JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

1 July 2010 *

In Case T-335/08,

BNP Paribas, established in Paris (France),

Banca Nazionale del Lavoro SpA (BNL), established in Rome (Italy),

represented by R. Silvestri, G. Escalar and M. Todino, lawyers,

applicants,

v

European Commission, represented by V. Di Bucci and E. Righini, acting as Agents,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision 2008/711/EC of 11 March 2008 on State aid C 15/07 (ex NN 20/07) implemented by Italy on the tax incentives in favour of certain restructured banks (OJ 2008 L 237, p. 70),

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2010, gives the following

Judgment

Background to the dispute

Italian provisions at issue

1 In 1990, under Italian law, the transfer of a branch of a business was, for tax purposes, regarded as a sale of assets which triggered, as such, the payment of company tax on the difference between the current value of the assets transferred and their value for tax purposes.

2 With a view to rationalising banking activities in Italy and, in particular, to enabling public entities operating in the banking sector to change their legal form into that of a joint stock company, considered to be more appropriate, legge nº 218 su disposizioni in materia di ristrutturazione e integrazione patrimoniale degli istituti di credito di diritto pubblico (Law No 218 containing provisions on the capital restructuring and consolidation of credit institutions governed by public law) of 30 July 1990 (GURI No 182 of 6 August 1990) ('Law No 218/1990') introduced a derogating tax scheme

intended to facilitate the transfer of fixed assets and other banking assets held by those public entities to existing or newly established private credit institutions (Articles 1 and 7(2) of Law No 218/1990).

3 Under that scheme, 85% of the value of the capital gain realised on the transfer of assets by a public credit institution to a private credit institution in consideration for stock in the private institution was not recognised for tax purposes — and therefore not subject to tax — provided that the gain was not actually realised through: (i) the distribution by the transferring entity to its shareholders, in the form of dividends, of the accounting reserve which it was under an obligation to maintain (corresponding to the difference between the value as shown on its balance sheet of the shares received and the value for tax purposes of the assets transferred); (ii) the disposal by the contributing entity of the shares received; or (iii) the disposal by the recipient company of the assets transferred.

4 On the other hand, the transferring entity was immediately taxed on the remaining 15% of the capital gain realised on the transfer, at the normal rate of company tax. At the same time, the sum of 15% of the capital gain could be offset as an increase in the value for tax purposes of the shares received in consideration for the contribution and in the value for tax purposes of the assets transferred, in the accounting records of the transferring entity and the recipient company respectively.

5 That system of partial fiscal neutrality established by Law No 218/1990 therefore brought about a dual misalignment of the values for tax purposes and the book values, that is, a misalignment of the values for tax purposes both as regards the assets transferred (in the accounts of the recipient company) and the shares received by way of consideration (in the accounts of the transferring entity). Whereas the book value of the assets transferred and of the shares received in exchange corresponded to the current value of those assets at the time of the transfer, the value of those assets and

shares for tax purposes was the same as the value of the shares for tax purposes when they belonged to the transferring entity, increased by 15% of the capital gain realised and immediately taxed.

6 Article 2 of legge nº 489 su proroga del termine di cui all'articolo 7, comma 6, della legge 30 luglio 1990, nº 218, recante disposizioni per la ristrutturazione e la integrazione del patrimonio degli istituti di credito di diritto pubblico, nonche'altre norme sugli istituti medesimi (Law No 489, which, inter alia, extended the period laid down in Article 7(6) of Law No 218/1990) of 26 November 1993 (GURI No 284 of 3 December 1993) made it mandatory for public credit institutions all or a majority of whose capital funds were held by the State to have adopted, by 30 June 1994, the form of joint stock companies, in accordance with the rules laid down in Law No 218/1990.

7 In tandem with the system of partial fiscal neutrality introduced by Law No 218/1990, which was specifically directed at the reorganisation of the Italian public banking sector, the Italian Republic implemented, by decreto legislativo nº 544 su attuazione della direttiva del Consiglio 90/434/CEE relativa al regime fiscale comune da applicare alle fusioni, alle scissioni, ai conferimenti d'attivo ed agli altri scambi concernenti società di Stati membri diversi (Legislative Decree No 544 implementing Directive 90/434/EEC) of 30 December 1992 (GURI No 9 of 13 January 1993), Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1). The objective of the directive was to bring to an end, through the introduction of a common system of taxation, distortions of competition arising from national legislation and to facilitate reorganisation operations among companies in different Member States by avoiding the imposition of tax in connection with the implementation of such operations, while at the same time safeguarding the financial interests of the Member States concerned (first to sixth recitals in the preamble to Directive 90/434).

8 Directive 90/434 and the Italian implementing provisions provided for a system of fiscal neutrality comparable to that introduced by Law No 218/1990, the difference being that the Italian provisions provided for a system of total fiscal neutrality under which part of the capital gain realised was not immediately subject to tax and brought about not a dual misalignment of the values for tax purposes and the book values — that is, in relation to both the shares received and the assets transferred — but a misalignment of the values for tax purposes only with regard to the assets transferred, that is, only as reflected in the accounts of the company to which the assets had been transferred.

9 By Article 23 of decreto legislativo n° 41 su misure urgenti per il risanamento della finanza pubblica e per l'occupazione nelle aree depresse (Legislative Decree No 41 introducing urgent measures for the consolidation of public finances and for employment in less favoured areas) of 23 February 1995 (GURI No 45 of 23 February 1995) ('Legislative Decree No 41/1995'), the Italian legislature recognised, for the first time, the right of companies to which assets had been transferred under Law No 218/1990 to realign the value for tax purposes of the assets transferred and that of the shares received by transferring entities with the higher book values of those assets and shares, thus eliminating the misalignment of the values for tax purposes and ensuring that tax was no longer suspended in respect of the accounting reserve which the transferring entity was obliged to maintain. The realignment was subject to payment by the company receiving the assets of a substitute tax, at the rate of 14% if only the value for tax purposes of the assets transferred was realigned, or 18% if both the value for tax purposes of those assets and that of the shares received by the transferring entity were realigned. If the right to realign was exercised, it had to relate to all the assets transferred in connection with the reorganisation under Law No 218/1990 and could not be extended to other assets whose value for tax purposes was lower than the book value.

10 Since Directive 90/434 applied only to the reorganisation of companies of different Member States, by decreto legislativo n° 358 su riordino delle imposte sui redditi applicabili alle operazioni di cessione e conferimento di aziende, fusione, scissione et permuta di partecipazioni (Legislative Decree No 358 on the reorganisation of income taxes applicable to disposals and transfers of undertakings, mergers, divisions

and exchanges of shares) of 8 October 1997 (GURI No 249 of 24 October 1997) ('Legislative Decree No 358/1997'), the Italian Republic independently extended the system of fiscal neutrality to the reorganisation of companies situated in its territory, while at the same time making available to operators an alternative solution entailing the immediate taxation of capital gains.

11 The system of fiscal neutrality was established by Article 4 of Legislative Decree No 358/1997. Under that system, the transfer of the assets of a branch of business between companies in Italy was fiscally neutral, provided that the value for tax purposes of the assets transferred was attributed to the shares received by the transferor and the assets received acquired the value for tax purposes that they had had when in the hands of the transferor (contribution in fiscal neutrality).

12 The system of fiscal neutrality introduced by Article 4 of Legislative Decree No 358/1997, in the same way as the system established by Law No 218/1990, thus brought about a dual misalignment of values for tax purposes and book values, namely in relation to both the assets transferred (in the accounts of the company receiving the assets) and the shares received in exchange for those assets (in the accounts of the transferor company).

13 By way of the alternative solution entailing the immediate taxation of the capital gains, Article 3 of Legislative Decree No 358/1997 provided that a substitute tax of 19% was to be paid, upon reorganisation, on the capital gain realised. Since the gain was recognised for tax purposes, there was no misalignment of the values for tax purposes and the book values of the assets (contribution in accounting neutrality).

14 By legge n° 342 su misure in materia fiscale (Law No 342 on tax measures) of 21 November 2000 (Ordinary Supplement to GURI No 276 of 25 November 2000) ('Law No 342/2000'), the Italian legislature introduced three temporary schemes

15 A first scheme, stemming from Article 10 of Law No 342/2000, provided for the revaluation of certain assets held by undertakings. That provision authorised undertakings to 'revalue tangible and intangible assets, except for those the production or exchange of which constitutes the undertaking's principal business, and shareholdings in controlled companies or companies that are affiliated in accordance with Article 2359 of the Civil Code, where those shareholdings constitute capital assets as recorded in the balance sheet for the financial year ending no later than 31 December 1999'.

16 In accordance with Article 12 of Law No 342/2000, the revaluation scheme required the payment, in relation to the higher values recorded on the balance sheet following revaluation, of a substitute tax at the rate of 19% in respect of depreciable assets and at the rate of 15% in respect of non-depreciable assets.

17 A second scheme, established by Article 14 of Law No 342/2000, provided that the values for tax purposes of the assets referred to in Article 10 of Law No 342/2000 could be realigned with the higher book values recorded on the balance sheet. Accordingly, Article 14 provided that '[t]he provisions in Article 12 [could] be applied, for the purposes of the tax on the income of natural persons, the tax on the income of legal persons and the regional tax on production activities, for the recognition of the higher values recorded on the balance sheet mentioned in Article 10 … of the assets referred to in Article 10'.

18 If combined, revaluation under Article 10 of Law No 342/2000, which is an accounting exercise producing a tax effect, and realignment under Article 14 of that law, which is a tax operation, had the effect of what is known as a 'tax' revaluation, consisting in the book values recorded on the balance sheet being revalued to reflect current values and the misaligned values for tax purposes being brought into line with the book values that had thus been revalued.

19 A third scheme provided for the realignment of the values for tax purposes with the book values recorded on the balance sheet for companies which had been reorganised pursuant to Law No 218/1990 or Article 4 of Legislative Decree No 358/1997. Articles 17 to 19 of Law No 342/2000 provided as follows:

'*Article 17*

1. Companies to which the assets provided for in Article 7(2) and (5) of [Law No 218/1990] are transferred ... may apply a [substitute] tax at the rate of 19% to the difference between the value of the assets received as a result of those contributions and the value attributed to those assets for tax purposes. The value of the assets retained is the value shown on the balance sheet for the financial year ending before the date of entry into force of this law.

2. The difference that is subject to the substitute tax referred to in paragraph 1 shall be deemed to be a cost of the assets, recognised for tax purposes, to which that difference may be attributed with effect from the financial year following that indicated in paragraph 1. That difference shall be deemed to be a cost recognised for tax purposes of the shares received by the transferring company or entity up to a value not exceeding that shown on the balance sheet for the financial year or the management period ongoing at the date on which the financial year referred to in paragraph 1 ends. Consequently, in respect of the same amount, reserves or funds established by

reference to the higher values recorded at the time of the transfer … shall be deemed to be subject to tax.

3. The companies referred to in paragraph 1 may apply, instead of the substitute tax referred to in that paragraph, a substitute tax at the rate of 15%. In that case, the difference that is subject to the substitute tax shall not be recognised for tax purposes for the transferring company or entity.

…

5. Application of the substitute tax must be requested in the tax return for the tax period ongoing at the date of entry into force of this law. The substitute tax must be paid in no more than three equal annual instalments …

Article 18

1. As regards companies which have carried out transfers within the meaning of Article 7(5) of [Law No 218/1990], the difference between the value of the shares received and their value that is recognised for tax purposes shall be deemed to be effective, provided that the difference is subject, in accordance with the rules and time-limits laid down in Article 17, to a substitute tax … at the rate of 19%. The value to be attributed to the shares is the value shown on the balance sheet for the financial year ending before the date on which this law enters into force.

2. The difference that is subject to the substitute tax for the purpose of paragraph 1 shall be deemed to be a cost of the shares received that is recognised for tax purposes. Reserves or funds established by reference to the higher values recorded at the time of the transfer shall be deemed to be subject to tax in respect of the amount corresponding to the difference referred to above, after deducting the substitute tax. That difference shall not be deemed to be a cost recognised for tax purposes for companies to which assets are transferred ...

Article 19

The provisions of Article 17 shall also be applicable to persons to whom the assets provided for in Article 4(1) of [Legislative Decree No 358/1997] are transferred.'

20 Article 20 of Law No 342/2000 laid down detailed rules concerning the substitute tax to be paid on capital gains and the corresponding tax credit for shareholders receiving dividends arising from the capital gains recognised.

21 By Article 3(1) of legge n° 448 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2002) (Law No 448 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2002)) of 28 December 2001 (Ordinary Supplement to GURI No 301 of 29 December 2001) ('Law No 448/2001'), the Italian legislature extended the applicability of the revaluation and realignment schemes provided for in Articles 10 and 14 of Law No 342/2000 to assets recorded on the balance sheet for the financial year ending before 31 December 2000, by providing for payment of the substitute tax at the unchanged rates of 19% in respect of depreciable assets and 15% in respect of non-depreciable assets.

22 By Article 3(11) of Law No 448/2001, the Italian legislature extended the applicability of the realignment scheme established in Articles 17 to 19 of Law No 342/2000 to assets recorded on the balance sheet for the financial year ongoing at 31 December 2001 and fixed the rates of the substitute tax at 12% and 9%, according to the extent of the realignment chosen.

23 The Italian company tax system underwent a reform in 2003 as a result of decreto legislativo n° 344 su riforma dell'imposizione sul reddito delle società a norma dell'articolo 4 della legge 7 aprile 2003, n° 80 (Legislative Decree No 344 on the reform of company tax pursuant to Article 4 of Law No 80 of 7 April 2003) of 12 December 2003 (Ordinary Supplement to GURI No 291 of 16 December 2003).

24 As a result of legge n° 350 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004) (Law No 350 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2004)) of 24 December 2003 (Ordinary Supplement to GURI No 299 of 27 December 2003) ('Law No 350/2003'), the Italian legislature further extended the applicability of the revaluation and realignment schemes provided for in Law No 342/2000.

25 Article 2(25) of Law No 350/2003 provides as follows:

'In Article 10 [of Law No 342/2000], the phrase "ending no later than 31 December 1999" shall be replaced by "ending no later than 31 December 2002". The substitute tax payable in accordance with the provisions set out in this paragraph must be paid in three annual instalments, before the date for final settlement of income tax, in the following amounts: 50% in 2004, 25% in 2005 and 25% in 2006.'

26 That provision therefore amended Article 10 of Law No 342/2000 so as to enable undertakings to have recourse to the voluntary revaluation mechanism for assets recorded on the balance sheet for the financial year ending no later than 31 December 2002.

27 That provision also permitted undertakings to use the realignment scheme provided for in Article 14 of Law No 342/2000. Article 14 gave them the option of using the realignment scheme for the same assets as those subject to the revaluation mech anism under Article 10 of Law No 342/2000. As a consequence, all undertakings were able to eliminate misalignment of the value for tax purposes and book value of assets by paying a substitute tax at the rate of 19% for the realignment of depreciable assets and 15% for the realignment of non-depreciable assets.

28 Article 2(26) of Law No 350/2003 provides as follows:

'The provisions in Articles 17, 18 and 20 of [Law No 342/2000] may also be applied to assets recorded on the balance sheet for the current financial year as at 31 December 2003. In that case, the 19% rate of substitute tax shall be reduced to 12% and the 15% rate to 9%. The substitute tax payable under this paragraph must be paid in three annual instalments, without interest, before the date for final settlement of income tax, in the following amounts: 50% in 2004, 25% in 2005 and 25% in 2006. Application of the substitute tax must be requested in the tax return for the tax period in which the values are taxed.'

29 That provision, which extended the applicability of Articles 17, 18 and 20 of Law No 342/2000 and reduced the rate of substitute tax to 12% and 9% according to the extent of the realignment, did not extend the applicability of Article 19 of that law, which provided for the possibility of realignment in respect of assets transferred by companies under the system of fiscal neutrality established by Article 4 of Legislative Decree No 358/1997.

Administrative procedure and contested decision

30 After carrying out a preliminary investigation of Article 2(26) of Law No 350/2003, the Commission of the European Communities, taking the view that that provision appeared to entail State aid incompatible with the common market, informed the Italian Republic by letter of 30 May 2007 of its decision to initiate the formal investigation procedure provided for under Article 88(2) EC ('the decision to initiate the procedure'). That decision was published in the *Official Journal of the European Union* of 7 July 2007 (OJ 2007 C 154, p. 15).

31 In response to the request, in the decision to initiate the procedure, to the Italian Republic and interested parties to submit comments, the Commission received comments from the Italian Republic and, inter alia, the Paribas banking group, to which the Banca Nazionale del Lavoro SpA (BNL) belongs.

32 On 11 March 2008, the Commission adopted Decision 2008/711/EC on State aid C 15/07 (ex NN 20/07) implemented by Italy on the tax incentives in favour of certain restructured banks (OJ 2008 L 237, p. 70) ('the contested decision').

33 In the contested decision, after describing the rules governing the tax treatment of capital gains under the Italian tax system (recitals 13 to 56 in the preamble to the contested decision), the administrative procedure and the comments of the Italian Republic and the interested parties (recitals 57 to 79), the Commission embarked on an assessment of Article 2(26) of Law No 350/2003 in the light of the rules governing State aid.

34 After finding that the condition for the existence of State aid relating to the use of State resources was fulfilled (recital 81), the Commission examined the condition regarding the existence of a selective advantage and any justification for such an advantage in the light of the nature of the tax system (recitals 82 to 107).

35 In that context, the Commission restated its position that the systems of fiscal neutrality introduced by Law No 218/1990 and Article 4 of Legislative Decree No 358/1997 did not constitute State aid, since the tax deferral available under the system of fiscal neutrality was justified, in its view, by the inherent logic of the tax system (recitals 82 to 86).

36 The Commission considered that the realignment scheme provided for in Article 2(26) of Law No 350/2003 established entitlement to an increase in the tax base on which ordinary company tax would have had to be paid if a special substitute tax, such as that at issue, had not been available. The Commission expressed the view that the introduction of a substitute tax, at a lower rate, could be justified in principle in so far as such a tax represents a technical measure to facilitate recognition of capital gains for tax purposes (the first and last sentences of recital 87).

37 However, it added that such a preferential realignment scheme may be justified only if it is applicable in objective terms and under the same conditions to all comparable arrangements for the recognition of capital gains for tax purposes, such as those arising from other reorganisations not covered by Law No 218/1990, including those relating to other credit institutions (recital 88).

38 The Commission considered that the realignments provided for in Law No 342/2000 and Law No 448/2001, which could be attained by payment of a substitute tax applied, under the same conditions, to all undertakings having elected to recognise the historical capital gains realised — which were temporarily not recognised, however, under Law No 218/1990 and Legislative Decree No 358/1997 — constituted general fiscal measures justified by the logic of the tax system and did not therefore constitute State aid (recital 89).

39 On the other hand, the Commission considered that the tax realignment provisions in Article 2(26) of Law No 350/2003 did not constitute a general measure because they were applicable to the capital gains realised by certain credit institutions only, as a result of the reorganisations effected under Law No 218/1990 (recitals 90 and 93).

40 The Commission considered that the tax scheme in question had provided an advantage represented by the difference between the tax actually paid to realign the value of the assets and the tax which would normally have been paid if realignment had occurred without the benefit of Article 2(26) of Law No 350/2003 (recital 91) and also observed that the substitute tax had been paid in three annual instalments without interest, whereas the normal tax was payable in full in 2004 (recital 92).

41 The Commission referred to the comments submitted by interested parties to the effect that, first, none of the beneficiaries of the scheme in question would have agreed to realign the value of their assets if, in so doing, they would have been subject to ordinary company tax and, second, the other companies which had not been reorganised under Law No 218/1990 benefited from the implicit realignment scheme under Article 2(25) of Law No 350/2003, in accordance with the general rules, which were substantively the same, laid down by Article 14 of Law No 342/2000 and, third, account should be taken of the taxes paid at the time of the initial transfer of assets, with the result that there was in fact no advantage (recitals 94 and 95).

42 The Commission 'maintain[ed], however, that the scheme provided for by Article 2(25) of Law [No] 350/2003 was not a tax realignment of values misaligned following tax-neutral reorganisations but rather a tax revaluation scheme which [made it possible] to realise the [suspended] gains deriving from the adjustment of the [base] value of the assets held by the beneficiary companies to their current value'. It 'consider[ed] that the two schemes [were] not comparable, nor was the tax revaluation scheme [provided for in] Article 2(25) of Law [No] 350/2003 equivalent to the tax realignment provided for in Article 2(26) of Law [No] 350/2003, [in view of] the difference between the statutory substitute tax rates [provided for] by the two schemes' (recital 96).

43 The Commission therefore concluded that the companies which realigned the tax bases of their assets pursuant to Article 2(26) of Law No 350/2003 had benefited from a specific advantage consisting in the difference between the ordinary tax rate applied to the gains recognised and the special substitute tax on those gains (recital 97).

44 After setting out the argument of the interested parties that the lower substitute tax rate provided for in Article 2(26) of Law No 350/2003 was not selective because it was justified by the specific factual and legal circumstances pertaining to the taxation of capital gains arising from the reorganisations effected under Law No 218/1990 and that the Italian Republic would not have been entitled to tax those gains after so many years in the same manner as the capital gains arising from other company reorganisations (recital 98), the Commission expressed the view that, notwithstanding those specific circumstances, the system of partial fiscal neutrality under Law No 218/1990 was essentially the same as the system of total fiscal neutrality established by Legislative Decree No 358/1997 and that the Italian legislature should have treated both situations alike when, in 2003, it provided for the fiscal recognition of suspended gains (recital 99).

45 At recital 100 in the preamble to the contested decision, the Commission also expressed the view that the application of a lower tax rate could not be regarded as simply offsetting the harsher tax treatment of the gains arising from banking sector restructurings under Law No 218/1990 distributed to shareholders in the form of dividends vis-à-vis the tax treatment of the gains distributed in the form of dividends arising from other tax-neutral reorganisations. According to the Commission, that view could not be followed because the application of different substitute taxes to capital gains cannot always be justified by reference to the different fiscal charges applicable where suspended gains are distributed as dividends. The Commission observed that to accept such a justification would effectively result in allowing different rates of company tax to be applied to some companies solely because they participated in certain types of reorganisations that are preferred by the State.

46 The Commission also took the view that the tax advantage conferred by the realignment scheme under Article 2(26) of Law No 350/2003 could not be regarded as '*de minimis*', that the alleged *de minimis* nature of the advantage was not in itself a

sufficient reason for precluding the measure adopted from being classified as aid, and that the *de minimis* exception could not moreover be relied on in the case of an aid measure that was not transparent (recitals 101 and 102).

47 The Commission also considered that the realignment scheme established in Article 2(26) of Law No 350/2003 did not represent an adaptation of the general system to the particular characteristics of the banking sector but, rather, a selective advantage which had an impact on improving the competitiveness of credit institutions involved in reorganisation under Law No 218/1990. Moreover, that scheme was not a simple reworking of the scheme introduced by Law No 342/2000, since realignment under Law No 350/2003 was more limited in scope than the general realignment provided for in Law No 342/2000 (recitals 105 and 106).

48 The Commission concluded that the advantage granted to certain credit institutions under Law No 350/2003, consisting in the application of a special substitute tax for the gains realised from certain contributions of assets rather than the ordinary tax rate, was a specific advantage which was not justified by the nature of the tax system (recital 107).

49 After stating that the conditions relating to the distortion of competition and the effect on trade between Member States were satisfied (recitals 108 to 110) and that none of the derogations provided for in Article 87(2) and (3) EC was applicable (recitals 111 to 116), the Commission concluded that the scheme at issue was incompatible with the common market (recital 117).

50 The Commission considered that, as the scheme entailed unlawful aid, it was necessary for the aid to be recovered but was of the view that recovery should concern only '[the shortfall in] the taxes paid [by comparison with] what beneficiar[ies] of the scheme would have paid had the beneficiar[ies] applied other tax schemes available at that time'. The Commission considered that in the present case the application of the alternative tax revaluation scheme in Article 2(25) of Law No 350/2003 was not merely a hypothetical choice but a sensible option which could have been chosen by the beneficiaries concerned in order that the actual value of their assets should be recognised for tax purposes (recital 118). The Commission took the view that, although realignments and revaluations are not the same, if, at the relevant time, the realignment scheme had not been available, the credit institutions concerned would in all likelihood have opted for the general revaluation scheme under Article 2(25) of Law No 350/2003 (recital 119).

51 The Commission therefore concluded that recovery of the aid should be confined to the difference between the tax payable in respect of the revaluation of the assets held pursuant to Article 2(25) of Law No 350/2003 and the tax actually paid pursuant to Article 2(26) of that law (recital 120).

52 The Commission therefore decided as follows:

'*Article 1*

The derogat[ing] tax scheme implemented by [the Italian Republic] under Article 2(26) of Law [No] 350/2003 constitutes State aid and is incompatible with the common market.

Article 2

[The Italian Republic] shall repeal the scheme referred to in Article 1.

Article 3

1. [The Italian Republic] shall take all necessary measures to recover from the beneficiaries the aid granted by [application] of the substitute tax [provided for in] Article 2(26) of Law [No] 350/2003 in relation to the fiscal recognition of the capital gains resulting from the reorganisations carried out under Law [No] 218/1990 and unlawfully made available to the beneficiaries.

2. The amount to [be] recover[ed] shall be limited to the difference between the tax which would have been paid had the aid beneficiaries applied the tax revaluation scheme [under] Article 2(25) of Law [No] 350/2003 and the [tax actually] paid [in accordance with] Article 2(26) of [that] Law.

3. Recovery shall be carried out without delay and in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision.

…

Article 5

This Decision is addressed to [the Italian Republic].'

Procedure and forms of order sought by the parties

53 By application lodged at the Registry of the Court on 14 August 2008, BNP Paribas ('BNP') and BNL brought the present action.

54 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the Court's questions at the hearing on 21 January 2010.

55 The applicants claim that the Court should:

— declare the action admissible;

— annul the contested decision.

56 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicants to pay the costs.

Law

Admissibility

Arguments of the parties

57 Without raising a separate objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court, the Commission maintains that the action is inadmissible. The contested decision, by which it classified the tax scheme at issue as an unlawful State aid scheme incompatible with the common market and ordered the

Italian Republic to recover the aid granted, is a measure of general application. According to the Commission, the fact that the applicants are the actual beneficiaries of the scheme does not confer upon them the status of persons individually concerned who are entitled to bring an action for annulment.

58 The Commission bases its objections on the case-law of the Court of Justice and the General Court, which, on a number of occasions, has declared inadmissible actions brought by the actual or potential beneficiaries of aid schemes for annulment of decisions declaring those schemes incompatible with the common market.

59 The Commission does not overlook the judgments of the General Court which, on the contrary, have found to be admissible certain actions brought by beneficiaries of aid schemes that had been declared incompatible, on the ground that the applicants were required to repay the aid paid to them under those schemes. However, it doubts whether that case-law is consistent with the principles governing actions for annulment brought by individuals.

60 In the alternative, in the event that the Court should consider that an action may be declared admissible on the basis that the applicant is an actual beneficiary, the Commission submits, in essence, that BNL does not have *locus standi*, unless it can be regarded as the actual beneficiary of the measures at issue, because the company owning the undertaking to which, at the material time, assets were transferred under the system of fiscal neutrality established by Article 7 of Law No 218/1990 ('the former BNL') was incorporated into BNP. The fact that, as a result of a transfer of assets, BNL received the banking branch of the former BNL is totally unconnected with the receipt of the aid or its repayment. In the further alternative, if it were to emerge, on the basis of facts unknown to the Commission, that BNL and not BNP is required to repay the aid, the action would be inadmissible on the basis that it was brought by BNP.

61 The applicants dispute the Commission's arguments. The case-law has clearly recognised the *locus standi* of actual beneficiaries of aid granted under aid schemes that are the subject of a Commission decision declaring them incompatible with the common market and ordering the Member State concerned to recover the aid paid.

62 The applicants submit that the Commission's argument in the alternative is ineffective, since the action is, in any event, admissible in relation to at least one of the two applicants.

Findings of the Court

63 A natural or legal person may institute proceedings for the annulment of a decision addressed to another person if that decision is of direct and individual concern to that natural or legal person.

64 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).

65 Accordingly, 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 that 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 Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 37 and the case-law cited, and Case C-519/07 P *Commission* v *Koninklijke FrieslandCampina* [2009] ECR I-8495, paragraph 53; see also, to that effect, Joined Cases 67/85, 68/85 and 70/*85 Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15).

66 However, the Court of Justice also held, in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraphs 34 and 35, that, since the applicant undertaking 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, *Italy* v *Commission*, paragraph 65 above, paragraph 39).

67 It is therefore necessary to determine whether the applicants are actual recipients of individual aid granted under an 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, and Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* [2009] ECR II-289, paragraph 49).

68 In their written pleadings before the Court, the applicants put forward three considerations which the Commission does not dispute.

69 First, the former BNL, when it was still the owner of the bank to which assets were transferred under the system of fiscal neutrality established by Law No 218/1990, made use, in its tax return for the 2003 tax year, submitted on 29 October 2004, of the realignment scheme provided for in Article 2(26) of Law No 350/2003 for the assets belonging to that bank.

70 Second, on 1 October 2007, the former BNL transferred the Italian branch of its banking business, including the assets in respect of which it had made use of the realignment scheme referred to above, to a newly established joint stock company called Banca Nazionale del Lavoro SpA (BNL), which is in fact the second applicant.

71 Third, the same day, immediately after the transfer, the former BNL was merged with and taken over by BNP, the first applicant, and, as a result of that transaction, BNP assumed the rights and obligations of the former BNL and therefore took the place of the former BNL in all the legal relationships in which it was involved, including proceedings commenced before the merger.

72 It follows from those considerations that the advantage derived by the former BNL from the tax scheme at issue was transferred either to BNP, when the merger referred to above took place, or to BNL, when the former BNL's banking branch was transferred to that company, and that, accordingly, either BNP or BNL must be regarded as the actual beneficiary of the aid granted under the scheme at issue and, on that basis, individually concerned by the contested decision.

73 In response to a question put by the Court, the applicants stated that it was BNP which, as a result of the merger referred to above, was the actual beneficiary of the contested measure, which was recorded in the minutes of the hearing.

74 It follows that BNP is individually concerned by the contested decision.

75 As regards the requirement that an applicant must be directly affected, it should be noted, in relation to BNP, that, since the Italian Republic is required pursuant to Article 3 of the contested decision to take all necessary measures to recover from the beneficiaries the aid granted under the tax scheme established by Article 2(26) of Law No 350/2003, BNP, as an actual recipient of the aid, is directly concerned by that decision.

76 In the light of the above considerations, the present action is admissible in so far as it was brought by BNP.

77 Since one and the same application is involved, there is no need to consider whether the other applicant is entitled to bring proceedings (see Case T-326/07 *Cheminova and Others* v *Commission* [2009] ECR II-2685, paragraph 68 and the case-law cited; see also, to that effect, Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 82; Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraphs 51 and 52; and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 52).

Substance

78 The applicants put forward two pleas for annulment. The first plea alleges infringement of Article 87(1) EC, in so far as the Commission incorrectly established the existence of State aid, since the scheme at issue did not confer any advantage for the purpose of that provision. The second plea alleges infringement of the obligation to state reasons as a result of an error of fact.

79 It is appropriate to begin by examining the second plea.

The second plea, alleging infringement of the obligation to state reasons as a result of an error of fact

— Arguments of the parties

80 The applicants criticise the Commission for having disregarded in the contested decision the realignment scheme established by Article 2(25) of Law No 350/2003, which should have been compared with the realignment scheme under Article 2(26) of that law. Both the Italian authorities and the applicants indicated to the Commission in the formal investigation procedure that it was necessary for it to carry out such a comparison of those two schemes in order to determine whether the second scheme, considered as a whole, conferred any advantage when compared with the first.

81 However, in practice, the Commission dispensed with that comparison, basing its decision on the simple finding that, in 2000 and 2001, the legislature extended the realignment scheme, which was initially reserved to institutions affected by the restructuring arrangements provided for in Law No 218/1990, to companies to which assets had been transferred under Article 4 of Legislative Decree No 358/1997, whereas Law No 350/2003 no longer extended the scheme in that way. The Commission rejected as a matter of principle the objections raised by the Italian authorities and the applicants, without providing in the contested decision any reasoned response, simply stating that realignment under Article 2(26) of Law No 350/2003 was applicable only to companies to which assets were transferred under Law No 218/1990 and not to all companies affected by transactions entailing transfers of assets.

82 The contested decision is based on the mistaken assumption that Law No 350/2003 simply provided for the realignment scheme under Article 2(26) of that law, without making available any other realignment scheme of general application. That position is unequivocally apparent from recital 96 in the preamble to the contested decision.

83 However, Article 2(25) of Law No 350/2003 amended the wording of Article 10 of Law No 342/2000 so as to enable undertakings to have recourse to the voluntary revaluation mechanism for assets 'recorded on the balance sheet for the financial year ending no later than 31 December 2002'. Article 2(25) of Law No 350/2003 thereby implicitly authorised the same undertakings also to use the realignment scheme provided for in Article 14 of Law No 342/2000. That provision permitted undertakings to take advantage of the realignment scheme for the same assets as those which could be the subject of the revaluation mechanism under Article 10 of Law No 342/2000. All undertakings were therefore entitled to eliminate misalignments between the value for tax purposes and the book value of assets by payment of a substitute tax, at the rate of 19% in respect of the realignment of depreciable assets and 15% in respect of the realignment of non-depreciable assets.

84 Moreover, the fact that the realignment scheme under Article 2(25) of Law No 350/2003 was in fact applied and available to any interested undertaking is demonstrated by the documents in the case-file.

85 The applicants add that, if the Commission had made a comparison of the realignment scheme under Article 2(26) of Law No 350/2003 and the scheme provided for in Article 2(25) of that law, it would have established that the former scheme did not confer any economic advantage when compared with the latter. The explanations given by the Commission in the defence to justify its failure to take account of the latter realignment scheme constitute an attempt to provide *ex post* reasons which are therefore inadmissible.

86 The Commission submits that, like the applicants, it is of the view that the application of Article 14 of Law No 342/2000 was extended by Article 2(25) of Law No 350/2003. However, that does not affect the correctness of the reasoning, set out at recital 96 in the preamble to the contested decision, to the effect that Article 2(25) of Law No 350/2003 extended provisions of a different nature from those extended by Article 2(26). While it is true that recital 96 could have made more explicit reference to both revaluation and realignment schemes, both of which were extended by Article 2(25), the fact remains that the core reasoning is clear and juxtaposed the 'tax realignment of values misaligned following tax-neutral reorganisations' with '[the realisation of] the [suspended] gains deriving from the adjustment of the tax value of the assets held by the beneficiary companies to their current value'.

87 Moreover, the difference between those two situations is explained at recital 56 in the preamble to the contested decision. Whereas capital gains relating to transfers and company reorganisations which take the form of exchanges of assets are realised but suspended, the gains which are 'simply recorded' are not linked to 'the occurrence of a previous event'. In other words, the realignments under Article 14 of Law

No 342/2000 relate to unrealised gains which are perfectly comparable to the gains relating to revaluation referred to in Article 10 of that law, which explains why the objective scope of application and the rates are the same for both instruments.

88 The fundamental similarity between those two instruments resides in the rationale for revaluations under Article 10 of Law No 342/2000 and realignments in Article 14 of that law and a radical distinction can be drawn between those instruments and the realignment of gains already realised in connection with the transfer of assets and company reorganisations, which is the subject of Article 17 of that law.

89 There is therefore no error of fact as alleged by the applicants, nor any failure to state reasons that would follow from such an error. The Commission was of the view that the realignment of gains already realised in connection with the transfer of assets and company reorganisations, which was reserved under Article 2(26) of Law No 350/2003 to credit institutions that had been reorganised under Law No 218/1990, could be compared only with the similar measure, which was of a general nature, established by Article 19 of Law No 342/2000, which had been in force up to that point but was not extended. It was therefore possible for the Commission to state that the advantage in question, which was of a general nature, became specific and to conclude correctly that it constituted State aid.

90 Lastly, it is true that the Commission considered that it was obliged to limit recovery to the difference between, on the one hand, the tax payable in respect of the revaluation provided for in Article 10 of Law No 342/2000 and the realignment of unrealised gains provided for in Article 14 of that law, both of which measures were extended by Article 2(25) of Law No 350/2003, and, on the other, the tax actually paid under Article 17 of Law No 342/2000, which was extended by Article 2(26) of Law No 350/2003. However, even if it were accepted that that is correct, if that decision was inconsistent with the reasoning which led to the conclusion as to the existence of State aid, such an inconsistency would have been to the benefit of the recipients under the scheme, which included the applicants, which would have no interest in challenging it. It is

also clear that, in the event that the contested decision were annulled for failure to state reasons, the Commission would have to re-examine the measure in question and adopt a new decision.

91 The Commission is of the view that the second plea is, in any event, ineffective. First, even though the applicants submit that realignment under Article 2(25) of Law No 350/2003 and that under Article 2(26) of that law are two different instruments, albeit basing their arguments on different considerations from those of the Commission, a more in-depth comparison of the two instruments could not have altered the conclusions set out in the contested decision.

92 Second, as has already been stated, the contested decision confined recovery to the difference between the tax that would have been paid if the beneficiaries of the contested scheme had applied the tax revaluation scheme under Article 2(25) of Law No 350/2003 and the tax actually paid in accordance with Article 2(26) of that law. It is irrelevant that the contested decision refers to only revaluation, given that the two instruments extended by Article 2(25) of Law No 350/2003 — revaluation and realignment — were subject to the same tax rate. Consequently, even if the Commission had concluded at the end of a more in-depth examination of the realignment under Article 2(25) of Law No 350/2003 that it constituted the normal level of taxation which would have been the benchmark for making a comparison with the realignment under Article 2(26) of that law, it would in any event have concluded that the advantage was to be regarded as equal to the difference between the two rates and it would therefore have ordered recovery to the same extent as it did in the contested decision.

— Findings of the Court

93 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need of the addressees, or of other parties directly and individually concerned by the measure, to be informed. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed in the light not only of its wording but also of its context and of all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

94 In addition, while, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 253 EC to set out at least the facts and considerations having decisive importance in the scheme of the decision, thereby enabling the Community Court and the persons concerned to know the circumstances in which it has applied the Treaty (see, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95 and the case-law cited).

95 As regards the complaint that the Commission failed in the contested decision to have regard to the realignment scheme established by Article 2(25) of Law No 350/2003, it should be noted that, contrary to the applicants' claims, the Commission did not disregard that scheme, after putting forward, in the second sentence of recital 94 in the preamble to the contested decision, the argument that 'the other companies not concerned by the reorganisations effected under Law [No] 218/1990 would have benefited from the implicit tax realignment scheme of Article 2(25) of Law [No] 350/2003 [in accordance with the general rules, which were substantively the same, laid down by] Article [14] of Law [No] 342/2000'.

96 Even if, as the Commission, moreover, accepts, more explicit reference could have been made at recital 96 in the preamble to the contested decision to the realignment under Article 2(25) of Law No 350/2003, the fact remains that the reasons given in that recital addressed the argument of the interested parties.

97 In that recital, the Commission maintained that 'the scheme provided for by Article 2(25) of Law [No] 350/2003 was not a tax realignment of values misaligned following tax-neutral reorganisations but rather a tax revaluation scheme which [made it possible] to realise the [suspended] gains deriving from the adjustment of the base value of the assets held by the beneficiary companies'.

98 That consideration, which must be read in conjunction with what is stated at recitals 16 to 19 and 56 in the preamble to the contested decision, clearly sets out the Commission's position that realignment under Article 2(25) of Law No 350/2003 was irrelevant, on the ground that it is only the extension of a realignment — that of Article 14 of Law No 342/2000 — which did not pursue the objective of ensuring the realignment of values that had been misaligned as a result of tax-neutral transactions, such as reorganisations.

99 According to the Commission, the function of the realignment under Article 2(25) of Law No 350/2003, in the same way as the realignment under Article 14 of Law No 342/2000, which Article 2(25) extended, was to realign assets that had become misaligned not in connection with an earlier company reorganisation but in connection with an earlier revaluation transaction, in the context of which, '[to] avoid paying [company] tax on gains not yet realised in cash, the tax system [made it possible to freeze] the tax gain by maintaining a lower tax value for the assets than the [revalued] book value' (the third sentence of recital 18). In other words, to adopt the expression used by the Commission in its defence, the realignment scheme under Article 2(25) of Law No 350/2003 was not directed at gains which, though realised, remained suspended, but at gains which were 'simply recorded', that is, gains which are not linked to 'the occurrence of a previous event'.

100 It follows from the foregoing considerations that, far from disregarding the argument of the interested parties concerning the realignment scheme under Article 2(25) of Law No 350/2003, the Commission responded to that argument and duly gave reasons for its response, to the effect that that realignment scheme was irrelevant.

101 Consequently, the second plea must be rejected.

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

— Arguments of the parties

102 In the first place, the applicants submit that the realignment scheme under Article 2(26) of Law No 350/2003 does not confer any economic advantage on companies to which assets were transferred under Law No 218/1990.

103 First of all, the normal tax scheme for company profits does not constitute a valid basis for comparison for the purpose of determining whether realignment under Article 2(26) of Law No 350/2003 confers an economic advantage.

104 Since it was not possible under the Italian tax system to realign assets on a voluntary basis, the companies in question would not in any event have been able to do so and to pay tax at the normal rate on the value of the realigned assets. As regards the argument that the normal tax scheme constitutes a valid basis for comparison since those companies would have been liable to tax at the normal rate if they had disposed of their assets, it is obvious that, if such a disposal were to have such tax implications, the companies in question would have no interest in doing so. In any event, while taxation of the disposal of assets at the normal rate would undoubtedly eliminate any misalignment of those assets, the shares received by the transferring entity would remain misaligned.

105 In any event, even if it were accepted that the normal tax scheme constitutes a valid basis for comparison, realignment under Article 2(26) of Law No 350/2003 clearly does not confer any genuine economic advantage by comparison with that scheme.

106 Any economic advantage resulting from the reduced rates of taxation applicable in connection with that realignment is totally negated by the fact that a tax had to be paid immediately (upon realignment) which would otherwise have been paid only subsequently (in connection with any disposal) or even never (if there were no disposal). Moreover, in view of the mandatory application of realignment under Article 2(26) of Law No 350/2003 to all assets transferred under the system of fiscal neutrality established by Article 7 of Law No 218/1990, the substitute tax would also have been payable on assets which it was not anticipated would be disposed of (real property used to carry out banking business) and on assets in relation to which the capital gains would have been virtually exempt from tax at the normal rate had they been disposed of (holdings constituting financial fixed assets).

107 Nor is it the case that the scheme under Article 2(26) of Law No 350/2003 conferred an advantage on beneficiary companies, on the ground that the substitute tax was payable in three instalments without interest, whereas the normal tax would have been payable immediately. Where assets were disposed of, the tax payable on the gains could be spread over five tax years, without interest, which is even more advantageous than the scheme established by Article 2(26) of Law No 350/2003.

108 In short, the scheme under Article 2(26) of Law No 350/2003 did not confer any economic advantage. Moreover, that explains why all companies to which assets were transferred under Law No 218/1990 did not have immediate recourse to the realignment scheme when it was made available in 2001, which led the legislature to extend the period for using that scheme to 2003. The advantage to be derived from realignment simply consisted in the fact that administrative and accounting management

was simplified by the removal of a dual system of book values and values for tax purposes.

109 Second, the realignment scheme under Article 2(25) of Law No 350/2003 could not, any more than normal taxation, serve as a basis for comparison for the purpose of determining whether an economic advantage was conferred, since the characteristics of that scheme differed from those of the realignment scheme under Article 2(26) of Law No 350/2003.

110 It was not possible under the realignment scheme established by Article 2(25) of Law No 350/2003 to realign the values for tax purposes of assets held by companies other than the company using that scheme, whereas it was possible as a result of the realignment scheme under Article 2(26) of that law to bring dual misalignment to an end. Moreover, it was not possible as a result of the realignment scheme under Article 2(26) of Law No 350/2003 either to realign assets other than those transferred under the system of fiscal neutrality or to choose which assets were to be realigned, which was not the case with the realignment under Article 2(25) of that law, under which it was possible not only to realign any asset, irrespective of the reason for its misalignment, but also to choose which assets were to be realigned.

111 In any event, even if it were accepted that it is possible to compare the two realignment schemes, the realignment under Article 2(26) of Law No 350/2003 does not confer any economic advantage by comparison with the realignment under Article 2(25) of that law.

112 It is true that the rate of the substitute tax payable on realignment under Article 2(26) of Law No 350/2003 is lower than the tax rate payable on realignment under Article 2(25) of that law. However, the overall tax burden under both those schemes is essentially the same, since all the income tax paid on the gains arising on the transfer by

both parties to the transfer, namely the transferring entity and the company to which the assets were transferred, would be taken into account. Even setting aside that consideration, the differences between the rate of the substitute tax payable under the realignment scheme established by Article 2(26) of Law No 350/2003 and the rates payable in respect of realignment under Article 2(25) of that law can also be justified by the fact that, under the former provision, the value for tax purposes of all assets transferred had to be realigned, whereas under the latter provision it was possible to realign the value for tax purposes of certain assets in isolation.

113 Moreover, those different rates of taxation are also justified in view of the fact that, since Law No 218/1990 provided that the tax payable by the transferring entities was suspended as regards not only the gains on shares but also the reserves to which the profits arising from the transfer were allocated, those transferring entities could already have paid income tax on the gains covered by the suspension of tax if they had sold the shares received or distributed the reserve to which the profits arising from the transfer had been allocated.

114 In conclusion, the option, available to companies to which assets had been transferred under the system of fiscal neutrality established by Law No 218/1990, to apply a substitute tax at a reduced rate by comparison with the rate applicable under the realignment scheme under Article 2(25) of Law No 350/2003 did not confer any economic advantage on those companies.

115 Lastly, in the reply, the applicants submit that, in 2000, an undertaking used the realignment scheme under Article 14 of Law No 342/2000 to release suspended gains that had arisen in connection with the transfer of assets under Law No 218/1990 and also rely on Italian Tax Circular No 207 of 16 November 2000 ('Circular No 207/2000'), from which it is apparent that that realignment was applicable to suspended gains that had arisen from the transfer of assets under Article 4 of Legislative Decree

No 358/1997. According to the applicants, that demonstrates that it was perfectly possible to use the scheme established by Article 2(25) of Law No 350/2003 to recognise gains realised on the transfer of assets carried out under Law No 218/1990 or Article 4 of Legislative Decree No 358/1997.

116 In the second place, the applicants state that, even if the scheme under Article 2(26) of Law No 350/2003 conferred an economic advantage on its beneficiaries, it would not be State aid because the advantage could not be regarded as selective.

117 First of all, whereas it would be necessary, for the purpose of examining the requirement of selectivity, to compare undertakings on which the advantage was conferred with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the scheme in question, it is apparent that the beneficiaries of the realignment scheme under Article 2(26) of Law No 350/2003 were in a very different situation from that of the beneficiaries of asset transfers other than those envisaged by Law No 218/1990.

118 Accordingly, transfers of assets by public credit institutions were subject to a very different regime from that which, at the material time, governed transfers of assets carried out by other companies. That system of fiscal neutrality established by Law No 218/1990 did not constitute State aid, as the Commission stated, moreover, and it was also justified by the fact that it was applied not to restructuring operations which were performed independently but to those performed on the basis of a recommendation and, subsequently, with effect from 1993, an obligation. However, that regime rapidly proved to be punitive, not only in absolute terms but also by comparison with the normal tax regime for asset transfers, since it was possible under that regime for there to be full double taxation of the gains arising on the transfer of assets, on the part of both the transferor and the company to which the assets were transferred. No rectification mechanism of the kind provided in Article 4 of Legislative Decree No 358/1997, consisting in classifying as a dividend the distribution by the recipient

company to the transferring company of the value of the increase in net worth generated by the transfer, was introduced to avoid or mitigate such double taxation.

119 It was in order to avoid that risk of full double taxation that Article 23 of Legislative Decree No 41/1995 introduced the possibility of dual realignment by means of payment of a substitute tax, which was extended in 2000, 2001 and 2003.

120 Moreover, the uniqueness of that system of fiscal neutrality established by Law No 218/1990 was not undermined by the introduction, on the basis of Article 4 of Legislative Decree No 358/1997, of a system of fiscal neutrality for transfers of assets between companies and trading organisations. The characteristics of the former system were totally different from those of the latter.

121 First, the system of fiscal neutrality established by Law No 218/1990 was 'extraordinary' and temporary, since it was intended to facilitate the privatisation of public credit institutions and operated for a limited period only (from 1990 to 1995), whereas the system under Article 4 of Legislative Decree No 358/1997 was 'normal' and permanent. Next, unlike the system established by Article 4 of Legislative Decree No 358/1997, it did not permit deferral of the taxation of the whole amount of the capital gains. Moreover, full double taxation of the gains could arise under that system, whereas that was not possible under the system established by Article 4 of Legislative Decree No 358/1997, at least if the recipient companies used the rectification mechanism referred to at paragraph 118 above. Finally, for the transferring companies, unlike the scheme under Law No 218/1990, the scheme introduced by Legislative Decree No 358/1997 provided that tax could be suspended only in respect of the gains on shares received and not in respect of the reserves built up by appropriating the profits generated by the transfer.

122 The decision in 2003 to extend the realignment option provided in Articles 17 and 18 of Law No 342/2000 only to companies to which assets had been transferred under Law No 218/1990 is therefore justified by the fact that those companies were in a different factual and legal situation from that of companies to which assets had been transferred in the context of Article 4 of Legislative Decree No 358/1997.

123 Second, the scheme under Article 2(26) of Law No 350/2003 did not confer a selective advantage, since the advantage conferred was justified by the structure of the Italian tax system.

124 The reform of company tax brought about by Legislative Decree No 344/2003 removed any risk of economic double taxation of gains arising on the transfer of assets under the system of fiscal neutrality established by Article 4 of Legislative Decree No 358/1997, that is, on the part of both the transferring companies and the companies to which the assets were transferred.

125 In particular, that reform replaced the tax on the income of legal persons ('IRPEG') with company tax ('IRES'), applicable at the rate of 33% to persons liable to IRPEG, that is, not only trading organisations but also non-trading organisations. Whereas, before the reform, double taxation of dividends was avoided by granting the shareholder a tax credit corresponding to the IRPEG paid by the company distributing the dividends, it was avoided after the reform by exempting 95% of the total amount of the dividends from IRES.

126 A special exemption scheme, known as 'shareholding exemption', was also introduced for capital gains realised by companies liable to IRES as a result of the disposal for consideration of shareholdings forming part of the fixed financial assets. Those gains, arising from the capitalisation of dividends, 95% of which were exempt from IRES, were in turn exempt from that tax at the same rate as a result of the operation of the 'shareholding exemption'.

127 By introducing the 'shareholding exemption' scheme, the reform of company tax therefore virtually eliminated the risk of double taxation of assets transferred in the context of Article 4 of Legislative Decree No 358/1997. Under that scheme, 95% of the gains arising from the disposal for consideration by the transferring companies of shares received in exchange for the assets transferred in the context of Article 4 of Legislative Decree No 358/1997 were exempt from tax. Moreover, since the difference between the book value and the value for tax purposes of the shares was not subject to IRES, the transferring companies were able to distribute to their members all the reserves to which they had appropriated that difference. Consequently, the system of fiscal neutrality established by Article 4 of Legislative Decree No 358/1997 ceased, on the facts, to be a bi-suspensory system and became a mono-suspensory system.

128 On the other hand, the reform of company tax did not make it possible to achieve the same result, namely to eliminate double taxation, as regards the gains arising on assets transferred in the context of the system of fiscal neutrality established by Article 7 of Law No 218/1990 precisely because of the *sui generis* nature of that system.

129 According to the applicants, in the case envisaged in that provision, in which the transferring entities transferred under Law No 218/1990 all their assets to a joint stock company, thus becoming non-commercial bodies for the purpose of IRES, it was not possible for them to benefit from the 'shareholding exemption' scheme, and 40%

of the gains arising from the disposal for consideration of qualifying holdings were subject to IRES and the gains arising from the disposal for consideration of non-qualifying holdings were subject to substitute tax at the rate of 12.5%, instead of income tax at the standard rate. Moreover, all transferring entities under Law No 218/1990, irrespective of the introduction of the 'shareholding exemption' scheme, remained, unlike transferring companies under Article 4 of Legislative Decree No 358/1997, subject to IRES as regards the reserve to which they had appropriated the difference between the book value of the shares received and the value for tax purposes of those shares, if they distributed the reserve to their members. Consequently, the system of fiscal neutrality established by Law No 218/1990 remained, on the facts, a bi-suspensory system.

130 In short, the decision to extend only the realignment scheme for assets transferred under Law No 218/1990, and not the scheme intended for commercial companies to which assets had been transferred under the system of fiscal neutrality established by Article 4 of Legislative Decree No 358/1997, can be explained by the fact that, as a result of the reform of company tax, only under the former scheme was it still possible for gains to be liable to double taxation. The need to provide for an appropriate scheme to avoid such double taxation remained only as regards the scheme for assets transferred under Law No 218/1990 and the scheme established by Article 2(26) of Law No 350/2003 was therefore justified by the structure of the Italian tax system.

131 In the third place, the realignment scheme under Article 2(26) of Law No 350/2003 did not confer a selective economic advantage because the legislature simply renewed a scheme from which companies to which assets had been transferred under Law No 218/1990 had already been legitimately able to benefit during earlier tax periods. That realignment scheme, introduced in 1995 and extended in 2000 and 2001, imposed the same tax rates as those fixed for its application in 2003 and was never classified as State aid incompatible with the common market.

132 The Commission is of the view that the scheme under Article 2(26) of Law No 350/2003 confers a selective advantage and is not justified by the nature of the Italian tax system.

133 In the first place, as regards the question of whether there is a selective advantage, the Commission points out that the very existence of an advantage may be established only when compared with normal taxation, and therefore with normal rules of law.

134 In the present case, the Commission considered that, before Law No 350/2003, the realignment provisions for credit institutions which were reorganised under Law No 218/1990 did not confer a selective advantage since a similar measure was available for all companies which had carried out company reorganisations. In other words, that scheme was a general scheme in so far as it applied to all undertakings which were in a similar situation.

135 The situation changed with Article 2(26) of Law No 350/2003, which extended the applicability of Article 17 of Law No 342/2000 only and not Article 19 of that law. From that time, only credit institutions which had been reorganised under Law No 218/1990 were able to realign the gains recorded on the balance sheet following reorganisation, whereas all other undertakings in a similar situation were no longer able to do so. The Commission's response to the argument that the realignment scheme under Article 2(25) of Law No 350/2003 constituted the reference scheme is that the scope of that rule, and therefore the number of values that could be realigned, was quite different. The contention that another bank opted for that different scheme to realign different gains does not therefore prove anything. In any event, Article 3(2) of the contested decision confined recovery to the difference between the tax which would have been paid if the beneficiaries had applied the tax revaluation scheme or

the tax realignment scheme under Article 2(25) of Law No 350/2003 and the tax actually paid in accordance with Article 2(26) of that law.

136 Under the new scheme resulting from Law No 350/2003, it was no longer possible for the normal level of tax to be that applicable to the realignment of gains recorded on the balance sheet following reorganisation, such realignment no longer being possible in general, and that level of tax could only be the normal rate of tax applicable to company income.

137 Realignment under Article 2(26) of Law No 350/2003 enabled credit institutions which had been reorganised under Law No 218/1990 to reflect on their balance sheet the gains which had been realised in connection with the transfer of assets but which were suspended for tax purposes. First, it was possible to distribute the realigned gains to members as dividends without the credit institution being required to pay company tax, as it would have had to do if it had decided to distribute the reserve built up as a result of the reorganisation under Law No 218/1990. Next, if depreciation of the realigned reserves was possible, the depreciation was calculated on the basis of the new values arrived at as a result of the realignment. Lastly, in the event of any disposal, the realigned gains were no longer subject to company tax. The situation of the applicants themselves is a practical illustration of the foregoing.

138 On the contrary, any other undertaking reorganised under Article 4 of Legislative Decree No 358/1997 was not able, after 2003, to realign all the reserves transferred and, if the reserves were disposed of, the suspended gains were subject to normal tax.

139 It cannot be objected that, in the absence of the realignment scheme established by Article 17 of Law No 342/2000 and extended by Article 2(26) of Law No 350/2003, credit institutions which had been reorganised under Law No 218/1990 would not have disposed of their reserves. First, the recent experience of the financial crisis shows the contrary to be the case. Second and above all, when it is a question of determining whether State aid exists, the Commission should not address the problem of the subjective choice of the beneficiary but should verify the normal level of tax applied in a comparable legal and factual situation, and that level consists in the taxes replaced by the substitute tax under examination.

140 The same reasoning applies to the argument that any advantage would be cancelled out by the obligation to pay immediately a tax which would otherwise not have been paid or would have been paid later. That argument is all the more misguided since the realignment which benefited only credit institutions reorganised under Law No 218/1990 allowed them to rely on gains that had been recognised for tax purposes in calculating any depreciation and distributing dividends, in the same way as if the tax had been paid in full at the same time.

141 Moreover, neither Article 17 of Law No 342/2000 nor the extension provided for in Article 2(26) of Law No 350/2003 obliged those credit institutions to use that realignment scheme. The application of those provisions was optional, the only obligation being, once it had been decided to rely on them, to apply the scheme to all the undertaking's transferred reserves which were still recorded on the balance sheet.

142 The Commission adds that, according to case-law, the fact that other derogations to the normal tax system exist does not undermine the finding that the scheme established by Article 2(26) of Law No 350/2003 in fact constitutes a derogation and that the benefit of its application is confined to certain persons. Any argument which

seeks to compare the derogating scheme reserved to credit institutions restructured under Law No 218/1990, which is the subject of the present dispute, with any other derogating schemes should therefore be disregarded.

143 The argument that the fact that it was necessary to pay the substitute tax within a period of three years, whereas normal tax could be paid over a period of five years, constituted a disadvantage was not raised during the formal investigation procedure, even though that point was made in the decision to initiate the procedure. Moreover, that argument is based on the unsubstantiated premiss that it remains possible to spread payments over a five-year period, even as regards gains suspended under the systems of fiscal neutrality.

144 On the other hand, the Commission shares the applicants' conclusion that the realignment scheme for recorded gains, which was extended by Article 2(25) of Law No 350/2003, cannot be regarded as the normal tax scheme of reference, and it did not therefore do so.

145 The Commission puts forward a different explanation in that connection from that proposed by the applicants. For the Commission, the fundamental difference between the realignment scheme established by Article 2(25) of Law No 350/2003 and that established by Article 2(26) of that law resides in the fact that the former is confined to certain categories of assets only and relates only to gains recorded in the accounts, whereas the latter concerns suspended gains that were realised in connection with operations involving the reorganisation of undertakings and can therefore relate to all the assets and reserves transferred in the course of those operations.

146 Moreover, the method for comparing the different tax rates proposed by the applicants cannot be accepted, for the reasons set out at recitals 99 and 100 in the preamble to the contested decision. The fact that transferring credit institutions paid, upon transfer, normal tax on 15% of the gains realised is extrinsic to the argument. What is important is that, as regards gains that had been neutralised and were still recorded on the balance sheet, the credit institutions reorganised under Law No 218/1990 benefited from more favourable tax rates than companies in the same factual and legal situation. That position is all the more justified because the very basis of the applicants' reasoning has not been verified, since it is not possible to ascertain — and the Commission is not required to analyse in a decision relating to an aid scheme — either the quantity of the original gains recorded on its balance sheet which each beneficiary still has or — a fortiori — whether normal taxes were paid and, if so, in what amount on the same gains by other companies outside the credit sector which were reorganised.

147 As regards the argument that the situation of credit institutions reorganised under Law No 218/1990 was different from that of all other undertakings reorganised under Article 4 of Legislative Decree No 358/1997, it should be noted, first, that it was not the Commission but the Italian legislature which considered that the latter provision 'reproduced in essence Law [No 218/1990]' and that, consequently, both kinds of undertakings were intended to benefit from the same realignment scheme. Next, even though the situations governed by Law No 218/1990 and Legislative Decree No 358/1997 were substantially different, those differences had no effect on the measure that is the subject of the contested decision, which relates to the tax treatment of the subsequent realignment of suspended capital gains.

148 Lastly, it would not be correct to consider that Law No 218/1990 had particular characteristics which distinguished it from Article 4 of Legislative Decree No 358/1997 or that such characteristics were decisive in the present case. First, the tax advantages conferred by Law No 218/1990 were not justified by the fact that its application was mandatory, which came about only in 1993. Next, the fact that the scheme

established by Law No 218/1990 was 'extraordinary' when it was introduced and of a temporary nature does not preclude the subsequent permanent scheme introduced in 1997 from having exactly the same nature from a tax perspective. It is irrelevant that Law No 218/1990 provided for the neutralisation of only 85% of gains and not 100%, as was the case with the subsequent scheme, because the problem of realignment, which, by definition, related only to amounts that were misaligned, remained the same. Moreover, the fact that the transferring companies were in a different situation was irrelevant, because Article 19 of Law No 342/2000 applied only to companies to which assets were transferred and because, in any event, the contested decision concerned only credit institutions to which assets had been transferred.

149 In the second place, with regard to whether the measure is justified by the nature of the system, the Commission submits that that is not the case.

150 As regards the first part of that complaint, relating to the situation of the transferring entities vis-à-vis a double-taxation mechanism, the Commission states that the contested decision does not in any way concern the transferring entities since it relates only to credit institutions that were reorganised. The transferring entities could no longer be credit institutions since they had ceased all banking activities, specifically as a result of Law No 218/1990. Moreover, in the majority of cases, they were not undertakings because they simply held shares.

151 However, the applicants would also appear to be claiming that the tax treatment of transferring entities and companies to which assets were transferred should be considered as a whole, taking account of the charges borne by both categories of entity and, in particular, double taxation, as alleged. In so doing, the applicants failed to consider that transferring companies other than public credit institutions never benefited from the realignment scheme for the transfer of assets because Article 19

of Law No 342/2000 refers only to Article 17 and not Article 18 of that law, whereas Article 18 applies to transferring banking foundations.

152 More fundamentally, it is illogical to consider in the same way the tax treatment of two entities which, in the vast majority of cases, are no longer in any way connected — as would be the case where the banking foundation no longer has any holding in the recipient company — or are separate in all respects from the tax point of view — as would be the case where the holding is a minority holding.

153 The Commission also disputes the second part of the complaint in question, which claims that the measure is justified by the nature of the system because the reduced tax rates under Article 2(26) of Law No 350/2003, which were more advantageous than those under Article 2(25) of that law, take account of the fact that gains accrued at the time of the transfer under Law No 218/1990 were taxed at the normal rate of 15%. It is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question.

154 Furthermore, the applicants' reasoning on that point lacks foundation. It is sufficient to point out that, under Article 19 of Law No 342/2000, the tax rates laid down for realignments carried out by credit institutions had been applied for a number of years to realignments in respect of assets transferred under the system of fiscal neutrality in accordance with Article 4 of Legislative Decree No 358/1997. It is therefore obvious that the provision of reduced rates is unconnected with any previous payment of tax on part of the gain realised.

155 Moreover, it is not possible to ascertain the quantity of the original gains recorded on its balance sheet which each beneficiary still had or — a fortiori — whether normal taxes were paid and, if so, in what amount on the same gains by other companies outside the credit sector which were reorganised.

156 In the third place, as regards the arguments relating to the fact that the realignment scheme established by Article 2(26) of Law No 350/2003 did not confer a selective economic advantage since the legislature simply renewed an existing scheme, the Commission submits that it is irrelevant that the situation of the presumed beneficiary of a measure is better or worse in comparison with the situation under the law as it previously stood or, on the other hand, has not altered over time. The approach of making the classification of an aid measure dependent on the intention of the Member State to generalise the measure would deprive Community law of its effectiveness in the area of State aid. The Member State concerned would then be able, in such a case, to escape application of Community rules simply by declaring its intention to generalise the contested measure in the future. The same reasoning applies a fortiori in a case such as the present, in which the measure, which was previously of general application, is retained in respect of one sector alone and thus becomes a selective measure.

157 Even if the applicants were to argue that the case entails existing aid, the only case of existing aid covered by Article 1 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) which is potentially relevant to the present case could be that relating to a measure which 'at the time it was put into effect … did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'. However, that is not the case with the measure under examination, which became aid as a result of action taken by the legislature, which made what had been a measure of general application into a measure of sectoral application — and thus a selective measure.

— Findings of the Court

158 According to settled case-law, classification as State aid requires that all the conditions set out in Article 87(1) EC are fulfilled (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; and Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68).

159 The principle of the prohibition of State aid set out in Article 87(1) EC entails the following conditions: (i) there must be an intervention by the State or by means of State resources; (ii) the intervention must be liable to affect trade between Member States; (iii) it must confer an advantage on the beneficiary; (iv) it must distort or threaten to distort competition.

160 As regards the third of those conditions, concerning the existence of an advantage, Article 87(1) EC requires that the measure in question favours 'certain undertakings or the production of certain goods' (Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52) in comparison with other undertakings which, in the light of the objective pursued by that measure, are in a comparable factual and legal situation (Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; and *Portugal* v *Commission*, paragraph 54). That requirement that a measure must be of a specific nature or selective in its application constitutes one of the characteristics of State aid (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

161 The Court of Justice has stated that the determination of the reference framework for the purpose of determining whether a measure is selective has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation (*Portugal* v *Commission*, paragraph 160 above, paragraph 56), that is to say, the taxation normally applicable to undertakings which are, in the light of the objective pursued by the scheme in question, in a factual and legal situation that is comparable to that of the undertakings benefiting from the scheme (*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 160 above, paragraph 41).

162 The Court of Justice has also held that the fact that undertakings benefiting from an exemption from normal tax enjoy such an economic advantage cannot be challenged on the ground that other exemptions from that tax are available to other undertakings. Accordingly, the fact that there are other derogations from the normal tax regime in addition to that of the scheme in question does not undermine the finding that the scheme is, in fact, derogatory in nature (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraphs 112 and 120).

163 Finally, according to established case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective, where that differentiation arises from the nature or the overall structure of the system of charges of which they form part (see *Portugal* v *Commission*, paragraph 160 above, paragraph 52 and the case-law cited). The selective nature of a measure may, in fact, be justified by 'the nature or the general scheme of the system' (see, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33). In that case, the measure avoids being classified as State aid under Article 87(1) EC since the requirement that an advantage be conferred is not satisfied.

164 By the plea under consideration, the applicants submit, in essence, that the scheme introduced by Article 2(26) of Law No 350/2003 did not confer a selective economic advantage and, in the alternative, that that scheme was justified by the nature or the general scheme of the system.

165 It is necessary, first, to consider the applicants' complaints relating to the Commission's choice of normal company tax as the reference framework and the finding made by that institution, within that framework, that there was a selective economic advantage.

166 In the present case, the Commission found that, although the system of fiscal neutrality established by Law No 218/1990 resembled, as regards gains realised but not recognised, the system of fiscal neutrality under Article 4 of Legislative Decree No 358/1997 (the second sentence of recital 99 in the preamble to the contested decision) — a finding which dictated that any realignment scheme that may be introduced by the legislature should be applied without distinction, under the same conditions, to gains realised in the context of either of those two systems (recital 88) — the Italian Republic had limited the benefit of the realignment scheme under Article 2(26) of Law No 350/2003 to undertakings reorganised under Law No 218/1990 (recital 90).

167 On the basis of those considerations, the Commission concluded that the Italian Republic had conferred a selective advantage on those undertakings, corresponding to the difference between the tax actually paid pursuant to Article 2(26) of Law No 350/2003 and the normal tax that would have been paid if the realignment had taken place in the absence of the preferential scheme (recital 91).

168 Against those considerations, the applicants argue (see paragraph 104 above) that the normal tax regime cannot form the reference framework for the purpose of calculating an advantage, on the ground, in essence, that the undertakings concerned would not in any event have disposed of assets that were subject to normal tax in the absence of the realignment scheme at issue.

169 However, it is not for the Commission, in examining a scheme in the light of the rules on State aid, to envisage the subjective choices that might have been made by the beneficiaries of that scheme in the absence of such a scheme but to examine the scheme in order to determine whether it entails, from an objective standpoint, an economic advantage by reference to the tax provisions from which it derogates which would normally have been applicable in the absence of the scheme (see, to that effect, Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 118). The fact that, in the absence of the realignment scheme at issue, the undertakings concerned would allegedly not have disposed of their assets is, in the context of such an objective assessment, irrelevant.

170 The applicants also claim (see paragraph 104 above) that the use of the normal tax as the reference framework is inappropriate because, whilst the application of the tax normally applied in the event of disposal would undoubtedly eliminate any misalignment of the assets for the establishment to which the assets were transferred under Law No 218/1990, it would, on the other hand, have no effect on the misalignment of the shares received by the transferring entity.

171 As regards the applicants' reference to the situation of the transferring entities under Law No 218/1990, it should be noted that the contested decision does not in any way concern those entities, but simply the banks to which assets were transferred under that law. The Commission considered in the contested decision whether there was an advantage, and concluded that that was the case, solely in connection with those banks.

172 It follows that the repeated references made by the applicants in the present action (see, inter alia, paragraphs 118 and 119 above) to the situation of the transferring entities under Law No 218/1990, in particular to the fact that the 2003 tax reform did not remove for those entities the risk of the double taxation of suspended gains distributed as dividends, are irrelevant.

173 With regard to the applicants' argument that the realignment scheme under Article 2(25) of Law No 350/2003 was not, to any greater extent than the normal tax, a valid reference framework (see paragraph 109 above), — which, moreover, contradicts the argument set out at paragraph 174 below — it is sufficient to point out that the Commission did not in the contested decision use the scheme established by Article 2(25) of Law No 350/2003 as a reference framework.

174 The applicants' argument (see paragraphs 111 to 115 above) that the realignment scheme established by Article 2(25) of Law No 350/2003 would have been perfectly usable for the purpose of recognising gains realised in connection with the transfer of assets under Law No 218/1990 or Article 4 of Legislative Decree No 358/1997 — which amounts to maintaining that that realignment scheme would in any event have been more appropriate than the normal tax scheme and have led to the conclusion that there was no economic advantage — must be rejected.

175 The claims that, first, a bank relied in 2000 on realignment under Article 14 of Law No 342/2000 to release suspended gains that had arisen in connection with the transfer of assets under Law No 218/1990 and, second, Circular No 207/2000 stated that that realignment was applicable to suspended gains that had arisen in connection with the transfer of assets under Article 4 of Legislative Decree No 358/1997 (see paragraph 115 above) do not undermine the Commission's choice of the normal tax as the reference framework for the purpose of calculating the advantage.

176 As regards the first of those claims, namely that a bank applied realignment under Article 14 of Law No 342/2000 to release suspended gains that had arisen in connection with the transfer of assets under Law No 218/1990, it is not substantiated by the document produced to support it, which, according to the applicants, consists of a statement of the annual accounts of that bank. That document, produced at the reply stage, without any justification for the delay in producing it, is inadmissible under Article 48(1) of the Rules of Procedure.

177 As regards the second of those claims, based on Circular No 207/2000, the applicants fail to establish, by their reference to that circular, that the Commission's position was incorrect and that one of the objectives of Article 14 of Law No 342/2000 was also to recognise suspended gains that had arisen in connection with the transfer of assets under Article 4 of Legislative Decree No 358/1997 or Law No 218/1990.

178 Accordingly, contrary to the applicants' incorrect claim that that circular 'specifically stated that that scheme [established by Article 14 of Law No 342/2000] made it possible to release all the "gains recorded on the balance sheet which were not recognised for tax purposes, including as a result of the repeal of Article 54(1)(c) of [the consolidated law on income tax (TUIR)] … by making them subject to the substitute tax, on condition that the relevant assets … still remain on the balance sheet" for the year ending on the date prescribed by statute', that circular simply provided that 'in essence, Article 14 [of Law No 342/2000] states that the higher values recorded on the balance sheet that have not been recognised for tax purposes, including as a result of the repeal of Article 54(1)(c) of TUIR, may be recognised by making them subject to the substitute tax, on condition that the relevant assets — provided that they form part of the assets referred to in Article 10 of Law [No 342/2000] — are still shown on the balance sheet for the year which ended following the date of entry into force of the corrective budget'.

179 Therefore, not only did Circular No 207/2000 not indicate that Article 14 of Law No 342/2000 could be applied to all suspended gains, but the circular even stated that that provision was not applicable — unlike Articles 17 to 19 of Law No 342/2000 — to all assets recorded on the balance sheet but only to those referred to in Article 10 of that law.

180 Moreover, Circular No 207/2000 does not, in the other short sections cited from it by the applicants without producing the Italian provisions cited, mention the suspended gains at issue in the present case, namely those that arose in connection with the transfer of assets under Law No 218/1990 or Article 4 of Legislative Decree No 358/1997; those gains are, on the other hand, covered by paragraph 1.3 of Circular No 207/2000 concerning Articles 17 to 19 of Law No 342/2000. Furthermore, the circular adds, in a sentence preceding that paragraph, that 'it is worth restating that only the assets revalued on the basis of the provisions considered thus far can be recognised for tax purposes'.

181 It follows that, by their references to Circular No 207/2000, which are based on incomplete citations and are not supported by adequate explanations, the applicants fail to establish that the Commission erred, as alleged, in taking the view that Articles 10 and 14 of Law No 342/2000 and Articles 17 to 19 of that law and, accordingly, the two realignment schemes established by Articles 2(25) and (26) of Law No 350/2003, pursued separate objectives.

182 In view of that difference in the objectives of the two realignment schemes, it was not necessary to compare realignment under Article 2(26) of Law No 350/2003 with realignment under Article 2(25) of that law.

183 The only measure with which realignment under Article 2(26) of Law No 350/2003 could have been compared was the realignment measure in Article 19 of Law No 342/2000, by which the legislature had extended the benefit of realignment under Article 17 of Law No 342/2000 to undertakings that had been reorganised under Article 4 of Legislative Decree No 358/1997.

184 However, since Article 19 of Law No 342/2000 was not extended by Law No 350/2003 and the realignment under Article 2(26) of Law No 350/2003 did not therefore constitute a general measure applicable under the same conditions to the recognition of comparable gains in all circumstances (recital 88 in the preamble to the contested decision), but a measure that was restricted to the gains realised by certain credit institutions only as a result of their reorganisation under Law No 218/1990 (recital 90), the Commission was correct to use as the framework reference the normal tax that would have been payable in the absence of that realignment scheme.

185 Moreover, according to the case-law cited at paragraph 162 above, the fact that there were other derogations from the normal tax regime in addition to the scheme established by Article 2(26) of Law No 350/2003 does not undermine the finding that that scheme was, in fact, derogatory in nature and that it confined the benefit of its application to certain undertakings.

186 It follows from the above considerations that, contrary to the applicants' claims, the Commission did not err in using the normal tax as a reference framework for the purpose of determining whether there was an economic advantage.

187 The applicants' arguments (see paragraph 105 et seq. above) that, even if the normal tax were used as the reference framework, there would be no economic advantage, must be rejected since, once again, they are based on considerations relating to subjective choices which the undertakings could have made in the absence of the realignment scheme at issue. As already stated at paragraph 169 above, it is not for the Commission, in examining a scheme in the light of the rules on State aid, to envisage the subjective choices that might have been made by the beneficiaries of that scheme in the absence of such a scheme but to examine the scheme in isolation in order to determine whether it entails, from an objective standpoint, an economic advantage by reference to the tax provisions from which it derogates which would normally have been applicable in the absence of the scheme.

188 As regards the applicants' argument (see paragraph 107 above) that the Commission should, in calculating the advantage, have taken account of the fact that the normal tax payable on capital gains arising in the event of disposal could be spread over five tax periods, without interest, which it failed to do at recital 92 in the preamble to the contested decision, it should be noted that, according to case-law, while Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision, it does not prevent the Commission from determining that aid is incompatible with the common market in the absence of any such comments (Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 39). In particular, it cannot be complained that the Commission failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 48 and 49, and the judgment of 14 December 2005 in Case T-200/04 *Regione autonoma della Sardegna* v *Commission* (not published in the ECR), paragraph 52 and the case-law cited). The applicants do not dispute that that objection was not raised at the stage of the formal investigation procedure, even though the Commission had expressly drawn the attention of the interested parties to that aspect of the calculation of the

advantage at paragraphs 29 and 37 of the decision to initiate that procedure. The applicants' argument must therefore be rejected.

189 In any event, it must be found that the applicants have failed to support their argument by producing the relevant Italian tax provisions and have also failed to submit, even less to prove, that if the Commission had taken account of the possibility of spreading payments over such a period — even assuming that it were relevant in the present case — that would have negated the economic advantage of more than EUR 586 million calculated by the Commission at recital 92 in the preamble to the contested decision.

190 The applicants' arguments (see paragraph 117 et seq. above) alleging that the scheme established by Article 2(26) of Law No 350/2003 could not be regarded as having conferred a selective advantage, in so far as the undertakings benefiting from that scheme and the undertakings to which assets other than those referred to in Law No 218/1990 were transferred were in very different situations, must be rejected.

191 It is clear, as the Commission pointed out, that it is not that institution but the Italian legislature itself which, when drafting Law No 342/2000, took the view that the system of fiscal neutrality under Legislative Decree No 358/1997 essentially reproduced the system of fiscal neutrality established by Law No 218/1990, with the result that it was necessary — as achieved by the legislature in Articles 17 to 19 of Law No 342/2000 — to provide for a uniform realignment scheme for the recognition of suspended gains arising as a result of company reorganisations under the system of fiscal neutrality in accordance with one or other of those two systems.

192 In any event, the differences put forward by the applicants are either not decisive or irrelevant.

193 Accordingly, with regard to the fact that the scheme established by Law No 218/1990 was mandatory and that public credit institutions were therefore under an obligation to transfer their banking assets to joint stock companies (see paragraph 118 above), it is sufficient to point out that that obligation arose only in 1993 (see paragraph 6 above). Before that obligation was introduced, Law No 218/1990 already recognised that the transfer of assets under that law by public credit institutions was neutral for tax purposes.

194 As regards the fact that the scheme established by Law No 218/1990 was, according to the applicants, 'extraordinary' and temporary in that it applied only to public credit institutions and for a limited period (1990 to 1995), whereas the scheme introduced by Article 4 of Legislative Decree No 358/1997 was 'ordinary' and permanent (see paragraph 121 above), that does not in any way mean that those two schemes could be distinguished from each other in terms of taxation.

195 As regards the fact that the transferring entities under Law No 218/1990 were required to pay, upon transfer, tax at the normal rate on 15% of the gains, whereas the scheme established by Legislative Decree No 358/1997 provided that the transaction was totally neutral for tax purposes (see paragraph 121 above), it should be recalled (see paragraph 171 above) that the contested decision does not in any way concern the transferring entities but only the undertakings to which assets were transferred under Law No 218/1990 and the selective advantage conferred on those undertakings as a result of the fact that realignment under Article 2(26) of Law No 350/2003 was applicable to them alone.

196 Moreover, and as is apparent in essence from recital 100 in the preamble to the contested decision and was submitted by the Commission in the defence, taking into account the overall tax burden arising in connection with the transfer of assets from the outset — including the burden on the transferring entities — was irrelevant, since the only question which arose was that concerning the favourable treatment afforded to the suspended gains which still appeared on the balance sheets of the undertakings to which assets had been transferred under Law No 218/1990. In addition, it is not feasible that that burden should have been taken into account because the Commission did not know and was not required to know, in the context of the investigation of an aid scheme, the actual amount of suspended gains remaining on those balance

sheets or the actual amount of gains which had already been taxed, either in connection with a realignment or as a result of being distributed as dividends.

197 It is therefore pointless for the applicants to rely on the differences between the system of fiscal neutrality established by Law No 218/1990 and that introduced by Legislative Decree No 358/1997 in order to claim that, in view of the differences, Article 2(26) of Law No 350/2003 could not be said to have conferred a selective advantage.

198 It follows from the above considerations that the Commission did not err in finding, on the basis of a comparison between the scheme established by Article 2(26) of Law No 350/2003 and the normal tax scheme, that there was a selective economic advantage in an amount corresponding to the difference between the tax paid pursuant to Article 2(26) of Law No 350/2003 and the tax which would have been payable had the normal tax rules been applied.

199 Next, it is necessary to consider the applicants' complaint (see paragraph 123 et seq. above) alleging that the Commission was wrong to consider that the selective nature of the scheme established by Article 2(26) of Law No 350/2003 could not be justified by the inherent logic of the system.

200 In that context, the applicants submit essentially (see paragraphs 124 to 130 above) that the 2003 tax reform eliminated any risk of the double taxation of the gains arising on the transfer of assets under the system of fiscal neutrality established by Article 4 of Legislative Decree No 358/1997, namely the taxation of both the companies transferring and the companies in receipt of assets. On the other hand, that reform did not remove the risk of the double taxation of the gains arising in connection with the transfer of assets under the system of fiscal neutrality introduced by Law No 218/1990. The applicants maintain that that explains the decision of the Italian legislature to extend

the realignment scheme under Articles 17 and 18 of Law No 342/2000 only to assets transferred in the context of Law No 218/1990.

201 However, it should be recalled that the contested decision does not concern transferring entities but only banking establishments to which assets were transferred under Law No 218/1990 and the economic advantage reserved to those establishments by the scheme at issue. Consequently, the fact that the transferring entities under Law No 218/1990 might have been taxed because there was a possibility of double taxation cannot be a factor that justifies a selective advantage being conferred on recipient banks by means of Article 2(26) of Law No 350/2003.

202 The Commission was therefore correct to consider, at recital 105 in the preamble to the contested decision, that the scheme introduced by Article 2(26) of Law No 350/2003 conferred a selective advantage which had the effect of improving the competitiveness of credit institutions which were reorganised under Law No 218/1990 by comparison with other undertakings.

203 Finally, the argument (see paragraph 131 above) that the scheme at issue simply extended, for the benefit of banks which had been reorganised under Law No 218/1990, a realignment scheme which had existed in the past and was not at that time regarded by the Commission as constituting State aid must be rejected.

204 According to case-law, for the application of Article 87 EC, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or, on the contrary, has not

altered over time. The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 87(1) EC in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 160 above, paragraph 41 and the case-law cited).

205 In the present case, the Commission correctly considered that, by retaining the realignment scheme established by Articles 17 and 18 of Law No 342/2000 solely for the benefit of undertakings to which assets had been transferred under Law No 218/1990, Article 2(26) of Law No 350/2003 had conferred on those undertakings a selective advantage in comparison with other undertakings to which assets had been transferred as a result of reorganisations other than those provided for in Law No 218/1990 (see paragraph 202 above).

206 Lastly, in so far as the applicants claim by that argument that the scheme under Article 2(26) of Law No 350/2003 constituted existing aid within the meaning of Article 1 of Regulation No 659/1999, it should be pointed out, as stated by the Commission, that the only potentially relevant instance of existing aid in the present case could be that of a measure which, 'at the time it was put into effect ... did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'. However, in the present case, it is as a result of steps taken by the Italian legislature that the realignment scheme at issue, which had previously been available to all undertakings to which assets had been transferred under the system of fiscal neutrality, was restricted solely to undertakings to which assets were transferred under Law No 218/1990.

207 It follows from all the above considerations that the Commission did not infringe Article 87(1) EC by finding that there had been a grant of State aid in the present case.

208 For the sake of completeness, even if the Commission had used as a reference framework for the purpose of determining whether there was an advantage the scheme introduced by Article 2(25) of Law No 350/2003 rather than the normal tax scheme, it would have been led to order the recovery of State aid in the same terms as those set out in the enacting terms of the contested decision.

209 In that case, in view of: (i) the irrelevance, for the purpose of calculating the advantage, of the taxes paid before Law No 350/2003 (in particular, the tax paid immediately, upon transfer of assets, by the transferring entities under Law No 218/1990, on 15% of the capital gains realised) (see paragraph 195 above); (ii) the differences between the reduced tax rates set by Article 2(25) and Article 2(26) of Law No 350/2003 respectively (see paragraphs 27 and 29 above, respectively); (iii) the objective manner in which the advantage was determined (see paragraphs 169 and 187 above), the Commission would have found that there was a selective economic advantage, to which, even though the advantage was not as great as that established at recital 92 in the preamble to the contested decision, the *de minimis* exception could not have applied, since — as stated at recital 102 in the preamble to the contested decision — it was not a transparent advantage.

210 Moreover, nor could such an advantage, any more than that established in the contested decision, have been justified by the arguments put forward by the applicants relating to the fact that, after the 2003 tax reform, transferring entities under Law No 218/1990 received less favourable tax treatment. As already stated, the contested decision does not in any way concern those transferring entities but only banks to which assets had been transferred under Law No 218/1990, which banks, as a result

of the scheme introduced by Article 2(26) of Law No 350/2003 which was reserved to them, enjoyed a selective advantage which had the effect of improving their competitiveness in comparison with that of all other undertakings (see, in that regard, recital 105).

211 It follows that, even if the scheme at issue had been compared with the scheme introduced by Article 2(25) of Law No 350/2003, the Commission would have established the existence of State aid in the terms of Article 1 of the contested decision and ordered the recovery of the aid in the terms of Article 3(2) of the decision.

212 Since all the applicants' pleas have been unsuccessful, the action must be dismissed.

Costs

213 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.

214 Since the applicants have been unsuccessful, they must be ordered to pay, in addition to their own costs, the costs incurred by the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) to pay the costs.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 1 July 2010.

[Signatures]