based on an erroneous interpretation of the judgment in Case C-355/95 P *TWD* v *Commission*, and from a misunderstanding of the nature of the State aid review procedure, in that they have looked at that procedure from the angle of a relationship between the recipient undertaking and the Commission, and not from the angle of the relevant relationship in that regard, namely that between the Member State and the Commission. That erroneous approach leads the applicants to believe that, according to that case-law, the decision declaring incompatible with the common market the unlawful aid received earlier and ordering its recovery concerns the aid which the recipient undertakings have in fact received and which they have not repaid.

85 However, it should be pointed out that the only addressees of Commission decisions in the State aid field are the Member States concerned (see Article 25 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), and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45). Consequently, when the Commission takes all the relevant factors into account, including the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State, in application of the case-law referred to above (Case C-261/89 *Italy* v *Commission*, paragraph 20), it examines only the obligations which such a decision imposes on the Member State concerned, not obligations which that decision might entail for the recipient undertaking. By the same token, as the Commission rightly points out, the Commission never, in the field of State aid, addresses orders for recovery to undertakings, but always to the Member States which must then, in turn, require the recipient undertakings to repay the sums received.

86 In that regard, the facts of the present case do not differ from those of the case which gave rise to the judgment in Case C-355/95 P *TWD* v *Commission*. In particular, in both cases, the Commission held that the Member State concerned had granted aid which was incompatible with the common market, without the Commission's prior agreement, and ordered the recovery of that aid from the recipient undertakings — an order with which the Member States concerned did not comply.

87 The only difference between the two cases is the fact that, in the case which gave rise to the judgment in Case C-355/95 P *TWD* v *Commission*, the earlier unlawful aid was individual aid which had been the subject of a decision addressed to the Member State concerned ordering the recovery of the aid from a single recipient, the amount of the aid being precisely specified, whereas, in the present case, the unlawful aid received earlier was part of a tax exemptions scheme, the exact benefit of which for the recipient undertakings could not, because of the lack of cooperation from the Italian authorities, be determined and specified in the tax exemptions decision.

88 However, that difference cannot justify not applying, in the present case, the approach adopted in the *Deggendorf* case-law. First, as the Commission contends, that case-law meets the need to prevent the cumulative effect of the aid which has not been repaid and of the aid which is planned, which would give an undertaking an unlawful competitive advantage, distorting competition in a way contrary to Community law (Joined Cases T-244/93 and T-486/93 *TWD* v *Commission*, paragraph 83). That need remains the same, whether the aid concerned is individual aid or aid granted under an aid scheme.

89 It should again be pointed out, in that regard, that the lack of precise information from the Commission, as regards the undertakings which benefit from an unlawful scheme and the precise sums they have received, does not affect the validity of an order for recovery or constitute an obstacle to its execution since, on the one hand, the Member State concerned is the entity best placed to obtain that information and, on the other hand, the Commission is entitled, in the absence of cooperation from the Member State concerned, to take a decision on the basis of the information available to it (see, to that effect, Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 48 to 51 and the case-law cited).

90 In the present case, the Commission contends — without being contradicted by the applicants — that, in the case which gave rise to the tax exemptions decision, neither the Italian Republic nor AEM Torino took the opportunity, despite repeated requests from the Commission to do so, to submit evidence concerning the specific situation of the

latter with regard to the recovery of the aid in question. In particular, on no occasion did they provide evidence to show that AEM Torino was not, for reasons specific to its individual case, obliged to make such a repayment. Consequently, the Commission inferred from the evidence in its possession that AEM Torino had received unlawful aid which was incompatible with the common market and that the repayment procedure had begun but had not been completed.

91 Moreover, although the applicants claim that the analysis of their individual situation was a precondition for ordering recovery of earlier aid, it must be held that this was a task for the Italian Government in the context of the recovery procedure at national level. The Court of Justice has held that, with regard to the recovery of aid granted under an aid scheme, the obligation on a Member State to calculate the exact amount of the aid to be recovered — particularly where that calculation is dependent on information which that Member State has not provided to the Commission — forms part of the more general reciprocal obligation, incumbent upon the Commission and the Member States, to cooperate in good faith in the implementation of Treaty rules concerning State aid. Similarly, where a Member State has doubts as to the identity of the addressees of the orders for recovery, it may submit those problems to the Commission for its consideration (see, to that effect, Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraphs 91 and 92). The applicants' complaints alleging failure to analyse their individual situation should therefore have been addressed to the Italian Republic, not to the Commission.

92 On the other hand, the unlawful failure of the Italian Republic to comply with its obligations in that regard — confirmed, in the present case, by the Court of Justice in *Commission* v *Italy* – cannot prevent the Commission from drawing from the evidence at its disposal all the logical inferences as regards the compatibility with the common market of the new aid which the Italian Republic intends to grant to the same undertaking. Any other approach would be tantamount to rewarding Member States which, after granting unlawful aid, go on to disregard also their duty to cooperate in good faith, and would thus deprive the system for the review of State aid of effectiveness.

93 It follows that the first branch of the second plea in law must be rejected as unfounded.

The second branch of the second plea in law, alleging failure to assess the distortion of competition resulting from the accumulation of the earlier aid with the measure at issue

— Arguments of the parties

94 The applicants maintain, essentially, that the Commission disregarded its obligation to demonstrate the potentially negative effects on competition of an accumulation of unlawful aid received earlier with new aid, as well as its obligation to identify the market on which those effects would arise.

95 According to the applicants, it was for the Commission to explain for what reasons the new aid — which is itself compatible with the common market — could not be paid in so far as it was likely to cause a distortion of competition if accumulated with previous aid which had not been repaid. The applicants reject any attempt by the Commission to impose on them the burden of proof as regards the cumulative effect of the aid and thus to make recognition of one of the exceptional cases specified in Article 87(3) EC subject to an additional condition. The thrust of the *Deggendorf* case-law is not to make the authorisation of aid subject to a new formal condition which is not provided for either in the EC Treaty or in secondary legislation, and which is therefore unlawful.

96 According to the applicants, the Commission cannot be allowed to excuse itself from carrying out such an analysis on the ground that it does not possess all the information necessary for that purpose. The fact that the Commission was not able to determine the amount of the alleged unlawful aid previously received resulted from its choice not to examine the individual situation of the undertakings concerned in the tax exemptions decision and to adopt in an abstract way a decision on an aid scheme. Shortcomings in the implementation of such a decision at national level do not authorise the Commission to blame the recipients for that while relying on the *Deggendorf* case-law in the examination of other aid.

97 The Commission maintains that it correctly applied the approach adopted in the *Deggendorf* case-law in the present case. In particular, it had borne in mind the doubts it had expressed in the decision to initiate the procedure when making reference to that case-law, concerning the risk of distortions of competition resulting from the cumulative effect of the earlier aid and the measure at issue, and it had found that those doubts had not been dispelled either by the Italian Republic or by AEM Torino. According to the Commission, in the absence of evidence to the contrary provided by the Italian Republic or by AEM Torino, it had the right to take as a basis the evidence at its disposal at the time of adoption of the contested decision in order to conclude that its doubts concerning the risk inherent in the cumulative effect of the aid in question remained.

98 According to the Commission, it follows from Case C-355/95 P *TWD* v *Commission*, paragraph 25, that the absence of any cumulative effect flowing from the combination of new aid with unlawful aid which was received earlier and which has not been repaid is one of the general conditions which make it possible to rely on one of the exceptions provided for in the Treaty with respect to the compatibility of aid with the common market. Accordingly, it is necessary to apply the settled case-law according to which it is for the Member State concerned to submit all evidence which would enable the Commission to ascertain whether the conditions for recognition of the exception are satisfied.

99 In addition, the Commission observes that, if the possibility of applying the approach adopted in the *Deggendorf* case-law were to depend on the circumstance that the Member States had completed their investigations and had provided the Commission with the information concerning the amount of the aid received by the various recipient undertakings, that would deprive the system for the review of State aid of effectiveness, while 'rewarding' the Member States which do not comply with their duties regarding the provision of information and of sincere cooperation.

— Findings of the Court

100 First of all, it should be borne in mind that, according to consistent case-law, the Member State which seeks to be allowed to grant aid under one of the exceptions provided for in the Treaty rules has a duty to cooperate with the Commission, pursuant to which it must in particular provide all the information necessary to enable the Commission to verify that the conditions for the derogation sought are fulfilled (Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 140; and *Regione autonoma della Sardegna* v *Commission*, paragraph 129).

101 That obligation has been extended to apply to a potential recipient of planned aid. It has been held that, since the decision to initiate the procedure provided for in Article 88(2) EC contains an adequate preliminary analysis by the Commission, setting out the reasons for its doubts regarding the compatibility of the aid in question with the common market, it is for the Member State concerned and the potential recipient of the aid to adduce evidence to show that the aid is compatible with the common market and, if necessary, to plead specific circumstances relating to recovery

of aid already paid, should the Commission require its repayment (*Fleuren Compost* v *Commission*, paragraph 45; see also, to that effect, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraphs 93 and 94, and, by analogy, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 170).

102 The applicants submit that the obligation of the Member State and the recipient undertaking to provide the Commission with information to show that the proposed aid is compatible with the common market cannot be extended to the cumulative effect of earlier unlawful aid and new aid, given that the latter aspect forms no part of the conditions for falling within one of the exceptions listed in Article 87(3) EC.

103 That argument cannot be upheld. First, there is nothing in the wording of the judgment in Case C-355/95 P *TWD* v *Commission* or in the judgment in Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* to suggest that the Court of Justice and the Court of First Instance intended to introduce a new condition for the compatibility of State aid with the common market, different from those set out in Article 87(3) EC. On the contrary, they clearly held that the criterion that there must be no cumulative effect of the new aid under consideration and earlier unlawful and incompatible aid that has not been repaid fell within the scope of the general examination of the compatibility of aid which the Commission must undertake, and therefore was merely one of the factors to be taken into consideration by the Commission when it applies Article 87(3) EC. The Court of First Instance found, in paragraph 56 of the judgment in Joined Cases T-244/93 and T-486/93 *TWD* v *Commission*, that, where the Commission considers the compatibility of State aid with the common market, it must take into account all the relevant factors, including, where relevant, the circumstances already considered in a prior decision and the obligations which the Commission may have imposed on a Member State by means of that decision. The Court of First Instance concluded from this that the Commission has the power to take into consideration (i) any cumulative effect of the earlier aid and the new aid and (ii) the fact that the earlier aid, declared unlawful, has not been repaid. To this, the Court of Justice added, in paragraph 26 of its judgment in Case C-355/95 P *TWD* v *Commission*, that under Article 87(3) EC, which applied to the decisions contested in that case, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context.

104 It follows that the obligation on the Member State, and on the undertaking that is the potential recipient of new aid, to provide the Commission with information to show that the aid is compatible with the common market (see the case-law referred to in paragraph 100 above) also entails the need to show that there is no cumulative effect of the new aid and earlier unlawful aid that was incompatible with the common market and that has not been repaid.

105 It remains to be examined whether the condition laid down in that case-law is satisfied in the present case, by checking whether the decision initiating the procedure contains an adequate preliminary analysis setting out the reasons for which the Commission had doubts regarding the compatibility of the aid with the common market.

106 In that respect, it must be held that the Commission explained in detail, in paragraph 31 et seq. of the 'Text of letter' in the decision initiating the procedure, the reasons for which it intended, in accordance with the approach adopted in the *Deggendorf* case-law, to make the compatibility of the aid at issue conditional upon the prior repayment of the unlawful aid granted under the tax exemptions scheme.

107 In particular, the Commission stated, in paragraphs 35 and 37 of the 'Text of letter' in the decision initiating the procedure, that the Italian authorities had not been able to indicate the amount of the sums that AEM Torino had to repay, or the payment conditions and deadlines, and that, in those circumstances, the Commission took the view that it was not in a position to assess the cumulative effect of the old aid and the new aid or the distortion of competition in the common market that might ensue.

108 Accordingly, it was for the Italian Republic and AEM Torino to provide the Commission with information, in the context of the formal investigation procedure, to show that there was no cumulative effect of the old aid and the measure at issue and

that the measure at issue would not result in distortion of competition in the common market. Consequently, the applicants must not be allowed to criticise the Commission for not setting out, in the contested decision, the potentially negative effects on competition of an accumulation of earlier unlawful aid with the measure at issue, since it was not for the Commission, given the lack of cooperation from the Italian Republic and the applicants, to seek out proof of such effects.

109 As for the applicants' criticism that the Commission failed to analyse the market, it should be borne in mind that the Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and distorts or threatens to distort competition. Contrary to the applicants' claim, it does not have to define the market in question (see, to that effect, Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraphs 9 to 12, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 95).

110 In the present case, as stated above, the Commission was unable, because of the lack of cooperation from the Italian authorities and AEM Torino in its capacity as the potential recipient of the measure at issue, to assess the cumulative effect of the earlier unlawful aid and the new aid, or any possible effects it might have on competition. According to the approach adopted in the case-law referred to in paragraphs 100 and 101 above, the applicants cannot turn the failure of the Italian Republic to fulfil its obligation to provide the Commission with all the information to enable it to undertake that assessment, or even their own lack of cooperation in the matter, into a basis for criticising the Commission for the lack of a definition or analysis of the market at issue, which such an assessment would have rendered unnecessary.

111 It follows that the second branch of the second plea in law must be rejected.

112 Since the pleas in law relied upon by the applicants have all been rejected, the action must be dismissed in its entirety.

Costs

113 Under 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 applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Iride SpA and Iride Energia SpA to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 11 February 2009.

[Signatures]