JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

20 September 2011 *

In Cases T-394/08, T-408/08, T-453/08 and T-454/08,

Regione autonoma della Sardegna (Italy), represented by A. Fantozzi, P. Carrozza and G. Mameli, lawyers,

applicant in Case T-394/08,

supported by

Selene di Alessandra Cannas Sas, established in Cagliari (Italy),

HGA Srl, established in Golfo Aranci (Italy),

Gimar Srl, established in Sassari (Italy),

Coghene Costruzioni Srl, established in Alghero (Italy),

* Language of the case: Italian.

Camping Pini e Mare di Cogoni Franco & C. Sas, established in Quartu Sant'Elena (Italy),

Immobiliare 92 Srl, established in Arzachena (Italy),

Gardena Srl, established in Santa Teresa di Gallura (Italy),

Hotel Stella 2000 Srl, established in Olbia (Italy),

Vadis Srl, established in Valledoria (Italy),

Macpep Srl, established in Sorso (Italy),

San Marco Srl, established in Alghero,

Due Lune SpA, established in Milan (Italy),

Nicos Residence Srl, established in Santa Teresa di Gallura,

Rosa Murgese, residing in Iglesias (Italy),

Mavi Srl, established in Arzachena,

Hotel Mistral di Bruno Madeddu & C. Sas, established in Alghero,

L'Esagono di Mario Azara & C. Snc, established in San Teodoro (Italy),

Le Buganville di Cogoni Giuseppe & C. Snc, established in Villasimius (Italy),

Le Dune di Stefanelli Vincenzo & C. Snc, established in Arbus (Italy),

represented by G. Dore, F. Ciulli and A. Vinci, lawyers,

interveners in Case T-394/08,

SF Turistico Immobiliare Srl, established in Orosei (Italy), represented by L. Marcialis, lawyer,

applicant in Case T-408/08,

Timsas Srl, established in Arezzo (Italy), represented by D. Dodaro, S. Pinna and S. Cianciullo, lawyers,

applicant in Case T-453/08,

Grand Hotel Abi d'Oru SpA, established in Olbia, represented by D. Dodaro, S. Cianciullo and R. Masuri, lawyers,

applicant in Case T-454/08,

v

European Commission, represented, in Cases T-394/08 and T-454/08, by E. Righini, D. Grespan and C. Urraca Caviedes, in Case T-408/08, by E. Righini and D. Grespan, and in Case T-453/08, by D. Grespan and C. Urraca Caviedes, acting as Agents,

defendant in Cases T-394/08, T-408/08, T-453/08 and T-454/08,

APPLICATION for annulment of Commission Decision 2008/854/EC of 2 July 2008 on a State aid scheme (C 1/04 (ex NN 158/03 and CP 15/2003)): Misuse of aid measure

N 272/98, Regional Act No 9 of 1998 (OJ 2008 L 302, p. 9), by which the Regione autonoma della Sardegna awarded grants in favour of initial investments in the hotel industry in Sardinia,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 February 2011,

gives the following

Judgment

Background to the dispute

1 On 11 March 1998, the Regione autonoma della Sardegna ('Region of Sardinia') adopted legge regionale n° 9, incentivi per la riqualificazione e l'adeguamento delle strutture alberghiere e norme modificative e integrative della legge regionale 14 settembre 1993, n. 40 (interventi creditizi a favore dell'industria alberghiera) (Regional Act No 9 on measures to encourage the renovation and adaptation of the hotel structures and

provisions amending and supplementing Regional Law No 40 of 14 September 1993, *Bollettino ufficiale della Regione Autonoma della Sardegna* No 9 of 21 March 1998, 'Act No 9/1998'), which came into force on 5 April 1998.

2 Article 2 of that law introduced, for the benefit of undertakings in the hotel sector, initial investment aid in the form of grants and subsidised loans, as well as operating aid under the *de minimis* rule (the 'initial aid scheme' or the 'initial scheme').

3 By letter of 6 May 1998, the Italian authorities notified Act No 9/1998 to the Commission and undertook not to apply the initial aid scheme until its approval by the Commission.

4 By letter of 22 June 1998, in response to a request for additional information made by the Commission, the Italian authorities informed the Commission that the implementing provisions for the initial aid scheme would be adopted only once the Commission's approval of that scheme had been obtained.

5 By letter of 28 September 1998, the Italian authorities also informed the Commission that the aid provided for in Act No 9/1998 could be granted only to projects to be conducted 'subsequently' and that that condition would be confirmed in the implementing provisions for that law.

6 By decision SG(98) D/9547 of 12 November 1998, the Commission approved the aid scheme 'N 272/98 — Italy — aid in favour of the hotel industry' introduced by Act No 9/1998 (the 'approval decision'). In that decision, the Commission found the

initial aid scheme to be compatible with the common market in accordance with Article 92(3)(a) EC [now Article 87(3)(a) EC].

7 On 29 April 1999, the Assessore del Turismo, Artigianato e Commercio (Advisor on Tourism, the Craft Industry and Trade) of the Region of Sardinia adopted decreto nº 285, esecutività della deliberazione della giunta regionale n. 58/60 del 22.12.1998 come modificata dalla deliberazione nº 16/20 del 16.03.1999 che approva la direttiva di attuazione prevista dall'art. 2 della LR 11 marzo 1998 n. 9 disciplinante: incentivi per la riqualificazione delle strutture alberghiere e norme modificativi della LR 14.9.1993 n. 40 (Decree No 285 implementing Act No 9/1998, *Bollettino ufficiale della Regione Autonoma della Sardegna* No 15 of 8 May 1999, 'Decree No 285/1999').

8 Pursuant to Article 2 of Decree No 285/1999, the initial aid scheme was to be applied in the context of an invitation to submit applications. Articles 4 and 5 of that same decree provided, respectively, that the aid granted was to relate to projects to be conducted after the submission of applications for aid and that the eligible expenditure had to postdate those applications. However, Article 17 of Decree No 285/1999, entitled 'Transitional provision', provided that, when the decree was first applied, expenditure and interventions made or incurred after 5 April 1998, the date on which Act No 9/1998 came into force, were eligible.

9 On 27 July 2000, the Region of Sardinia adopted deliberazione nº 33/3 (Resolution No 33/3), which repealed Decree No 285/1999 by reason of the errors of form vitiating it, and deliberazione nº 33/4 (Resolution No 33/4), which established new implementing provisions for the initial aid scheme.

10 On the same day, the Region of Sardinia also adopted deliberazione nº 33/6 (Resolution No 33/6), which provided that, since the publication of Decree No 285/1999, which contained provisions incompatible with Community rules, could have given rise to the expectation amongst potential beneficiaries of aid that all the work carried out after 5 April 1998 was deemed to be eligible, account had to be taken — when Act No 9/1998 was first applied — of the work carried out after that date, provided that that work formed the subject-matter of an application for aid in the context of the first annual invitation to submit applications.

11 By letter of 2 November 2000, in response to a request made by the Commission concerning the appropriate measures laid down in order to ensure from 1 January 2000 onwards the compatibility of the existing aid schemes with the Guidelines on national regional aid of 10 March 1998 (OJ 1998 C 74, p. 9, the '1998 Guidelines'), the Italian authorities informed the Commission of the implementing provisions for Act No 9/1998 by sending to it a copy of Resolution No 33/4, without however mentioning Resolution No 33/6.

12 On 29 December 2000, the Region of Sardinia published the first invitation to submit applications implementing the initial aid scheme.

13 By letter of 28 February 2001, the Commission asked the Italian authorities for additional information on the application of Act No 9/1998, as well as on the mechanism for the invitations and as to how, in the context of that mechanism, compliance with the provision requiring that the application be submitted before work started on the project had been ensured.

14 By letter of 25 April 2001, to which Resolution No 33/4 was again attached, the Italian authorities confirmed that the aid scheme, as it was applied, was consistent with the 1998 Guidelines.

15 On 21 February 2003, the Commission received a complaint alleging a misuse of the initial aid scheme. Following that complaint, on 26 February 2003 the Commission requested additional information from the Italian authorities.

16 By letter of 22 April 2003, the Italian authorities replied to the Commission's request for additional information and mentioned Resolution No 33/6 for the first time.

17 By decision of 3 February 2004, the Commission initiated the procedure under Article 88(2) EC in relation to the misuse [of the initial aid scheme] (OJ 2004 C 79, p. 4, the 'decision to initiate the procedure'). In that decision, the Commission stated that, by awarding aid to investment projects started before the date of application for the aid, the Italian authorities had not complied with the obligation contained in the approval decision, nor with the requisites set out in the 1998 Guidelines. As a result, the Commission concluded that the initial aid scheme could have been misused within the meaning of Article 16 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) and expressed doubts as to the compatibility of the aid awarded to investment projects started before the date of application for the aid.

18 On 19 April 2004, the Italian authorities submitted their observations to the Commission. On 30 April 2004, the Commission received the observations of the applicant in Case T-454/08, *Grand Hotel Abi d'Oru SpA*. It received supplementary information from the Italian authorities on 25 June 2005.

19 On 22 November 2006, the Commission adopted a decision to correct and extend the scope of the pending procedure C 1/2004 pursuant to Article 88(2) EC (OJ 2007 C 32, p. 2, the 'correction decision'). In that decision, under the heading 'Reasons for correcting and extending the procedure', the Commission stated inter alia that

Resolution No 33/6 was not mentioned in the decision to initiate the procedure, even though it was on the basis of that instrument that, in 28 cases, aid was awarded to investment projects started before the date of application for the aid, and not on the basis of Resolution No 33/4, as erroneously indicated in the decision to initiate the procedure. In addition, the Commission pointed out that the concept of the misuse of aid within the meaning of Article 16 of Regulation No 659/1999, to which the decision to initiate the procedure makes reference, covered situations where the beneficiary of approved aid applies the aid contrary to the conditions laid down in the award decision and not situations where a Member State, by altering an existing aid scheme, introduces new unlawful aid [Article 1(c) and (f) of Regulation No 659/1999].

Contested decision

20 On 2 July 2008, the Commission adopted Decision 2008/854/EC on a State aid scheme (C 1/04 (ex NN 158/03 and CP 15/2003)): Misuse of aid measure N 272/98, Regional Act No 9 of 1998 (OJ 2008 L 302, p. 9, the 'contested decision').

21 In that decision, the Commission observed inter alia that Resolution No 33/6 made amendments to the notified measure which were not compatible with the terms of the approval decision. Resolution No 33/6 was not notified to the Commission, in breach of Article 88(3) EC and of the Italian Republic's duty of cooperation under Article 10 EC. Consequently, in the view of the Commission, the aid scheme as it was in fact applied is in contravention of the approval decision and the aid projects on which work started before any application for aid was made must therefore be considered unlawful.

22 With regard to the compatibility of the aid in question with the common market, the Commission, having pointed to the assessment it made in the decision to initiate the procedure and in the correction decision, regards as incompatible the individual amounts of aid granted to projects whose eligible costs were incurred before the submission of an application for aid, on the basis of the implementing measures in force at the time the application was submitted, which exceed the amount of *de minimis* aid for which the recipient may have been eligible at the relevant time, calculated in accordance with Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 [EC] and 88 [EC] to *de minimis* aid (OJ 2001 L 10, p. 30).

23 The operative part of the contested decision reads as follows:

'*Article 1*

The State aid granted in accordance with Regional Act No 9 of 1998, unlawfully put into effect by [the Italian Republic] in Resolution (*deliberazione*) No 33/6 and in the first call for applications, is incompatible with the common market unless the recipient of the aid submitted an application for aid under the scheme before starting work on an initial investment project.

Article 2

1. The Italian Republic shall recover the incompatible aid granted under the scheme referred to in Article 1 from the recipients.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the recipients until their actual recovery.

3. …

4. The Italian Republic shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. The Italian Republic shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

This Decision is addressed to the Italian Republic.'

Procedure

24 By application lodged at the Registry of the Court on 16 September 2008, the Region of Sardinia brought the action in Case T-394/08.

25 By application lodged at the Registry of the Court on 25 September 2008, SF Turistico Immobiliare Srl brought the action in Case T-408/08.

26 By application lodged at the Registry of the Court on 3 October 2008, Timsas Srl brought the action in Case T-453/08.

27 By application lodged at the Registry of the Court on 6 October 2008, Grand Hotel Abi d'Oru SpA brought the action in Case T-454/08.

28 By document lodged at the Registry of the Court on 19 December 2008, Selene di Alessandra Cannas Sas, HGA Srl, Gimar Srl, Coghene Costruzioni Srl, Camping Pini e Mare di Cogoni Franco & C. Sas, Immobiliare 92 Srl, Gardena Srl, Hotel Stella 2000 Srl, Vadis Srl, Macpep Srl, San Marco Srl, Due Lune SpA, Nicos Residence Srl, Rosa Murgese, Mavi Srl, Hotel Mistral di Bruno Madeddu & C. Sas, L'Esagono di Mario Azara & C. Snc, Le Buganville di Cogoni Giuseppe & C. Snc and Le Dune di Stefanelli Vincenzo & C. Snc ('the interveners') sought leave to intervene in the proceedings relating to Case T-394/08 in support of the forms of order sought by the Region of Sardinia. By order of 15 June 2009, the President of the Second Chamber of the Court granted that request.

29 By order of 25 June 2009, after hearing the parties, the President of the Second Chamber of the Court joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure of the General Court.

30 On 27 July 2009, the interveners submitted their statement in intervention in Case T-394/08. On 21 September 2009, the Commission submitted its observations on that statement. The Region of Sardinia did not submit any observations within the time-limit specified by the Registry of the Court.

31 As the composition of the Chambers of the Court had been altered, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present cases were therefore assigned.

32 On 7 December 2010, in the context of a measure of organisation of procedure, the Court put written questions to the Commission and to Grand Hotel Abi d'Oru, the applicant in Case T-454/08, to which they replied within the time-limit set.

Forms of order sought by the parties

33 In Case T-394/08, the Region of Sardinia, supported by the interveners, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

34 In Case T-408/08, SF Turistico Immobiliare claims that the Court should:

— primarily,

— annul the contested decision;

— order the Commission to pay the costs;

— in the alternative, annul the contested decision in part, in so far as it declares the aid scheme in its entirety to be incompatible with the common market and orders the recovery of the amounts falling within the limits provided for in the provisions relating to *de minimis* aid;

— in the further alternative,

— first, annul point 4.2 of the 1998 Guidelines in so far as it precludes the eligibility of all the aid granted to the recipients, without excluding the part of the aid which relates to the investments made after the application was submitted and is functionally or structurally independent and,

— second, annul the contested decision in part in so far as it orders the recovery, by the Italian Republic, of the sums paid, without excluding the aid which relates to the costs borne by the recipient after the application was submitted and concerns functionally or structurally independent parts of the project undertaken.

35 In Case T-453/08, Timsas claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

36 In Case T-454/08, Grand Hotel Abi d'Oru claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs;

— order the interveners to bear their own costs as well as those which their intervention caused it to incur.

Law

38 After hearing the parties on this point, the Court considers it appropriate to join the present cases for the purposes of the judgment, in accordance with Article 50 of its Rules of Procedure.

1. *Admissibility of certain pleas in law put forward by the interveners in Case T-394/08*

39 The Commission states that the interveners have put forward certain pleas in law which were not put forward by the Region of Sardinia, the applicant in Case T-394/08, and which therefore fall outside the scope of the dispute in that case, as defined by the pleas in law advanced by the Region of Sardinia in the application.

40 In the view of the Commission, the following pleas in law are affected:

— the plea in law alleging that the Commission initiated the formal investigation procedure on the basis of the incorrect assumption that an earlier conditional decision had been infringed;

— the plea in law alleging infringement of Article 9 of Regulation No 659/1999 because the Commission should have revoked the approval decision before adopting the contested decision;

— the plea in law alleging infringement of Article 16 of Regulation No 659/1999, which does not provide for the correction or extension of a procedure which has already been initiated;

— the plea in law alleging infringement of Article 87(3)(a) and (c) EC because the Commission wrongly held the aid in question to be incompatible with the common market, and a failure to state reasons in the contested decision in that regard on account of a contradiction in comparison with earlier decisions;

— the plea in law alleging infringement of certain provisions of Regulation No 659/1999 on procedural time-limits, and of the principle of the reasonable duration of the procedure;

— the plea in law alleging infringement of the principles of impartiality and of the protection of competition;

— the plea in law alleging infringement of the *de minimis* rule because the Commission failed to deduct the amount of EUR 100 000 or EUR 200 000 from the aid which it ordered to be recovered.

41 The fourth paragraph of Article 40 of the Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. Article 116(4) of the Rules of Procedure provides that the statement in intervention is to contain, in particular, a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, as well as the pleas in law and arguments relied on by the intervener.

42 Those provisions give the intervener the right to set out arguments as well as pleas independently, in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, which would result in a change in the subject-matter of the dispute (see Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 152, and the case-law cited).

43 It is thus for the Court, when determining the admissibility of the pleas put forward by an intervener, to determine whether they are connected with the subject-matter of the dispute, as defined by the main parties.

44 However, where it appears that an action, the admissibility of which is in question, must in any event be dismissed on the merits, it is open to the Court to rule on the merits at the outset for the purposes of procedural economy (see, to that effect, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52, and Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26). Similarly, where it appears that a plea of dubious connection to the subject-matter of the dispute is in any event to be dismissed as inadmissible for another reason or because it is unfounded, it is open to the Court to dismiss that plea without ruling on the issue whether the intervener went beyond the parameters of its role in support of the form of order sought by one of the main parties (Case C-118/99 *France* v *Commission* [2002] ECR I-747, paragraphs 64 and 65, and *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 42 above, paragraph 155).

45 In the present case, it must be pointed out, first, that the majority of the pleas in law put forward by the interveners which were not also advanced by the Region of Sardinia were put forward by one or other of the applicants in Cases T-408/08, T-453/08 and T-454/08. Second, those pleas in law are in any event unfounded for the reasons which will be set out below.

46 In view of these circumstances, and for the purpose of procedural economy, it is not necessary to examine the plea of inadmissibility raised by the Commission.

2. *Admissibility of certain complaints raised at the reply stage*

47 The Commission claims that the applicants introduced new pleas in law for the first time at the reply stage and that those pleas in law should therefore be rejected as inadmissible.

Case T-394/08

48 In Case T-394/08, the Commission regards as new, first, the plea in law alleging a manifest error in the assessment of the incentive effect of the aid, second, the plea in law alleging infringement of the Commission's obligation to conduct an investigation and, third, the plea in law alleging that the infringement of the principle of the necessity of the aid by the scheme in question is merely apparent.

49 With regard to the first and third pleas in law contested by the Commission, it appears that the developments which the Commission regards as new pleas in law are in fact intended simply to develop complaints already introduced as part of the first plea in law in the application.

50 It is true that that first plea in law put forward by the Region of Sardinia is entitled 'Infringement of essential formal requirements by virtue of a contradiction in the reasons stated: alleged lack of relevance of the expectation on the part of the recipients in the assessment of the "incentive effect" and therefore in the assessment of the condition of the "necessity of the aid"'. This heading seems to restrict the scope of the plea in law to an infringement of the obligation to state reasons. However, the text which follows that title also contains passages which are clearly concerned with an error in the assessment of the incentive effect of the aid, for example the fourth indent of paragraph 17, and paragraphs 18, 20 and 23 of the application. In addition, the criterion of the incentive effect of aid is used by the Region of Sardinia as a synonym for the criterion of necessity, under which the grant of the aid must be the reason for the recipient's implementation of a particular project that would otherwise not be carried out. Accordingly, the first plea in law put forward by the Region of Sardinia in fact contains two pleas in law: the first alleging an error in the assessment of the incentive effect of the aid and the second alleging a failure to state reasons in that regard.

51 With regard to the second plea in law that it contests, the Commission alleges that, in the reply, on the pretext of lending support to its line of argument concerning the alleged infringement of the obligation to state reasons in relation to the assessment of the incentive effect, the Region of Sardinia complains that the Commission did not conduct an adequate investigation for the purposes of the contested decision.

52 It appears from the passages in question in the reply that the Region of Sardinia, which by no means intended to introduce a new plea in law alleging a failure to conduct an investigation, simply sought to substantiate its first plea in law alleging — as pointed out in paragraph 50 above — both an error in the assessment of the incentive effect of the aid and a failure to state reasons in that regard.

53 The Region of Sardinia did not therefore put forward new pleas in law at the reply stage, with the result that the plea of inadmissibility raised by the Commission must be rejected.

Case T-408/08

54 In Case T-408/08, the Commission regards as new the plea in law alleging a failure to state reasons with regard to the impact of the scheme in question on trade between Member States.

55 This plea of inadmissibility raised by the Commission stems from a misunderstanding of the written submissions of SF Turistico Immobiliare, which are indeed confusing. The applicant had in fact already referred in the application to the 'alteration of trading conditions to a degree which is contrary to the common interest' in the context of its ninth plea in law, alleging infringement of Article 87(3)(c) EC and of the 1998 Guidelines. Nevertheless, in so doing, it intended merely to substantiate that plea in law alleging infringement of the provisions governing the compatibility of aid, and not to put forward a separate plea in law alleging infringement of Article 87(1) EC by virtue of the fact that the Commission wrongly found that State aid existed.

56 Accordingly, the reference made by SF Turistico Immobiliare, in the reply, to the effect that it 'also pointed out [in the application] the substantive lack of a sufficient statement of grounds regarding the impact of the aid on trade between Member States' must be understood in the same vein, namely that it was meant to substantiate the plea in law alleging infringement of the provisions governing the compatibility of aid.

57 It follows that SF Turistico Immobiliare did not put forward a new plea in law at the reply stage, and therefore the plea of inadmissibility raised by the Commission must be rejected.

Case T-453/08

58 In this case, the Commission regards as new the plea in law alleging infringement of Article 253 EC in relation to the application of the *de minimis* rule.

59 It claims in this connection that the plea in law put forward in the application concerns the proper application of the *de minimis* threshold and not the provision of an adequate statement of reasons for its application.

60 That claim is incorrect in the light of the wording of the paragraphs of the application in question, in which reference is made to the 'failure to state reasons with regard to the existence of the incentive element of the aid in relation to the fact that the part of the grant connected to the expenditure made prior to the application is an amount falling below the *de minimis* threshold' and a 'contradiction" between the contested decision and the statements made by the Commission regarding the *de minimis* ceiling in its other contacts with the Region of Sardinia.

61 The view must therefore be taken that the plea in law alleging a failure to state reasons with regard to the application of the *de minimis* rule had already been put forward by Timsas in the application, so that the plea of inadmissibility raised by the Commission must be rejected.

Case T-454/08

62 In this case, the Commission regards as new the plea in law alleging infringement of the rights of the defence, allegedly put forward by Grand Hotel Abi d'Oru at the reply stage.

63 It submits in that regard that, in the application, and in connection with the fact that the Commission did not notify it of certain documents, Grand Hotel Abi d'Oru was clearly claiming merely the infringement of Article 254 EC and of Article 20(1) of Regulation No 659/1999.

64 In response to a written question put by the Court, Grand Hotel Abi d'Oru stated that it had not intended, by the passage in the reply referred to by the Commission, to put forward a new plea in law alleging infringement of the rights of the defence, that passage being intended merely to substantiate the plea in law advanced in the application alleging infringement of Article 254 EC and of Article 20(1) of Regulation No 659/1999. Consequently, there is no need to reject as inadmissible a plea in law raised by Grand Hotel Abi d'Oru.

3. *Admissibility of the pleas in law alleging that the correction decision was unlawful*

65 The interveners and SF Turistico Immobiliare have pleaded the unlawful nature of the correction decision in order to claim that the contested decision is unlawful.

66 Despite not formally raising an objection of inadmissibility in this regard, the Commission takes the view that the pleas in law in question are inadmissible because the correction decision has become final. Indeed, it was published in the *Official Journal of the European Union* on 14 February 2007 and was not challenged within the time-limits under the fifth paragraph of Article 230 EC.

67 SF Turistico Immobiliare argues that the correction decision did not adversely affect it since the only specific harm to its interests stemmed from the contested decision. It is therefore solely in connection with that decision that it has an interest in bringing proceedings.

68 In this regard, it is necessary first of all to establish the legal nature of the correction decision, in order subsequently to determine, where appropriate, whether the applicants are prevented from claiming the illegality of that decision in the context of an action for annulment brought against the contested decision because they failed to bring legal proceedings to challenge the correction decision within the time-limit laid down in the fifth paragraph of Article 230 EC.

The legal nature of the correction decision

69 The texts governing the procedure applicable to State aid make no express provision for a decision to correct and extend a pending procedure.

70 In this regard, it follows from recital 8 in the preamble to Regulation No 659/1999 and from Article 6(1) of the same regulation that the decision to initiate the formal investigation procedure must summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the proposed measure and set out the doubts as to its compatibility with the common market, so as to allow the Member State concerned and other interested parties to submit their observations properly and, in doing so, to provide the Commission with all the information it needs to assess the compatibility of the aid with the common market. The formal investigation procedure permits a more in-depth examination and clarification of the questions raised in the decision to initiate the procedure. It follows from Article 7 of Regulation No 659/1999 that, at the end of that procedure, the Commission's analysis may

have changed, as it may ultimately decide that the measure does not constitute aid or that the doubts as to the compatibility of the measure have been removed. Consequently, the final decision may differ somewhat from the decision to initiate the procedure, without, however, those differences affecting the legality of the final decision (judgment of 4 March 2009 in Case T-424/05 *Italy* v *Commission*, not published in the ECR, paragraph 69). Viewed from this perspective, there would therefore be no need for the Commission to correct a decision to initiate the formal investigation procedure.

71 Nevertheless, it is logical and, moreover, it is in the interest of the potential recipients under an aid scheme that, if the Commission realises, once a decision to initiate the formal investigation procedure has been adopted, that that decision is based either on incomplete facts or on an incorrect legal classification of those facts, it must be able to alter its position by adopting a correction decision. Indeed, such a correction decision, together with a new invitation to the interested parties to submit their observations, allows those parties to respond to the change in the Commission's provisional assessment of the measure at issue and to put forward their point of view in that regard.

72 It must further be pointed out that the Commission could also have chosen to adopt, first of all, a decision concluding the procedure and, thereafter, a new decision to initiate the formal investigation procedure based on its revised legal assessment, the content of which would have been essentially the same as the content of the correction decision. In such circumstances, considerations relating to procedural economy and the principle of sound administration point to it being preferable to adopt a correction decision rather than to conclude the procedure and initiate a new procedure. It should be borne in mind in this context that correcting the subject-matter of the procedure enabled the Commission to take into account, for the purposes of the contested decision, the observations submitted by Grand Hotel Abi d'Oru following the decision to initiate the procedure, which it would not have been able to do if it had concluded the formal investigation procedure in order to initiate a new procedure.

73 With regard to the legal classification of such a correction decision, since — when it is combined with the decision to initiate the procedure — the two decisions together form an amended decision to initiate the procedure, the correction decision must be deemed to share the same legal status as that amended decision. In this regard, it must be borne in mind that the sole aim of the communication regarding the initiation of the formal investigation procedure is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

74 In the present case, the Commission set out, in the correction decision, the reasons why it took the view that the legal assessment of the aid scheme in question, contained in the decision to initiate the procedure, had to be corrected. It explained in particular that, in its view, this was a case of an unlawful scheme and not one of the abusive application of a scheme it had approved. The Commission included with those explanations a new invitation to the parties concerned to submit their observations. It follows that the correction decision had the same subject-matter and the same objective as a decision to initiate the procedure, and should therefore be regarded as such.

The consequences, in the present case, for the admissibility of the pleas in law alleging the illegality of the correction decision

75 First, it must be observed that the Court has consistently held that measures or decisions against which proceedings for annulment, as provided for in Article 230 EC, may be brought are measures producing legal effects which are binding on and capable of affecting the interests of the applicant by having a significant effect on his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Joined

Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

76 In the case of acts or decisions drawn up in several stages, in particular following an internal procedure, in principle only measures definitively laying down the position of the institution upon the conclusion of that procedure may be contested, and not provisional measures intended to pave the way for the final decision (*IBM* v *Commission*, cited in paragraph 75 above, paragraph 10, and *Cimenteries CBR* v *Commission*, cited in paragraph 75 above, paragraph 28).

77 In accordance with that case-law, the final decision adopted by the Commission in order to conclude the formal investigation procedure provided for in Article 88(2) EC constitutes a measure which may be contested on the basis of Article 230 EC. Such a decision produces effects which are binding on and capable of affecting the interests of the parties concerned, since it concludes the procedure in question and definitively decides whether the measure under review is compatible with the rules applying to State aid. Accordingly, interested parties are always able to contest the final decision which concludes the formal investigation procedure and must, in that context, be able to challenge the various elements which form the basis for the position definitively adopted by the Commission (Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 45). That right is independent of whether the decision to initiate the formal investigation procedure gives rise to legal effects which may be the subject-matter of an action for annulment. It is true that in the case-law of the Court of Justice and the General Court it is accepted that an action may be brought against the initiation decision when it gives rise to definitive legal effects which cannot subsequently be regularised by the final decision. Such is the case when, as in the present case, the Commission initiates the formal investigation procedure in respect of a measure which it provisionally classifies as new aid, since that decision to initiate the procedure entails legal effects independent of the final decision. Suspension of the implementation of the measure concerned, which under Article 88(3) EC results from the provisional classification of that measure as new aid, is independent of the final decision, limited in time until the conclusion of the formal procedure (Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 12 to 24; Case

C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraphs 29 and 30; Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraphs 56 to 62 and 69; and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 80 to 86).

78 Nevertheless, the right to challenge a decision to initiate the procedure may not diminish the procedural rights of interested parties by preventing them from challenging the final decision and relying in support of their action on defects at any stage of the procedure leading to that decision (*Regione Siciliana* v *Commission*, cited in paragraph 77 above, paragraph 47).

79 It follows from the foregoing that the fact that the applicants and the interveners did not bring an action against the correction decision within the specified time-limit does not prevent them from putting forward pleas in law alleging the illegality of that decision in order to oppose the contested decision, with the result that the plea of inadmissibility raised by the Commission must be rejected.

4. *The pleas in law alleging procedural errors*

80 The applicants and the interveners put forward three pleas in law relating to procedural errors alleging, first, infringement of Article 88(2) EC and of Regulation No 659/1999, second, infringement of Article 254(3) EC and of Article 20(1) of Regulation No 659/1999 and, third, the inadequacy of the reasons stated in the contested decision.

The plea alleging infringement of Article 88(2) EC and of Regulation No 659/1999

81 This plea in law can be subdivided into three complaints, alleging, respectively, infringement of Article 9 of Regulation No 659/1999, a failure to conduct a proper investigation and non-compliance with the time-limits laid down in Regulation No 659/1999.

The complaint alleging infringement of Article 9 of Regulation No 659/1999

82 The interveners submit that, since the aid declared incompatible by the contested decision had previously been approved by the Commission, the Commission should have revoked the approval decision as it was required to do under Article 9 of Regulation No 659/1999.

83 The Commission has not made any specific comments about the substance of this complaint.

84 Pursuant to Article 9 of Regulation No 659/1999, the Commission may inter alia revoke a decision by which it authorised aid after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision.

85 However, it must be observed that the approval decision is not based on incorrect information. In this connection, it is clear from recitals 51, 54, 59, 61 and 72 in the preamble to the contested decision that the Commission does not criticise the Italian

authorities for communicating to it incorrect or incomplete information in the course of the procedure leading up to the approval decision. Indeed, it attributes the incompatibility with the common market of the aid in question in the present case to the fact that Resolution No 33/6 introduced changes to the measure initially notified which were incompatible with the terms of the approval decision to the extent that, in the course of the initial invitation to submit applications under the scheme in question, projects on which work had started prior to the submission of the application for aid ('the disputed aid scheme' or 'the disputed scheme') could be eligible. In addition, Resolution No 33/6 is dated 27 July 2000 and was therefore adopted after the approval decision of 12 November 1998.

86 It follows that Article 9 of Regulation No 659/1999 did not apply to the present case.

87 In this connection, it should be added that there was no reason for the Commission to revoke the approval decision, since its assessment regarding the compatibility of the aid scheme approved by that decision had not changed. Indeed, the Commission observed in Article 1 of the contested decision that 'the State aid granted in accordance with … Act No 9/1998, unlawfully put into effect by Italy in Resolution (*deliberazione*) No 33/6 …, is incompatible with the common market unless the recipient of the aid submitted an application for aid under the scheme before starting work …'. It therefore follows that the contested decision does not affect the compatibility of the State aid granted in accordance with Act No 9/1998 where an application for aid was made before work was started. It was subject to that very condition that the Commission declared in the approval decision that it had no objections to the aid scheme notified by Italy.

88 Accordingly, the complaint raised by the interveners alleging infringement of Article 9 of Regulation No 659/1999 must be rejected.

The complaint alleging a failure to conduct a proper investigation

89 Timsas and Grand Hotel Abi d'Oru allege that the Commission failed to conduct a proper investigation because it did not take account of their specific situation. In particular, the Commission failed to examine their position as private parties as compared with the Region of Sardinia and the differences existing between the various undertakings concerned by the implementation of the aid scheme at issue. In addition, the Commission failed to give consideration to the legitimate expectation raised on their part by both the Region of Sardinia and the Commission.

90 The Commission disputes the arguments advanced by Timsas and Grand Hotel Abi d'Oru.

91 It is settled case-law that, in the case of an aid scheme, the Commission is, in principle, not required to conduct an analysis of the aid granted in individual cases but may confine itself to examining the characteristics of the scheme in question (see, to that effect, Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18; Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 89; and Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24). Furthermore, the specific circumstances of the individual recipients of an aid scheme can be assessed only at the stage of recovery of the aid by the Member State concerned (*Italy* v *Commission*, cited above, paragraph 91, and Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 67). Indeed, if the situation were otherwise, the burden of proof on the Commission would be greater in the case of a scheme put into effect unlawfully, in breach of Article 88(3) EC, than in a case where the Member State in question had complied with the notification requirement laid down in that provision, since in the latter case the specific circumstances of the potential recipients are by definition unknown at the examination stage.

92 Accordingly, in the present case, the Commission was entitled to confine itself to examining the aid scheme as such and was not required to take into account the relationships between the applicants and the Region of Sardinia, the differences existing between the various undertakings concerned, or any legitimate expectations which might be claimed by some of those undertakings and which were raised on their part either by the Commission or by the Region of Sardinia. Account can be taken of such circumstances only at the stage of the recovery of the individual grants of aid.

93 It follows that the complaint alleging a failure to conduct a proper investigation must be rejected.

The complaint alleging non-compliance with the time-limits laid down in Regulation No 659/1999

94 The interveners allege that the Commission failed to comply with the following time-limits laid down in Regulation No 659/1999:

— the two-month time-limit from the day following the complete notification, within which the Commission must make a decision following completion of the preliminary examination stage, in accordance with Article 4(5) of Regulation No 659/1999;

— the two-month time-limit within which the Commission should make a decision following completion of the preliminary examination stage where it has in its possession information regarding alleged unlawful aid, in accordance with Article 10(1) of Regulation No 659/1999, as interpreted by case-law;

— the 18-month time-limit from the initiation of the formal investigation procedure within which the Commission must adopt a decision to conclude that procedure, in accordance with Article 7(6) of Regulation No 659/1999.

95 The Commission has not made any specific comments about the substance of this complaint.

96 In this connection, it must be pointed out, first, that the two-month time-limit for the conclusion of the preliminary examination stage, laid down in Article 4(5) of Regulation No 659/1999, begins on the day following the receipt of a complete notification. In the present case, the preliminary examination of the disputed scheme was initiated not by a notification of that scheme by the Italian Republic but by a complaint relating to the abusive application of the initial scheme which was received by the Commission on 21 February 2003. Accordingly, the Commission was not bound by the two-month time-limit laid down by Article 4(5) of Regulation No 659/1999 (see, to that effect, even before the entry into force of Regulation No 659/1999, Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 79, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 103).

97 Second, with regard to the two-month time-limit allegedly imposed by case-law in the light of Article 10(1) of Regulation No 659/1999, it must be pointed out first of all that, in accordance with that provision, where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it is to examine that information without delay. That provision must not be understood as referring to the conclusion of the preliminary examination stage, but rather as relating to the beginning of the preliminary examination; this argument is supported by the fact, highlighted in the previous paragraph, that the Commission is not bound by the ordinary time-limit in the case of a preliminary examination initiated by a complaint.

98 The case-law relied upon by the interveners does not provide an interpretation of those provisions which differs from that set out above. Indeed, although it is true that

that case-law points to the fact that the Commission must conclude the preliminary examination stage within a period of two months, that time-limit nevertheless applies exclusively in the case of aid notified by the Member States, as is clear from the context of the paragraphs cited by the interveners, and not in cases where, as here, the preliminary examination stage was initiated by a complaint.

99 It is true that the above cannot mean that the Commission is entitled to prolong the preliminary examination stage at its discretion. For example, it has been held that, since it has exclusive jurisdiction to assess the compatibility of State aid with the common market, the Commission must, in the interests of sound administration and the fundamental rules of the Treaty relating to State aid, conduct a diligent and impartial examination of a complaint alleging aid to be incompatible with the common market (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62, and *Gestevisión Telecinco* v *Commission*, cited in paragraph 96 above, paragraph 72), and that it cannot therefore prolong indefinitely its preliminary investigation into State measures in relation to which there has been a complaint concerning State aid (*Gestevisión Telecinco* v *Commission*, cited in paragraph 96 above, paragraph 74). In accordance with settled case-law, whether or not the duration of an administrative procedure is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission, the complexity of the case and its importance for the various parties involved (Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 45; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57; and *Gestevisión Telecinco* v *Commission*, cited in paragraph 96 above, paragraph 75).

100 In the present case, a period of just over 11 months elapsed between the receipt of the complaint by the Commission on 21 February 2003 and the adoption of the decision to initiate the procedure on 3 February 2004. In view inter alia of the fact that the Commission had to request addition information from the Region of Sardinia, through the intermediary of the Italian Republic, such a period of time cannot be regarded as excessive.

101 Third, in accordance with Article 13(2) and Article 16 of Regulation No 659/1999, in cases where aid is presumed to be unlawful and in cases where aid is presumed to have been misused, the Commission is not bound inter alia by the time-limit laid down in Article 7(6) of Regulation No 659/1999. Furthermore, in the present case, the formal investigation procedure initiated by the Commission was at first concerned with aid presumed to have been misused and then, following the correction decision, with aid presumed to be unlawful.

102 It follows that the complaint alleging non-compliance with the time-limits laid down in Regulation No 659/1999 must be rejected.

The plea in law alleging infringement of Article 254(3) EC and of Article 20(1) of Regulation No 659/1999

103 Grand Hotel Abi d'Oru claims that the Commission infringed the notification requirement laid down in Article 254(3) EC and in Article 20(1) of Regulation No 659/1999 by failing to communicate to it both the request for additional information, addressed by the Commission to the Italian Republic on 26 February 2003 (see paragraph 15 above), and the correction decision, even though it had submitted observations concerning the disputed aid scheme in response to the invitation contained in the decision to initiate the procedure.

104 The Commission contests the arguments advanced by Grand Hotel Abi d'Oru.

105 In the first place, pursuant to Article 254(3) EC, decisions are to be notified to those to whom they are addressed and are to take effect upon such notification.

106 With regard, first, to the correction decision, the Court has consistently held that decisions adopted by the Commission in relation to State aid are always addressed

to the Member States concerned (*Commission* v *Sytraval and Brink's France*, cited in paragraph 99 above, paragraph 45; Case T-82/96 *ARAP and Others* v *Commission* [1999] ECR II-1889, paragraph 28; and *SIC* v *Commission*, cited in paragraph 96 above, paragraph 45). This case-law, which pre-dates Regulation No 659/1999, was expressly confirmed by Article 25 of that regulation, which provides that decisions taken pursuant to Chapters II, III, IV, V and VII of the regulation are to be addressed to the Member State concerned, and notified to them by the Commission without delay. It must be borne in mind in this connection that, as held in paragraphs 69 to 74 above, the correction decision must be assigned the legal status of a decision to initiate the formal investigation procedure.

107 It follows that the correction decision was addressed exclusively to the Italian Republic and not to the recipients under the disputed scheme. Consequently, Article 254(3) EC did not require the Commission to notify the correction decision to Grand Hotel Abi d'Oru.

108 With regard, secondly, to the request for additional information, such a request is not a decision within the meaning of the fourth paragraph of Article 249 EC, such that Article 254(3) EC does not apply to it.

109 The complaint alleging infringement of that provision must therefore be rejected.

110 In the second place, in accordance with Article 20(1) of Regulation No 659/1999, any interested party which has submitted comments following a Commission decision to initiate the formal investigation procedure is to be sent a copy of the decision taken by the Commission pursuant to Article 7 of the Regulation.

111 Neither the correction decision nor the request for additional information may be regarded as a 'decision taken pursuant to Article 7' of Regulation No 659/1999. As is clear both from the title of the provision and from its content, that article in fact covers only the Commission decisions concluding the formal investigation procedure. In

addition, first, as explained in paragraphs 73 and 74 above, the correction decision must be classified not as a decision concluding the formal investigation procedure but, on the contrary, as a decision to initiate that procedure. Second, with regard to the request for additional information, as pointed out in paragraph 108 above, such a request is not an act capable of being classified as a decision, with the result that it is likewise not covered by Article 20(1) of Regulation No 659/1999.

112 The complaint alleging infringement of that provision must therefore be rejected.

113 It follows that the complaint alleging infringement of Article 254(3) EC and of Article 20(1) of Regulation No 659/1999 must be rejected.

The plea in law alleging failures to state reasons in the contested decision

114 The applicants and the interveners raise six complaints regarding the failure to state reasons in the contested decision and in the correction decision.

The complaint alleging a failure to state reasons as regards the infringement of the principle that the duration of the procedure should be reasonable

115 SF Turistico Immobiliare claims that both the correction decision and the contested decision lack any statement of reasons in relation to the alleged infringement of the principle that the duration of the procedure should be reasonable.

116 The correction decision fails to explain the reasons which led the Commission to wait for two and a half years to correct and extend the scope of the decision to initiate the procedure, even though it had been fully aware of all the relevant factors since April 2003.

117 With regard to the contested decision, SF Turistico Immobiliare concedes that, in accordance with Article 13(2) of Regulation No 659/1999, the Commission is not to be bound, in cases of possible unlawful aid, to the time-limits set out in Articles 4(5), 7(6) and 7(7) of Regulation No 659/1999. This does not mean, however, that the principle of the reasonable duration of the procedure does not apply in such cases. Since the contested decision provides no justification for the abnormally lengthy duration of the investigation procedure of more than four years and five months, it is vitiated by an error relating to the statement of reasons.

118 The Commission disputes the arguments advanced by SF Turistico Immobiliare.

119 It must be recalled as a preliminary point that, in the context of the examination of the present complaint, the aim is not to examine whether the duration of the procedure was in fact excessive in the present case, but simply to answer the question whether the Commission's duty to state reasons applies to the duration of the procedure and, if so, whether it fulfilled that duty.

120 The first of those two questions must, however, be answered in the negative — in other words, the Commission's duty to state reasons does not apply to the duration of the procedure but simply to the actual content of the decision.

121 Indeed, it has been consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear

and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure adopted and to enable the competent court to exercise its power of 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, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom the measure is of direct and individual concern, may have in obtaining explanations (see *Commission* v *Sytraval and Brink's France*, cited in paragraph 99 above, paragraph 63 and the case-law cited, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 166, and the case-law cited).

122 The duration of a procedure is not determined by the reasoning followed by the institution in question, which may justify that duration, but is rather a purely factual circumstance which depends exclusively on the time needed by the institution to bring the procedure to its conclusion. It does not therefore form part of the content of the decision, in respect of which reasons may be stated, within the meaning of the case-law cited in the previous paragraph. As the Commission rightly points out, it requires merely — and purely as a matter of fact — that the different stages of the procedure leading up to the adoption of the decision in question be listed.

123 Consequently, the complaint alleging a failure to state reasons as regards the infringement of the principle of the reasonable duration of the procedure must be rejected.

The complaint alleging a failure to state reasons as regards the classification of the aid as new unlawful aid

124 The Region of Sardinia claims that the contested decision does not state the reasons for the classification of the aid to the projects on which work had already started before the application was made as unlawful rather than misused.

125 The Commission contests the arguments advanced by the Region of Sardinia.

126 In this connection, it is sufficient to point out that the Commission essentially set out, in recitals 48 to 55 in the preamble to the contested decision, that the aid scheme which was implemented by the adoption inter alia of Resolution No 33/6 did not comply with the terms of the approval decision, in so far as it did not guarantee the incentive effect of the aid in question, and that, therefore, the aid awarded to projects on which work started before the application for aid was submitted was to be regarded as unlawful.

127 Such a statement of reasons discloses in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review within the meaning of the case-law cited in paragraph 121 above.

128 This complaint must therefore be rejected as unfounded.

The complaint alleging a failure to state reasons as regards the incompatibility of the aid as regional development aid

129 The interveners and SF Turistico Immobiliare claim that the contested decision does not contain a statement of reasons relating to the compatibility of the aid granted under the disputed scheme ('the disputed aid'), in particular from the perspective of its contribution to regional development for the purposes of Article 87(3)(c) EC. In particular, the Commission has failed to specify the reasons why, unlike in other cases characterised by similar circumstances, it did not consider the derogations provided for in Article 87(3)(a) and (c) EC to be applicable.

130 The Commission contests the arguments advanced by the interveners and SF Turistico Immobiliare.

131 With regard, in the first place, to the admissibility of the complaint raised by SF Turistico Immobiliare, since the plea in law alleging a failure to provide a statement of reasons is a matter of public policy, it cannot be rejected as inadmissible because it must be examined by the Court of its own motion (see Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 52 and the case-law cited).

132 In the second place, the Commission's argument in which it claims that it is not required to demonstrate the incompatibility of the aid since it is for the Member State concerned to demonstrate its compatibility must be rejected. It is indeed true that, where the decision to initiate the procedure provided for in Article 88(2) EC contains an adequate preliminary analysis by the Commission setting out the reasons for its doubts regarding the compatibility of the aid in question with the common market, it is for the Member State concerned and the potential recipient to adduce evidence to show that the aid is compatible with the common market (Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 45; see also, to that effect, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraphs 93 and 94; see also, by analogy, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 170). However, this is simply a rule relating to the burden of proof and not to the duty to state reasons, meaning that it is for the Commission, where appropriate, to set out in its decision the reasons which led it to take the view that, despite the evidence adduced by the Member State or the recipients, the aid in question is not compatible with the common market.

133 In the third place, in the present case, the Commission has complied with its duty to state reasons in that regard.

134 Indeed, it essentially stated, in recitals 56 to 73 in the preamble to the contested decision, that the reason why the disputed aid was not compatible with the common market was the absence of any incentive effect of that aid on account of the fact that it had been granted to projects which had already been started before the application for aid was submitted. It pointed out in particular in this connection that the principle of the necessity of aid is a general principle, a fact confirmed by case-law, which was moreover restated both in the approval decision and in the 1998 Guidelines (see recitals 58 to 61 in the preamble to the contested decision). That finding alone constituted a sufficient statement of the reasons for the incompatibility of the aid, since it was capable of precluding the compatibility of any aid under the heading of regional development aid. It must be borne in mind in this context that the Court has previously found that, by recalling the criteria laid down in the Guidelines and holding that those criteria were not satisfied in a particular case, the Commission gave sufficient reasons for its decision to refuse to grant a derogation under Article 87(3) EC (Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 102). Accordingly, although in recitals 62 to 69 in the preamble to the contested decision the Commission rejected various arguments advanced by the Italian authorities, and in recital 71 in the preamble to that decision it stated that the disputed aid also could not be approved on the basis of other legal provisions, such explanations are merely superfluous in nature.

135 The complaint alleging a failure to state reasons as regards the incompatibility of the aid as regional development aid must therefore be rejected.

The complaint alleging a failure to state reasons as regards the assessment of the incentive effect of the disputed aid

136 In the context of this complaint, the Region of Sardinia, the interveners, SF Turistico Immobiliare, Timsas and Grand Hotel Abi d'Oru put forward three arguments alleging a failure to state reasons in relation to the assessment by the Commission of the incentive effect of the disputed aid.

137 First, the interveners claim that the Commission should have explained the reasons why, in the present case, the presumption referred to in point 4.2 of the 1998 Guidelines, namely that the incentive effect is absent where work is started before the application for aid is made, could not be rebutted by the arguments advanced by the Region of Sardinia. At the very least the Commission should have carried out a specific comparison of the alleged imbalance that the payment of the aid in question caused on the reference market. There is, however, no trace of any such justification in the contested decision.

138 Second, the Region of Sardinia claims that the contested decision is devoid of any statement of reasons and contradictory as regards the reason why the Commission failed to take into account, as part of the assessment of the incentive effect of the disputed aid scheme, the confidence of the recipients under that scheme in the applicable national and Community legislation at the time that they took the decision to invest.

139 Third, SF Turistico Immobiliare, Timsas and Grand Hotel Abi d'Oru claim that the contested decision is devoid of any statement of reasons as regards the reason why the Commission failed to take into account, as part of the assessment of the incentive effect of the disputed aid scheme, the specific situation of the recipients under that scheme.

140 The Commission contests those arguments.

141 With regard, in the first place, to the arguments advanced by the Region of Sardinia and by the interveners, it is necessary to reject from the outset the argument that the Commission should have carried out a specific comparison of the alleged imbalance that the payment of the aid in question caused on the market. Indeed, the issue of whether the aid in question caused an imbalance on the market, which is in principle a matter relating to the concept of aid, is wholly irrelevant for the purposes of the

assessment of its incentive effect, which relates to the examination of the compatibility of the aid in question with the common market.

142 Furthermore, it is likewise necessary to reject the argument that the Commission should have explained the reasons why the presumption referred to in point 4.2 of the 1998 Guidelines could not be rebutted by the arguments advanced by the Region of Sardinia and, in particular, by considerations relating to the legitimate expectations of the recipients under the disputed scheme, without it being necessary at that stage to rule on the claim by the interveners that the requirement to submit an application for aid before work is started stemmed from a rebuttable presumption. Indeed, it must be held that, in recitals 62 to 67 in the preamble to the contested decision, the Commission began by providing a summary of the arguments which were put forward by the Italian authorities as part of the formal investigation procedure and which are set out in greater detail in recitals 36 to 43 in the preamble to that decision. It went on to state in relation to each of those arguments the reason why it took the view that it should be rejected. In any event, there can be no question of a failure to state reasons in this regard, and therefore the arguments advanced by the Region of Sardinia and by the interveners must be rejected.

143 In the second place, the argument presented in paragraph 139 above must be rejected without it being necessary, in accordance with the considerations set out in paragraph 44 above, to rule on its admissibility in so far as that argument is advanced by SF Turistico Immobiliare.

144 Indeed, as set out in paragraphs 91 and 92 above, in the context of the examination of an aid scheme, the Commission is entitled to confine its examination to the general and abstract characteristics of that scheme, without being required to examine the particular situation of the different recipients under that scheme. Since the Commission was not required to examine the particular situation of the recipients, the duty to state reasons likewise did not apply to that situation, meaning that the argument

advanced by SF Turistico Immobiliare, Timsas and Grand Hotel Abi d'Oru must be rejected.

145 Consequently, the complaint alleging a failure to state reasons as regards the assessment of the incentive effect of the aid must be rejected.

The complaint alleging a failure to state reasons as regards the refusal to apply the *de minimis* rule

146 SF Turistico Immobiliare and Timsas claim that the Commission failed to explain in the contested decision the reason why it ruled out applying the *de minimis* rule to the part of the aid corresponding to the costs borne before the date on which the application for aid was made.

147 The Commission contests those arguments.

148 It is sufficient in this regard to point out that, in recital 68 in the preamble to the contested decision, the Commission stated the reasons why it took the view that the *de minimis* rule could not be applied in the present case to circumvent the obligation to submit the application for aid before work is started on the project. It thus made clear that the sum to be considered should relate to the project in its entirety, with the result that it was not possible to consider the initial work eligible under the *de minimis* rule. It further stated that the Italian authorities apparently did not take into account the fact that a recipient might have received *de minimis* aid under other schemes.

149 The complaint alleging a failure to state reasons as regards the refusal to apply the *de minimis* rule must therefore be rejected, without it being necessary, in accordance with the case-law cited in paragraph 44, to examine the complaint's admissibility.

The complaint alleging a failure to state reasons for the order for recovery

150 The Region of Sardinia claims that the contested decision fails to state reasons for the order to recover the aid from the recipients. It states in this connection that, in the grounds of that decision, the Commission should have taken into account the fact that, in accordance with case-law, a recipient of unlawful aid is permitted to rely on exceptional circumstances capable of forming a legitimate basis for its belief in the lawful nature of that aid.

151 The Commission contests that argument.

152 The Court has consistently held that, in the matter of State aid, where, contrary to the provisions of Article 88(3) EC, the aid has already been granted, the Commission, which has the power to require the national authorities to order repayment, is not obliged to provide specific reasons in order to justify the exercise of that power (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 82; *Italy* v *Commission*, cited in paragraph 91 above, paragraph 106; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 99). That case-law, which pre-dates the entry into force of Regulation No 659/1999, continues to apply within the framework of Article 14(1) of that regulation. That provision states that 'where negative decisions

are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. The decision to recover the aid is therefore the more or less automatic consequence where that aid is held to be unlawful and incompatible, subject to the sole condition — which stems from the second sentence of that provision — that an order for recovery is not contrary to a general principle of Community law. The Commission therefore has no discretion in this regard. In addition, in such circumstances, once it has set out the reasons why it takes the view that the aid in question is unlawful and incompatible with the common market, it cannot be required to state reasons for the decision ordering the recovery.

153 Accordingly, the complaint alleging a failure to state reasons for the decision to recover the disputed aid must be rejected, as must, consequently, the plea in law alleging a failure to state reasons in general.

5. *The substantive pleas in law*

154 The applicants and the interveners put forward 10 substantive pleas in law alleging, first, the absence of any legal basis for the correction decision, second, a misuse of powers when that decision was adopted, third, that the approval decision did not mention the condition of a prior application, fourth, the misclassification of the aid in question as unlawful, fifth, that the 1998 Guidelines do not apply, sixth, a manifest error of assessment as regards the existence of an incentive effect, seventh, infringement of Article 87(3) EC, eighth, infringement of the principle of impartiality and of the principle of the protection of competition, ninth, infringement of the principle of the protection of legitimate expectations and, tenth, infringement of the provisions relating to *de minimis* aid.

The plea in law alleging the absence of any legal basis for the correction decision

155 SF Turistico Immobiliare and the interveners claim that no provision is made in the EC Treaty or in Regulation No 659/1999 for the possibility of reopening, extending or correcting the formal investigation procedure. In addition, SF Turistico Immobiliare submits that, in accordance with Article 7 of Regulation No 659/1999, that procedure must be concluded by an express decision and not by the initiation of a new investigation. The correction decision is thus unlawful, thereby also vitiating the measures subsequently adopted.

156 The Commission disputes those arguments.

157 The findings made in paragraphs 69 to 72 above make clear that, although it is true that the texts governing the procedure for State aid do not provide expressly for a decision to correct a pending procedure, such a decision may be adopted where the Commission realises, after the adoption of a decision to initiate a formal investigation procedure, that the latter decision is based either on incomplete facts or on an incorrect legal classification of those facts. As held in paragraphs 73 and 74 above, since — when such a decision is combined with the decision to initiate the procedure — the two decisions together form an amended decision to initiate the procedure, the correction decision must be deemed to share the same legal status as that amended decision.

158 Accordingly, in the present case, it was possible to base the correction decision on the first subparagraph of Article 88(2) EC and on Article 4(4) of Regulation No 659/1999, as is the case with any decision to initiate the formal investigation procedure, in addition to the principles of procedural economy and sound administration, as stated in the considerations set out in paragraph 72 above.

159 The plea in law alleging that there is no legal basis for the correction decision must therefore be rejected.

The plea in law alleging a misuse of powers when the correction decision was adopted

160 SF Turistico Immobiliare claims that the Commission's adoption of the correction decision constitutes the use of a 'ploy not provided for in legislation', with a view to prolonging excessively the formal investigation procedure opened in 2004 in order to mitigate its own failings. In its view, the Commission reclassified as unlawful the aid which it had initially classified as misused in order that the aid granted might be recovered.

161 The Commission disputes those arguments.

162 In the first place, in so far as SF Turistico Immobiliare claims that the formal investigation was prolonged excessively, it must be pointed out that, as is made clear in paragraph 101 above, although the duration of the formal investigation procedure may appear to have been lengthy in the present case, the Commission was not in any event bound by the time-limit laid down in Article 7(6) of Regulation No 659/1999.

163 In the second place, as found in paragraphs 157 to 159 above, the correction decision was based on the first subparagraph of Article 88(2) EC and on Article 4(4) of Regulation No 659/1999, with the result that — contrary to the claims of SF Turistico Immobiliare — there is no question whatsoever of a 'ploy not provided for in legislation'.

164 In the third place, the correction decision cannot have been adopted in pursuit of the aim of enabling the recovery of the aid granted, as SF Turistico Immobiliare claims. Indeed, since the second sentence of Article 16 of Regulation No 659/1999 refers, inter alia, to Article 14 of that same regulation, aid which has been misused must be recovered on the same basis as unlawful aid, assuming that the Commission finds that the aid is not compatible with the common market. The change to the legal assessment made in the correction decision was therefore by no means necessary in order for a recovery decision to be made.

165 Consequently, the plea in law alleging a misuse of powers must be rejected.

The plea in law alleging that the approval decision did not mention the condition of a prior application

166 The interveners submit that the approval decision does not mention the condition that the application for aid had to be submitted before the work started. The Commission therefore approved, by that decision, an aid scheme which did not prevent the economic operators who had started work before submitting an application for aid from benefiting from the aid provided for under that scheme. In so doing, the Commission acknowledged the incentive effect and the necessity of that aid. Accordingly, the contested decision was based on the incorrect finding of an infringement of a condition which, in reality, did not exist.

167 The Commission disputes that argument.

168 This plea in law must be rejected. Indeed, in the part of the approval decision given over to the description of the scheme approved, the Commission stated unambiguously that 'the undertakings must have submitted an application for financing before work is started on the investment projects'.

169 It is true that the copy of the approval decision contained in Annex A.2 to the application in Case T-394/08 is reproduced in such a way that it does not clearly convey the statement in question, which appears at the top of the second page of that document. However, the copy produced by the Commission in the annex to the defence in Case T-408/08 makes clear that the statement at issue is indeed contained therein. Furthermore, it is clear both from the pre-litigation procedure between the Commission and the Region of Sardinia and from the conduct of the latter before the Court that the party concerned was aware of the condition regarding the submission of the application for aid before work is started. Indeed, as the Commission rightly points out, the Region of Sardinia has never denied, either in its correspondence with the Commission or before the Court, that it undertook to grant aid only to projects on which work started after an application for aid had been made.

170 It follows that the contested decision is by no means founded — as the interveners claim — on the finding of the infringement of a condition which, in reality, did not exist. The plea in law advanced by the interveners must therefore be rejected.

The plea in law alleging that the classification of the aid as unlawful, rather than as misused, is incorrect

171 The Region of Sardinia, the interveners and SF Turistico Immobiliare claim that, in the correction decision and the contested decision, the Commission incorrectly classified the aid in question as unlawful, rather than as misused, taking as a basis the

view that that aid constituted alterations to existing aid within the meaning of Article 1(c) and (f) of Regulation No 659/1999. In reality, the aid in question should be classified as existing aid which, however, was put into effect in breach of the detailed rules laid down in the provisions authorising that aid.

172 The interveners add that, in the present case, the aid was not altered, since the condition that the application for aid had to be made before work was started was not stipulated either in Act No 9/1998 or in the approval decision. In any event, alterations are made to existing aid only in cases where the alteration affects the actual substance of the initial scheme. In the present case, the alteration may be regarded as no more than minor.

173 The Commission disputes those arguments.

174 It is necessary, first of all, in order to classify the disputed aid, to recall the following definitions contained in Article 1 of Regulation No 659/1999:

'For the purposes of this Regulation:

…

(b) "existing aid" shall mean:

…

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

…

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88(3) EC];

(g) '"misuse of aid" shall mean aid used by the beneficiary in contravention of [the approval] decision;

…'

175 First, it is clear from those provisions that, if the aid granted under the initial scheme, as approved by the approval decision, is to be regarded as existing aid within the meaning of Article 1(b) of Regulation No 659/1999, the aid granted on a legal basis which is substantially different from the aid scheme approved by the approval decision must be regarded as new aid within the meaning of Article 1(c) of the same regulation.

176 This definition of aid is consistent with the case-law established prior to the adoption of Regulation No 659/1999 to the effect that measures to grant or alter aid must be regarded as new aid (Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraphs 17 and 18; Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 13; and Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani* v *Commission* [2008] ECR II-3269, paragraph 358). In particular, where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme. On the other hand, if the alteration is not substantive, only the alteration as such is liable to be classified as new aid (*Government of Gibraltar* v *Commission*, cited in paragraph 77 above, paragraphs 109 and 111, and *Hotel Cipriani* v *Commission*, cited above, paragraph 358).

177 In the present case, as stated in paragraph 168 above, the approval decision expressly refers to the condition that the application for aid had to be submitted before work was started on the investment projects. In addition, it is not in dispute between the parties that, in the context of the initial invitation to submit bids, under the scheme introduced by Act No 9/1998, the Region of Sardinia was permitted to grant, on the basis of Resolution No 33/6, aid for projects on which work had started before the submission of the applications for aid. With regard to the disputed aid, the scheme as it was applied was therefore altered as compared with the scheme approved in the approval decision.

178 It must be pointed out in this regard that that alteration cannot be regarded as minor or insignificant. Indeed, since — as is clear from point 4.2 of the 1998 Guidelines — the Commission regularly makes its approval of regional aid schemes subject to the condition that the application for aid must be made before work is started on the projects, it is clear that the removal of that condition was likely to influence the assessment of the compatibility of the aid measure with the common market.

179 It follows that the disputed aid had to be classified as new aid, within the meaning of Article 1(c) of Regulation No 659/1999, and not as existing aid.

180 Second, that new aid must be classified as unlawful within the meaning of Article 1(f) of Regulation No 659/1999, since the alteration of the approved scheme which the Region of Sardinia made by adopting Resolution No 33/6 was not notified to the Commission prior to the introduction of the aid in question, in breach of Article 88(3) EC.

181 Third, in order to provide an exhaustive analysis, it follows from Article 1(g) of Regulation No 659/1999 that the classification of a measure as a misuse of aid requires that the beneficiary use the aid in contravention of the decision by which it was approved. In the present case, the infringement of the approval decision is attributable not to the beneficiaries but to the Region of Sardinia. Accordingly, the disputed aid cannot be classified as misused aid.

182 The plea in law alleging that the Commission's classification of the disputed aid as illegal rather than misused was incorrect must therefore be rejected.

The plea in law alleging that the 1998 Guidelines do not apply

183 The Region of Sardinia and SF Turistico Immobiliare raise several complaints alleging, in essence, that the 1998 Guidelines, or at least point 4.2 thereof, do not apply.

The applicability *ratione temporis* of the 1998 Guidelines

184 The Region of Sardinia and SF Turistico Immobiliare claim that Act No 9/1998 could not in fact have taken account of the 1998 Guidelines because it was adopted the day after their publication and, in any event, the Guidelines themselves provided that they fully entered into force only with effect from 1 January 2000.

185 The Commission has not expressly taken a view on these arguments.

186 It must be pointed out, first, that the provision which renders the disputed scheme unlawful and incompatible with the common market is contained not in Act No 9/1998, which remains silent as to the timeline between the submission of the application for aid and the start of work, but in Resolution No 33/6, which permits account to be taken of certain projects started before the application was submitted (see paragraph 10 above). Resolution No 33/6 is dated 27 July 2000 and was therefore clearly adopted after the date on which the 1998 Guidelines entered into force 'fully', i.e. 1 January 2000.

187 Secondly, point 6.1 of the 1998 Guidelines provides as follows:

'… the Commission will assess the compatibility of regional aid with the common market on the basis of these Guidelines as soon as they are applicable. However, aid proposals which are notified before these Guidelines are communicated to the Member States and on which the Commission has not yet adopted a final decision will be assessed on the basis of criteria in force at the time of notification.'

188 As observed in paragraphs 177 to 180 above, the disputed scheme was not covered by the approval decision and, therefore, had not in fact been notified but had been implemented unlawfully by the Italian authorities. Consequently, its compatibility with the common market was to be assessed on the basis of the 1998 Guidelines, in accordance with the provision cited in the previous paragraph.

The argument based on provisions applicable to the previous scheme

189 The Region of Sardinia and SF Turistico Immobiliare submit that Act No 9/1998 represented — in conceptual terms — the continuation of an earlier aid scheme approved by the Commission, under which aid was granted irrespective of whether the investment had already been made. It is on account of the unexpected change in the Community provisions, manifested in the publication of the 1998 Guidelines, that Resolution No 33/6 provided for the retention, within the context of the initial invitation to submit applications, of the possibility also to support projects started in the

period between the date on which Act No 9/1998 entered into force and the date of the submission of applications.

190 It must be pointed out in this regard that the compatibility of an aid scheme with the common market must be assessed exclusively according to the characteristics of that specific scheme, in the light of the policy pursued by the Commission at the time of that assessment. However, the assessment of the compatibility of an aid scheme with the common market cannot be influenced by the fact that it may have been preceded by other schemes in relation to which the Commission accepted certain arrangements. Indeed, if that were not the case, it would be impossible for the Commission to amend the criteria on the basis of which it assesses the compatibility of State aid, a power which it must have in order to be able to react both to the evolution of the practices of the Member States in relation to the grant of State aid and to the development of the common market.

191 This argument must therefore be rejected.

The argument based on the national legislative context

192 The Region of Sardinia claims that Act No 9/1998 was initially implemented by Decree No 285/1999, which provided for an 'over-the-counter' system. It is only as a result of its 'excessive diligence' that it subsequently decided to introduce a tendering procedure, by means of Resolutions Nos 33/4 and 33/6, in order to comply with the 1998 Guidelines, which had been adopted in the intervening period. In the view of the Region of Sardinia, it was to implement that change, which it was not required to do, that it felt bound to lay down a provision to the effect that the applications made before the publication of the initial invitation to tender could nevertheless be accepted, specifically to protect the legitimate expectations of the interested parties who had submitted their application for aid in accordance with the procedure laid down in

Decree No 285/1999. The Region of Sardinia therefore takes the view that this was a case merely of the 'recovery' of the earlier applications made prior to the launch of the tendering procedure.

193 The Commission disputes that argument.

194 It must be observed that the allegations made by the Region of Sardinia are inaccurate in several respects.

195 For example, first, the fifth subparagraph of Article 2 of Decree No 285/1999, which is entitled 'Benefici della legge' (Benefits of the Act [Act No 9/1998]), provides:

'The financing aid referred to in the present article shall be granted applying the method of a six-monthly invitation to submit applications, to be made within 60 days of the publication of the relevant notice, and the corresponding classification of the eligible initiatives in accordance with Article 9 below'.

196 It follows from that provision that, contrary to the Region of Sardinia's claim, Decree No 285/1999 did not establish an 'over-the-counter' system, but on the contrary provided that the aid was to be 'granted applying the method of a six-monthly invitation to submit applications'.

197 Secondly, it is clear from paragraph 3.3 of the letter from the Region of Sardinia sent to the Commission on 22 April 2003 that 10 undertakings had submitted applications for aid in accordance with the procedure under Decree No 285/1999. Even though, following the repeal of that decree and its replacement by Resolution No 33/4, those

undertakings should have resubmitted a new application in accordance with the formal requirements laid down in Resolution No 33/4, the Region of Sardinia took the view, in that letter, that the aid granted to those 10 undertakings complied with the criterion that an application must be submitted before work is started.

198 It is apparent from the contested decision that the Commission concurred with that view. Indeed, Article 1 of the contested decision declares aid granted in accordance with Act No 9/1998 to be incompatible with the common market unless the recipient submitted an application for aid under that scheme before work was started on an initial investment project. Since that article makes no reference to the formal requirements which the applications for aid were required to satisfy, the view must be taken that the contested decision does not concern the aid granted to the investment projects carried out by the 10 undertakings in question, but exclusively concerns the aid granted for projects on which work was started before the submission of any application for aid under the scheme provided for in Act No 9/1998.

199 Contrary to the claim made by the Region of Sardinia, the provisions contained in Resolution No 33/6 were therefore by no means necessary for the purposes of protecting the expectations of the undertakings which had submitted an application under the procedure provided for in Decree No 285/1999.

200 Thirdly, even though Articles 4 and 5 of Decree No 285/1999 provided, respectively, that financing aid could be granted in respect of interventions and works 'to be carried out after the submission of the application for aid' and that 'the expenditure referred to above was eligible provided that it had been made after the application', Article 17 of that decree, entitled 'Transitional provision', provided, in its second subparagraph, that 'on the occasion of the initial application of the present provisions [implementing Act No 9/1998], … the interventions and expenditure made or incurred after 5 April 1998 (date of the entry into force of Act No 9/1998) shall be eligible'.

201 It follows from the above that the provision to the effect that aid could be granted to projects on which work had already started prior to the submission of the application for aid was not — as the Region of Sardinia claims — introduced by Resolutions Nos 33/4 and 33/6 in the context of the replacement of Decree No 285/1999, but already formed part of that decree, which laid down for the first time provisions implementing Act No 9/1998. Contrary to the claim made by the Region of Sardinia, the reason for introducing that provision was not therefore to make changes to the procedures following the replacement of Decree No 285/1999 by Resolution No 33/4.

202 The argument raised by the Region of Sardinia must therefore be rejected as factually inaccurate.

The plea of illegality in relation to point 4.2 of the 1998 Guidelines

203 SF Turistico Immobiliare claims, on the basis of Article 241 EC, that point 4.2 of the 1998 Guidelines is illegal in so far as it does not allow, or is interpreted to the effect that it does not allow, the assessment of the compatibility with the common market of aid granted to finance projects on which work was started before the application for aid was made. Indeed, in such circumstances, point 4.2 of those Guidelines is contrary to the *ratio legis* of Community policies on aid.

204 SF Turistico Immobiliare points out, in this regard, that the projects forming the subject-matter of State aid often provide for structural and infrastructural interventions encouraged by the same aid scheme and forming a coordinated series of works which, although interlinked, retain a degree of independent functionality. Accordingly, in its own particular case, projects involving finishing, extension, modernisation or new

construction work on different installations and properties which, although included in one and the same application for finance, could be carried out separately, formed the subject-matter of a joint application under the disputed scheme. Nevertheless, on a strict application of point 4.2 of the 1998 Guidelines, the carrying-out of a small part of the planned works, corresponding to around 5 % of the total works, could result in the aid being held to be inadmissible in its entirety, even though the other parts of the planned works were duly started after the application for aid.

205 The Commission disputes those arguments.

— Admissibility of the plea of illegality

206 As a preliminary point, it should be borne in mind that, in accordance with settled case-law, Article 241 EC expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which, although they are not in the form of a regulation, form the legal basis of the decision under challenge, if that party was not entitled under Article 230 EC to bring a direct action challenging those acts, by which it was thus affected without having been in a position to ask that they be declared void (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 39 and 40, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 272).

207 Since Article 241 EC is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue

with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority* [1965] ECR 175, at 187 and 188; Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 409; Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57; *LR AF 1998* v *Commission*, cited in paragraph 206 above, paragraph 273; and Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 35).

208 With regard to the 1998 Guidelines, it must be pointed out that it is clear from their introductory section that they lay down, in a general and abstract manner, the criteria which the Commission is to apply for the purposes of the assessment of the compatibility with the common market of regional aid, in accordance with Article 87(3)(a) and (c) EC, and thereby guarantee legal certainty for the Member States granting such aid. In particular, the condition laid down in point 4.2 of the 1998 Guidelines applies to all the aid covered by those Guidelines, irrespective of its subject-matter, form or amount.

209 Moreover, in the contested decision, the Commission relied explicitly on point 4.2 of the Guidelines as part of its assessment of the compatibility with the common market of the disputed aid. It follows that, although point 4.2 of the 1998 Guidelines is not the legal basis of the contested decision, which is in fact based on Article 88(2) EC and Article 62(1)(a) of the Agreement on the European Economic Area (EEA), that condition determined — in general and abstract terms — the way in which the Commission assessed the compatibility of the aid in question with the common market.

210 In the present case, therefore, there is a direct legal connection between the contested decision and the general measure represented by the 1998 Guidelines. Since SF Turistico Immobiliare was not in a position to seek the annulment of the Guidelines, as a

general measure, those Guidelines may form the subject-matter of a plea of illegality (see, to that effect and by analogy, *LR AF 1998* v *Commission*, cited in paragraph 206 above, paragraphs 272 to 276).

211 It follows that the plea of illegality in relation to the 1998 Guidelines is admissible.

— Substance

212 Point 4.2 of the 1998 Guidelines provides that 'aid schemes must lay down that an application for aid must be submitted before work is started on the projects'. The arguments advanced by the applicant in support of the plea of illegality essentially consist in the claim that the Commission's interpretation of that provision, to the effect that the aid scheme in question in the present case is devoid of any incentive effect in so far as it allows aid to be granted to finance work started before the submission of the application for aid, fails to take sufficient account of the circumstances of the present case and is contrary to the logic underlying the Community policies on aid.

213 It should be observed in this connection that the General Court has already held that point 4.2 of the 1998 Guidelines refers to a circumstance of a chronological nature and therefore points to an examination *ratione temporis*, which is perfectly suitable for determining whether an incentive effect exists. That examination must be made by reference to the decision to invest taken by the undertaking concerned, which marks the beginning of the dynamic process that an operating investment necessarily constitutes (Case T-162/06 *Kronoply* v *Commission* [2009] ECR II-1, paragraph 80).

Similarly, the Court of Justice has ruled that the finding that an aid measure is not necessary can arise in particular from the fact that the aid project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities, which precludes the aid concerned from operating as an incentive (Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 69).

214 Regardless of those precedents, it must be held that the criterion of the submission of an application prior to the start of work on the project is relevant and suitable.

215 Indeed, the purpose of the criterion laid down in point 4.2 of the 1998 Guidelines is to establish whether an aid measure has an incentive effect in a situation in which it is not possible to conduct a full examination of all the economic aspects of the investment decision of the future beneficiaries of the aid. In this connection, the second and fourth subparagraphs of point 2 of the 1998 Guidelines make clear that the Commission, in principle, approves regional aid only in the form of aid schemes, since it considers that individual *ad hoc* aid does not satisfy the requirement that an equilibrium is to be guaranteed between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region. In addition, in the course of its examination of the compatibility of a notified aid scheme with the common market, the particular circumstances specific to the various potential beneficiaries of the scheme and to the particular projects in respect of which those beneficiaries will be able to apply for grants are — by definition — unknown to the Commission. Accordingly, the Commission must take as a basis, when assessing the compatibility of an aid scheme with the common market, criteria which are either independent of the particular circumstances specific to the future beneficiaries or uniform in respect of all future beneficiaries. Moreover, the requirement that the application for aid be submitted before work is started on the subsidised project makes it possible to guarantee that the undertaking concerned has clearly demonstrated its intention to benefit from the aid scheme in question before starting work on that project. This therefore means that it is possible to prevent applications for projects on which work has started irrespective of the existence of an aid scheme from being submitted *ex post*. In the light of the foregoing considerations, the mere finding that the application for aid was made prior to the start of work on the investment project

is a simple, relevant and suitable criterion which allows the Commission to assume that an incentive effect exists.

216 Furthermore, in so far as SF Turistico Immobiliare relies on the specific circumstances of its investment project to demonstrate that the end results of the application of point 4.2 of the 1998 Guidelines are unacceptable, it is necessary to point out again the findings made and case-law cited in paragraphs 91 and 92 above, in accordance with which — in the context of the examination of an aid scheme — the Commission is entitled to confine its examination to the general and abstract characteristics of the scheme, without it being required to examine the specific situation of the various beneficiaries under that scheme.

217 The plea of illegality in relation to the 1998 Guidelines must therefore be rejected.

The plea in law alleging a manifest error of assessment as regards the existence of an incentive effect

218 The Region of Sardinia, the interveners, SF Turistico Immobiliare, Timsas and Grand Hotel Abi d'Oru claim that the Commission did not correctly assess the incentive effect of the disputed scheme, having regard to the characteristics of the local market and in the light of the subjective understanding acquired by the economic operators as regards the functioning of the support mechanisms.

219 In this regard, they put forward several arguments alleging that the 1998 Guidelines do not apply and relying on provisions relating to a previous aid scheme, on the national legislative context, on the certainty on the part of the undertakings that, from the adoption of Act No 9/1998 onwards, they would be able to benefit from the aid

provided for therein and on the particular situation or conduct of the beneficiaries of the disputed aid.

The arguments based on the particular situation or conduct of the beneficiaries of the disputed aid

220 The Region of Sardinia, supported by the interveners, claims that it is clear from the circumstances which surrounded the investments made by the beneficiaries that Act No 9/1998 fully operated as an incentive, even though the aid scheme it created had not yet taken its final form. The infringement of the condition of necessity is therefore merely apparent, since all the beneficiaries submitted applications for aid following the entry into force of Act No 9/1998, which was notified to and approved by the Commission. Furthermore, many beneficiaries opted for the disputed aid scheme rather than apply for alternative measures from which they could definitely have benefited, and almost all of them had to take out bank loans on terms which, in the absence of the anticipated aid, were incompatible with the prudent management of an undertaking.

221 The Region of Sardinia is therefore of the opinion that the Commission was not able to infer merely from the failure to submit an application for aid before work was started that the beneficiaries went ahead with the investment irrespective of the aid, or to rule out the incentive effect by means of an assessment conducted *a posteriori* on the basis of an altered legislative context.

222 The interveners add that, in any event, the lack of necessity or of an incentive effective, in a situation in which work has started before the application for aid is made, is merely a presumption which may be rebutted once the beneficiaries or the national

authorities provide the Commission with evidence confirming that the criteria of an incentive effect and the necessity of the aid are satisfied. In the present case, the Commission should therefore have evaluated whether that was the case, rather than hiding behind the formal criterion that the application be submitted before work is started.

223 SF Turistico Immobiliare criticises the Commission for having ruled out the incentive effect not only with regard to the works on which work had started before the application for aid was submitted, but also in connection with the — much more significant and functionally independent — works in respect of which the application for aid was submitted before work was started, since the declaration of illegality should have been restricted to only the works carried out before the aid applications were made. Indeed, if the Commission had wanted to be certain that the incentive effect was fully protected, it could very well have confined itself to adopting a conditional decision, stating that the aid was compatible with the common market provided that the expenditure made prior to the submission of the application was borne by the undertakings. This would have enabled it to 'cleanse' the aid of the application — deemed improper — of Act No 9/1998 by the Region of Sardinia by means of Resolution No 33/6.

224 Timsas and Grand Hotel Abi d'Oru claim that, from the perspective of the incentive effect of the aid, the Commission simply stated that the incentive effect could not be transferred from one scheme to another. They point out that they submitted applications under the disputed aid scheme simply with a view to exhausting the financial resources available in the context of the earlier aid schemes, comparable to the disputed scheme, under which they had submitted applications in respect of the same projects. Accordingly, it is not true that work was started before the application for aid was submitted and, therefore, there can be no doubts as to the existence and continuation of the incentive effect.

225 The Commission disputes the arguments advanced by the applicants.

226 In the first place, it is necessary to recall the findings made in paragraphs 213 to 215 above to the effect that the criterion that the application for aid is submitted before work is started on the projects is relevant and suitable for the purposes of the assessment of the incentive effect of an aid scheme. Accordingly, in the context of this plea in law, there is no longer a need to call that criterion into question; rather it is necessary to consider only whether the applicants have demonstrated that, in the present case, circumstances exist which are capable of ensuring the incentive effect of the disputed aid, even where the application was not made prior to the start of work on the projects in question.

227 In the second place, it must be borne in mind, once again, that the subject-matter of the contested decision was the aid scheme introduced by Resolution No 33/6 and not the individual aid received by the applicants under that scheme, and that the Commission was therefore not required to assess the particular circumstances specific to the individual beneficiaries, a task which falls to the Italian authorities at the stage of the recovery of the aid from each of the beneficiaries (see paragraphs 91 and 92 above). Accordingly, the arguments related to the particular situation or conduct of the beneficiaries must be rejected as irrelevant in the context of this plea in law.

228 Consequently, the arguments set out in paragraphs 220 to 224 above must be rejected and it is necessary to examine only those arguments relating, in general terms, to the disputed scheme.

The argument that the mere entry into force of Act No 9/1998 afforded the undertakings the certainty that they would be able to benefit from the aid

229 The interveners claim that, when it came into force on 5 April 1998, Act No 9/1998 already contained detailed provisions regarding the objective criteria to be satisfied

by the beneficiaries, the projects in respect of which aid would be granted and the amounts assigned to the scheme in question. Indeed, Resolutions Nos 33/4 and 33/6 merely restated Article 3 of Act No 9/1998, without modifying or clarifying the criteria which aid had to satisfy in order to be eligible. It is therefore clear that an undertaking which satisfied those criteria could legitimately expect to be awarded that aid and, therefore, feel encouraged to start work on the projects.

230 The Commission disputes the arguments advanced by the interveners.

231 It must be pointed out first of all that a distinction must be drawn between the legal scope of the present argument and that of the arguments based on the protection of the beneficiaries' legitimate expectations, which is dealt with in paragraph 268 et seq. below, even though the facts to be taken into account for the purposes of examining all those arguments are essentially identical. The question of the incentive effect of the disputed aid forms part of the examination of the compatibility of that aid with the common market, whereas the question of the existence of any legitimate expectation on the part of the beneficiaries comes under the examination of the legality of the recovery order contained in the contested decision. Nevertheless, in both cases, it is necessary to assess to what extent the adoption of Act No 9/1998 was itself likely to give rise — from the perspective of the undertakings concerned by the scheme in question — to the certainty that they were going to be able to benefit from the aid provided for in that law.

232 It must be recalled in this regard that the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 9; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 14; and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 52). Accordingly, where there is no decision by the Commission ruling on the compatibility of notified aid, the mere

fact that the national authorities have adopted legal rules providing for the introduction of an aid scheme is not capable of affording the potential beneficiaries under that scheme the certainty that they will be able to benefit from the aid provided therein (see, to that effect, Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51).

233 Consequently, in the present case, the adoption by the Region of Sardinia of Act No 9/1998 could not on its own give rise — on the part of undertakings satisfying the criteria laid down in that law — to the certainty that they would, in the future, be awarded aid under the scheme provided for therein. It was possible inter alia that, in the context of the examination procedure, the Commission would classify the scheme in question as incompatible with the common market or would require changes to be made to the eligibility criteria for the undertakings or the projects subsidised.

234 In addition, the Commission's adoption of the approval decision on 12 November 1998 in any event put an end to any hopes that could have been entertained by the potential beneficiaries as regards the eligibility of projects started before the submission of the applications for aid, since that decision expressly ruled out — as stated in paragraph 168 above — the grant of aid to such projects under the aid scheme introduced by Act No 9/1998.

235 It must further be pointed out that the interveners' claim that Act No 9/1998 already contained detailed provisions governing, inter alia, the objective criteria to be satisfied by the projects for which aid could be granted is untrue. Indeed, whereas Act No 9/1998 did not contain any provisions concerning the timeline between the submission of the application for aid and the start of work, Decree No 285/1998 explicitly and exceptionally introduced — as set out in paragraphs 200 and 201 above — the clause providing that, on the occasion of the initial application of the scheme, projects

started before the entry into force of Act No 9/1998, and therefore before the submission of the application for aid, were eligible. It follows that the eligibility of those projects in no way stems from the scheme laid down in that law.

236 The argument advanced by the interveners must therefore be rejected.

237 Accordingly, taking into account the factors already set out in paragraphs 184 to 216 above with regard to the arguments alleging that the 1998 Guidelines did not apply and relying on the existence of an earlier aid scheme and the national legislative context, the plea in law alleging a manifest error of assessment as regards the incentive effect of the disputed scheme must be rejected in its entirety.

The plea in law alleging infringement of Article 87(3) EC

238 The interveners and SF Turistico Immobiliare claim that the contested decision infringes Article 87(3) EC in so far as the disputed scheme is found to be incompatible with the common market.

239 The interveners state in that connection that Act No 9/1998 extended to the tourism and hotel sector the benefits provided under an earlier scheme which — together with its implementing rules — had been approved by the Commission under the derogation provided for in Article 87(3)(a) EC. Accordingly, by declaring that same aid scheme to be incompatible with the common market in relation to the tourism and hotel sector, the Commission infringed that Treaty provision.

240 SF Turistico Immobiliare claims that the Commission reversed the burden of proof by taking the view, in recital 70 in the preamble to the contested decision, that the Italian authorities failed to advance any argument to the effect that the aid in question could be compatible under provisions other than that laid down in Article 87(3)(a) EC, whereas it was for the Commission to assess what amount was compatible with the common market. The Commission failed, inter alia, to calculate the amounts actually relating to the period prior to the application in order to evaluate their effect on the 'extent' to which that expenditure could affect trade between Member States. In its own application for aid, it was possible to distinguish between, on the one hand, an application relating to work started before the submission of the application and, on the other hand, a wholly separate application relating to work started after the submission of the application.

241 The Commission disputes those arguments.

242 In the first place, the interveners' claim that Act No 9/1998 was simply the extension of an earlier scheme approved by the Commission to the tourism and hotel sector, and thus the scheme provided for in that law could not be declared to be incompatible with the common market, must be rejected.

243 First, the declaration of incompatibility contained in the contested decision did not relate to the aid scheme introduced by Act No 9/1998, as notified by the Italian Republic and approved in the approval decision. Indeed, as stated in paragraph 87 above, the Commission still takes the view that that scheme is compatible with the common market. It is in fact the extension of the benefit of that scheme to projects on which work was started before the application for aid was submitted, on the basis of Resolution No 33/6, which has been found to be incompatible with the common market.

244 Second, even assuming that the disputed scheme were the extension or continuation of an earlier scheme approved by the Commission, it must be pointed out that, as set out in paragraph 190 above, the assessment of the compatibility of an aid scheme cannot be influenced by the fact that it may have been preceded by other aid schemes in respect of which the Commission accepted certain arrangements.

245 In the second place, the complaint raised by SF Turistico Immobiliare claiming, in essence, that it is for the Commission to demonstrate that the disputed aid was incompatible with the common market and not for the Italian authorities to demonstrate the contrary must likewise be rejected.

246 In that regard, it should be borne in mind, first, that, when the Commission decides to initiate the formal investigation procedure, it is for the Member State concerned and the beneficiaries of the measure under consideration to put forward the arguments whereby they seek to show that the measure at issue either does not constitute aid or is aid compatible with the common market, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case. Indeed, although the Commission is required to express its doubts clearly as to the compatibility of the aid with the common market when it opens a formal procedure, in order to enable the Member State and the other parties concerned to respond as fully as possible, the fact remains that it is for the latter to dispel those doubts and to establish that the measure in question satisfies the conditions for a derogation (see, to that effect, *Ferriere Nord* v *Commission*, cited in paragraph 132 above, paragraphs 93 and 94 and the case-law cited). In particular, in order to obtain approval of aid by way of derogation from the Treaty rules, the Member State concerned must, in order to fulfil its duty to cooperate with the Commission, provide all the information necessary to enable that institution to verify that the conditions for the derogation sought are satisfied (see, to that effect, Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 42 above, paragraph 129; and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139, paragraph 48).

247 In the present case, it was therefore for the Italian Republic and, in the alternative, the beneficiaries of the disputed aid to establish that the projects which benefited from that aid were compatible with the common market.

248 Furthermore, as set out in paragraph 91 above, in the case of an aid scheme, the Commission is not, in principle, required to conduct an analysis of the aid granted in individual cases but may confine itself to examining the general characteristics of the scheme in question, without being obliged to consider each individual grant of aid.

249 The argument advanced by SF Turistico Immobiliare and set out in paragraph 240 above must therefore be rejected.

250 Accordingly, the plea in law alleging infringement of Article 87(3) EC must be rejected.

The plea in law alleging infringement of the principle of impartiality and the principle of the protection of competition

251 The interveners claim that the aid provided for in Act No 9/1998 was also granted to 10 tourism undertakings which started work on projects before the publication of the law and of Resolutions Nos 33/4 and 33/6 implementing that law but after the submission of their applications for aid. In view of the criteria set out by the Commission to define the incentive effect, those undertakings find themselves in the same situation as the interveners. The Commission has not requested the recovery of the aid paid to those 10 undertakings, which constitutes an infringement of the principle of impartiality.

252 In addition, in the view of the interveners, the 10 undertakings in question obtained an unjustified advantage in comparison to themselves, since the interveners are required to pay back the aid already received. This gives rise to a breach of the competition between the undertakings in the tourism and hotel sector.

253 The Commission has not made any specific comments about the substance of this plea in law.

254 It must be pointed out, first of all, that the interveners refer, in paragraph 54 of their statement in intervention, to the 10 undertakings mentioned in paragraph 3.3 of the letter from the Region of Sardinia to the Commission of 14 April 2003 which had submitted an application for aid under the procedure provided for in Decree No 285/1999, which was later repealed. As set out in paragraph 198 above, it is clear from the contested decision that the Commission concurred with the view of the Region of Sardinia expressed in that letter to the effect that account had to be taken of the date of the initial application with regard to the investment projects of those 10 undertakings. Accordingly, it took the view that the aid granted to those 10 undertakings complied with the criterion that an application must be submitted before work is started and that it was therefore neither unlawful nor incompatible with the common market.

255 It follows that those 10 undertakings were not in a situation comparable to that of the applicants or the interveners. Indeed, whereas the latter had not made any application for aid prior to the start of work on their investment projects, the 10 undertakings at issue had in fact submitted applications on the basis of an implementing decree which was later repealed. In addition, from the point of view of Community law on the monitoring of State aid, the question of whether an application for aid is consistent with the formal requirements laid down in the national implementing provisions is secondary. As set out in paragraph 215 above, the requirement that the undertaking concerned has clearly expressed its intention to benefit from the aid scheme in question before starting work on the subsidised project means that it is possible to prevent

applications for projects on which work has started irrespective of the existence of an aid scheme from being submitted *ex post*.

256 Since that requirement is satisfied in the case of the 10 undertakings mentioned by the interveners but not in the case of the interveners or the applicants, comparable situations were not treated unequally in the present case, and nor was the duty of impartiality infringed. It likewise follows that the 10 undertakings in question did not benefit from an unjustified competitive advantage as compared with the interveners.

257 The plea in law alleging infringement of the principle of impartiality and the principle of the protection of competition must therefore be rejected.

The plea in law alleging infringement of the principle of the protection of legitimate expectations

The legitimate expectations of the Region of Sardinia concerning the absence of any guidelines when Act No 9/1998 was adopted

258 The Region of Sardinia submits that the Commission failed to take account of its legitimate expectations when examining the compatibility of the aid scheme in question with the common market. In addition, the existence of such an expectation should have been examined by the Commission of its own motion in accordance with Article 14 of Regulation No 659/1999, which prohibits it from ordering the recovery of aid where to do so appears to be contrary to a general principle of Community law.

259 It points out, first, in this regard that the obligation to provide that the application for aid is submitted before work is started on the projects stems directly from the 1998 Guidelines and was not provided for in the earlier regional aid scheme. Second, those Guidelines were published in the Official Journal the day before the adoption of Act No 9/1998. Accordingly, it takes the view that it was not objectively in a position to ensure, from the outset, the conformity of Act No 9/1998 with the 1998 Guidelines.

260 The Commission disputes the arguments advanced by the Region of Sardinia.

261 In accordance with settled case-law, any person on whose part an institution has given rise to justified hopes has the right to rely on the protection of legitimate expectations. However, the principle of the protection of legitimate expectations may not be relied upon by a person who has committed a manifest infringement of the rules in force (Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 30; Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 41; and Case T-217/01 *Forum des migrants* v *Commission* [2003] ECR II-1563, paragraph 76).

262 In the present case, as held in paragraphs 177 to 180 above, since the provisions laid down in Resolution No 33/6 did not comply with the condition that the application for aid has to be made before work is started, the Region of Sardinia introduced an unlawful aid scheme because it was not notified to the Commission. The Region of Sardinia therefore infringed the rules in force by failing to comply with Article 88(3) EC, which provides that Member States may not put into effect new aid before the Commission has adopted a final decision on its compatibility with the common market.

263 This infringement was manifest, since both the 1998 Guidelines and the approval decision made explicit reference to the condition that the application must be submitted before work is started.

264 In addition, in a letter of 28 September 1998, the Region of Sardinia assured the Commission that 'the grant of aid provided for in the law [Act No 9/1998] will be for the benefit only of undertakings' initiatives to be carried out subsequently'. It must be pointed out in this regard that the wording of Act No 9/1998 did not itself provide for the grant of aid to investment projects started before the application for aid was submitted. It is therefore of no significance that, during the legislative procedure relating to that law, the Region of Sardinia was in fact unable to take account of the 1998 Guidelines, which were published on the eve of the law's adoption. By contrast, the legislation introducing the possibility to submit applications for aid with retrospective effect in relation to projects on which work had already started, namely Decree No 285/1999 and Resolution No 33/6, was adopted — respectively — on 29 April 1999 and 27 July 2000, and therefore dates from a good time after the publication both of the 1998 Guidelines and of the approval decision.

265 Finally, it is clear from the actual wording of Resolution No 33/6 that the Region of Sardinia was perfectly aware that allowing applications for aid in respect of projects on which work had already started was contrary to Community law, since Resolution No 33/6 refers to the responsibility of the regional authority 'which stems from the official publication of directives containing provisions which, as in the present case, are not consistent with the requirements of EU law'.

266 Accordingly, applying the case-law cited in paragraph 261 above, the Region of Sardinia cannot rely on the principle of the protection of legitimate expectations.

267 The plea in law alleging infringement of that principle must therefore be rejected in so far as it is based on the alleged expectations of the Region of Sardinia.

The legitimate expectations of the beneficiaries based on the existence of an earlier approval decision and the circumstances of the case

268 The Region of Sardinia, the interveners, SF Turistico Immobiliare, Timsas and Grand Hotel Abi d'Oru submit that the beneficiaries of the aid in question could rely on a legitimate expectation as regards the compatibility of the aid received. That expectation was in particular protected by Article 14 of Regulation No 659/1999.

269 In the view of those parties, the expectations on the part of the recipients of the disputed aid were based on the existence of the approval decision, the fact that Act No 9/1998 itself already specified all the necessary criteria for the grant of individual amounts of aid, the assurances given by the Italian authorities and the Commission's decision of 12 July 2000 not to raise any objections to an aid scheme to promote investment in the less favoured regions of Italy until 31 December 2006 (State aid N 715/99 — Italy), a succinct notice of which was published in the Official Journal (OJ 2000 C 278, p. 26) and which related to the aid scheme provided for in legge n° 488/92, conversione in legge, con modificazioni, del decreto-legge 22 ottobre 1992, n° 415, concernente rifinanziamento della legge 1 marzo 1986, n° 64, recante disciplina organica dell'intervento straordinario nel Mezzogiorno (Law No 488/92 converting into a law, with amendments, Decree Law No 415 of 22 October 1992 on the refinancing of Law No 64 of 1 March 1986 laying down a comprehensive set of rules governing the extraordinary intervention in Southern Italy) of 19 December 1992 (GURI No 299 of 21 December 1992, p. 3, and correction, GURI No 301 of 23 December 1992, p. 40), which defined eligible expenses as those which had been incurred after the closing date of the notice preceding that under which the application for aid was submitted.

270 Their expectation was reinforced by Decree No 285/1999 and Resolution No 33/6, by the clarifications obtained from the administrative services of the Region of Sardinia regarding the conformity of the aid with the common market, by the fact that the Region regularly granted applications for reimbursement and by the slow pace at

which the Commission conducted its investigations without adopting any measures to suspend the payment of aid.

271 SF Turistico Immobiliare points out that this expectation cannot be called into question by the fact that neither Decree No 285/1999 nor Resolution No 33/6 was notified to the Commission. In the view of SF Turistico Immobiliare, it is in fact excessive to require the beneficiaries to ask the Region of Sardinia for formal proof of the communication to the Commission of any measure having an effect on the procedure, or to ask the Commission, after the grant of the aid, if any later and potentially significant measure has been notified to it.

272 The Commission disputes the arguments advanced by the applicants and the interveners.

273 It is clear from case-law that three conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 102; Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraph 77; and Case T-444/07 *CPEM* v *Commission* [2009] ECR II-2121, paragraph 126).

274 However, a legitimate expectation in the lawfulness of State aid can, in principle, save in exceptional circumstances, be relied upon only where that aid was granted in a manner compatible with the procedure laid down in Article 88 EC. Indeed, a diligent

operator should normally be able to determine whether that procedure has been followed (*Commission* v *Germany*, cited in paragraph 232 above, paragraph 14; *Spain* v *Commission*, cited in paragraph 232 above, paragraph 51; and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

275 In the present case, as pointed out in paragraphs 168 and 180 above, the approval decision clearly stated that the Commission's approval related only to aid for projects started after the submission of the application for aid and that the disputed aid, which did not comply with that condition, was therefore not granted in a manner compatible with the procedure laid down in Article 88 EC. It follows, in accordance with the case-law cited in the previous paragraph, that the beneficiaries of the disputed aid cannot, in principle, be allowed to rely on a legitimate expectation in the lawfulness of that aid.

276 Admittedly, the case-law does not preclude the possibility that, in order to challenge its repayment, the recipients of unlawful aid may, in the procedure for the recovery of the aid, plead exceptional circumstances which could legitimately have given rise to a legitimate expectation that the aid was lawful (*Commission* v *Germany*, cited in paragraph 232 above, paragraph 16; Joined Cases T-126/96 and T-127/96 [1998] *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69; and *Fleuren Compost* v *Commission*, cited in paragraph 132 above, paragraph 136).

277 However, it is implicit in the case-law of the Court of Justice (*Commission* v *Germany*, cited in paragraph 232 above, paragraphs 13 to 16, and *Alcan Deutschland*, cited in paragraph 274 above, paragraphs 24 and 25) and has expressly been held on several occasions by the General Court (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 104 and 105; Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 83; and *Fleuren Compost* v *Commission*, cited in paragraph 132 above, paragraph 137), that those recipients can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework

of the recovery procedure before the national courts, the only courts competent to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

278 In any event, none of the circumstances put forward in the present case by the applicants or the interveners can be regarded as capable of justifying the annulment of the contested decision.

279 First, in so far as it has been claimed that the alleged legitimate expectations of the beneficiaries were based on the existence of the approval decision and on the fact that Act No 9/1998 itself already specified all the necessary criteria for the grant of individual amounts of aid, such that the potential beneficiaries satisfying those criteria expected to be granted that aid, it follows from the findings made in paragraphs 232 to 234 and in paragraph 168 above that neither the adoption of Act No 9/1998 nor the approval decision was capable of forming the basis of the certainty of being able to benefit lawfully from the disputed aid. Consequently, those acts were also incapable of forming the basis of a legitimate expectation on the part of the beneficiaries of the disputed aid.

280 No different conclusion may be reached on the basis of paragraph 189 of the judgment in Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, relied upon by the Region of Sardinia. Indeed, as the Commission rightly pointed out, in the case which gave rise to that judgment and unlike in the circumstances of the present case, it had expressly authorised the aid in question by a decision adopted following a notification submitted in due and proper form by the Member State concerned. It is on precisely that ground that the Court took the view that the principle of protection of legitimate expectations prevented a recovery of the aid in question from the beneficiaries, despite the fact that the Commission had subsequently, on the basis of new information, found the aid to be incompatible with the common market (*ESF Elbe-Stahlwerke Feralpi* v *Commission*, cited above, paragraphs 188 and 189).

281 Secondly, with regard to the assurances given by the Italian authorities, Decree No 285/1999, Resolution No 33/6, the clarifications obtained from the administrative services of the Region of Sardinia regarding the conformity of the aid with the common market and the fact that the Region of Sardinia was regularly granting applications for reimbursement, it must be held that all those factors are actions on the part of the national authorities. They do not therefore satisfy the first condition laid down in the case-law cited in paragraph 273 above, namely that it is the Community authorities which must have given the assurances to the parties concerned, the expectations of those parties having their basis in those assurances.

282 Thirdly, with regard to the alleged slow pace of the Commission procedure, leaving aside the fact — referred to in paragraph 100 above — that the duration of the preliminary examination procedure cannot be regarded as excessive in the present case, the Commission rightly submits that any apparent failure to act on its part is irrelevant when an aid scheme has not been notified to it (Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 52).

283 Fourthly, the Commission decision of 12 July 2000 on the aid scheme laid down in legge n° 488/92, which provided, subject to certain conditions, that expenditure incurred before the submission of the application for aid was eligible, was also incapable of forming the basis for a legitimate expectation on the part of the beneficiaries of the disputed aid. Indeed, it should be borne in mind that the general principle under Article 87(1) EC is that State aid is not permitted. In accordance with case-law, exceptions to that principle are to be interpreted strictly (*Fleuren Compost* v *Commission*, cited in paragraph 132 above, paragraph 75). It follows that a decision not to raise objections to an aid scheme is concerned only with the actual grant of the aid falling under that scheme and cannot, therefore, form the basis for a legitimate expectation on the part of the potential beneficiaries of similar future aid projects in the

compatibility with the common market of the aid at issue (see, to that effect, the judgment of 2 December 2008 in Joined Cases T-362/05 and T-363/05 *Nuova Agricast and Cofra* v *Commission*, not published in the ECR, paragraph 80).

284 The plea in law based on infringement of the principle of the protection of legitimate expectations must therefore be rejected.

The plea in law alleging infringement of the provisions relating to de minimis aid

285 The interveners and SF Turistico Immobiliare claim that the Commission has infringed the applicable provisions relating to *de minimis* aid.

286 In this regard, the interveners are of the opinion that the Commission should have confined itself to requiring the Region of Sardinia to recover the part of the amounts of aid paid above the ceiling of EUR 200 000 laid down in Article 2 of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 [EC] and 88 [EC] to *de minimis* aid (OJ 2006 L 379, p. 5), or, in any event, that part above the ceiling of EUR 100 000 laid down in Article 2 of Regulation No 69/2001.

287 SF Turistico Immobiliare adds that, by preventing the expenditure incurred before the submission of the application for aid from being regarded as expenditure made in the context of *de minimis* aid, the Commission failed to take into account the exceptional situation in the territory of the Region of Sardinia, the result of overlapping and contradictory provisions from different sources all seeking to govern aid in the tourism sector.

288 In its view, *de minimis* aid is exempt from the notification requirement, covers 'any public aid' and is without prejudice to the possibility of receiving other aid in respect of the same project. The words 'project in its entirety' are interpreted in an overly formalistic manner by the Commission on the basis of the first expenditure stated in the calculation attached to the application.

289 The Commission disputes those arguments.

290 It is necessary, first of all, to determine which of the various successive instruments relating to *de minimis* aid is applicable *ratione temporis* to the facts of the present case. This very issue has successively formed the subject-matter of the Commission communication on *de minimis* aid (OJ 1996 C 68, p. 9), Regulation No 69/2001 and Regulation No 1998/2006.

291 In accordance with the third sentence of recital 5 in the preamble to Regulation No 69/2001 and recital 10 in the preamble to Regulation No 1998/2006, *de minimis* aid should be considered to be granted at the moment the legal right to receive the aid is conferred to the beneficiary under the applicable national law. It must be pointed out in this regard that it is clear from the various tables contained in the letter from the Region of Sardinia of 14 April 2003 that the applications for aid relating to the disputed aid were made between 20 January and 31 March 2001. It follows that the date on which that aid was granted cannot have been before April 2001. In addition, pursuant to Article 4(1) of Regulation No 69/2001, that regulation entered into force on 2 February 2001, the 20th day following that of its publication in the Official Journal on 13 January 2001. Accordingly, in the present case, the provisions on *de minimis* aid contained in Regulation No 69/2001 should be applied.

292 Next, with regard to the content of the provisions in question, Article 2 of Regulation No 69/2001, which is entitled '*De minimis* aid', provides:

'1. Aid measures shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore not fall under the notification requirement of Article 88(3) of the Treaty, if they fulfil the conditions laid down in paragraphs 2 and 3.

2. The total *de minimis* aid granted to any one enterprise shall not exceed EUR 100 000 over any period of three years. This ceiling shall apply irrespective of the form of the aid or the objective pursued.

…'

293 Furthermore, pursuant to the fourth sentence of recital 5 in the preamble to Regulation No 69/2001, '[t]he *de minimis* rule is without prejudice to the possibility that enterprises receive, also for the same project, State aid authorised by the Commission or covered by a group exemption Regulation.'

294 Finally, in the present case, the contested decision contains the following passages relating to the application of the *de minimis* rule:

295 Pursuant to recital 68 in the preamble to the contested decision:

'… the Commission cannot accept the Italian authorities' arguments with regard to the *de minimis* rule, because the *de minimis* rule cannot be invoked to circumvent

the obligation contained in the [1998] Guidelines that in order to comply with the principle of incentive effect the application must be submitted before work is started on the project. The sum to be considered must relate to the project in its entirety, and not just the section granted before the application for aid. The Commission cannot accept the suggestion that it ought to consider the initial work eligible under the *de minimis* rule, thus taking it outside the scope of the [1998] Guidelines'.

296 In recital 73 in the preamble to the contested decision, the Commission explains:

'[The] finding of incompatibility [relating to the aid granted on the basis of Resolution No 33/6] applies to the entirety of the aid granted towards projects whose eligible costs were incurred before the submission of an application for aid, on the basis of the implementing measures in force at the time the application was submitted, which exceeds the amount of *de minimis* aid for which the recipient may have been eligible at the relevant time, calculated in accordance with Article 2 of Regulation No 69/2001'.

297 It follows from those two recitals, when read in conjunction, that the Commission did not intend to exclude, in absolute terms, the application of the *de minimis* rule to the disputed aid. It must be pointed out in this regard that the Commission's ruling in the contested decision related only to the aid scheme as amended by Resolution No 33/6. The contested decision therefore in no way precludes the application of the *de minimis* rule in respect of certain individual aid granted on the basis of that scheme.

298 By contrast, the Commission took the view that the application of the rule presupposed that the total amount of the aid received for a particular project is below the *de*

minimis ceiling available to the undertaking in question, and that it was therefore not possible simply to deduct the amount corresponding to that ceiling from the amount of aid to be recovered or to take account of the amount corresponding to the work in fact completed before the submission of the application for aid.

299 The parties are therefore in dispute solely on the question whether it is possible, for the purposes of the application of the *de minimis* rule, to divide up the aid relating to a specific project in order that it may benefit from that rule in respect of the amount falling below the applicable ceiling, or whether — on the contrary — the aid relating to a specific project must be regarded as indivisible and the application of the *de minimis* rule must be ruled out in respect of aid exceeding the ceiling.

300 In the absence of explicit provisions in this regard in Regulation No 69/2001, this question must be examined having regard to the purpose of the *de minimis* rule.

301 In this connection, it must be pointed out that, in paragraph 3.2 of its communication regarding Community guidelines on State aid for small and medium-sized enterprises (OJ 1992 C 213, p. 2), the Commission gave as the reason for the initial introduction of the *de minimis* rule the fact that 'not all aid has a perceptible impact on trade and competition between Member States', which is so 'especially of aid provided in very small amounts', and the concern to act 'in the interests of administrative simplification for the benefit of SMEs'. Thus, it is 'desirable that aid up to a certain absolute amount, below which Article [87](1) [EC] can be said not to apply, should no longer be subject to prior notification to the Commission'.

302 Similarly, in the second subparagraph of its 1996 communication on *de minimis* aid (see paragraph 290 above), the Commission again made reference to 'an effort to reduce the administrative burden on the Member States and on the Commission itself — which ought to be left to concentrate its resources on cases of real importance to the Community'.

303 As far as Regulation No 69/2001 is concerned, it contains no recitals explicitly devoted to the *ratio legis* of the *de minimis* rule and simply states the following:

'In the light of the Commission's experience, it can be established that aid not exceeding a ceiling of EUR 100 000 over any period of three years does not affect trade between Member States and/or does not distort or threaten to distort competition and therefore does not fall under Article 87(1) [EC]' (first sentence of recital 5 in the preamble to Regulation No 69/2001).

304 It follows from the foregoing considerations that the objective of the *de minimis* rule is to simplify administrative procedures, both in the interest of the beneficiaries of aid of relatively small amounts which are therefore incapable of distorting competition and in that of the Commission, which ought to be left to concentrate its resources on cases of genuine interest to the Community.

305 In that connection, it must be noted that allowing aid to be divided up in order to enable a part of that aid to benefit from the *de minimis* rule would not contribute to the pursuit of the abovementioned objective. Indeed, the mere act of deducting from the amount of aid to be granted to an undertaking the amount corresponding to the *de minimis* ceiling spares neither the Commission the task of having to examine the compatibility with the common market of the aid in question in respect of the amount which exceeds that ceiling, nor the undertaking in question the requirement

to await the outcome of that examination before being able to benefit from or, in the case of unlawful aid, having — where appropriate — to pay back that amount.

306 Furthermore, as the Commission rightly pointed out in its answer to a written question put by the Court, allowing aid to be divided up could result, in the circumstances of the present case, in the waiving of the principle that the compatibility of the aid presupposes the existence of an incentive effect, specifically in respect of the total amount of the aid granted. Indeed, if the amounts corresponding to the work carried out before the submission of the application for aid were to fall below the ceiling of EUR 100 000 and therefore should not be regarded as State aid within the meaning of Article 87(1) EC, it would have to be concluded that no aid was granted before the application for aid. Consequently, the project would have to be regarded as having started after the submission of the application for aid, whereas — in reality — the project has failed to comply with that criterion.

307 Such an outcome would risk compromising the objectives pursued by the supervision of State aid in general, since it would be likely to undermine the willingness of Member States and of undertakings to comply with the obligation not to grant State aid before the Commission has been able to rule on its compatibility with the common market. Indeed, even if the amounts corresponding to the work carried out prior to the submission of the application for aid were above the ceiling of EUR 100 000, the beneficiaries could then be assured that at least some of the aid unlawfully paid would not be recovered. In addition, as the Commission rightly pointed out, the purpose of the *de minimis* rule is not to guarantee that any undertaking which has been granted unlawful aid can benefit from an exemption from repayment fixed at the *de minimis* ceiling.

308 That last finding is supported by an analysis of the very concept of '*de minimis* aid'. That concept makes clear that the aid must be of a small amount. Allowing — on an *ex post* basis — aid exceeding the applicable ceiling to be divided up in this regard

would involve permitting part of the aid, which was not of a small amount when it was granted, to benefit from the *de minimis* rule.

309 It is true that, following the recovery of the total amount of the aid granted unlawfully, the Member State in question may, in principle, immediately grant to the undertaking new *de minimis* aid fixed at the ceiling of EUR 100 000. However, as the Commission made clear in its answer to the written question put by the Court, this requires a new decision to grant public funds by the Member State, which is not bound by its decision, such that the prohibition on dividing up aid thus cannot be regarded as a purely formal rule.

310 It is therefore necessary to interpret Article 2(1) and (2) of Regulation No 69/2001 as meaning that the exemption from the notification requirement provided for in Article 88(3) EC cannot be applied to amounts which make up aid, the total amount of which exceeds the ceiling of EUR 100 000 over a period of three years.

311 In any event, the explicit inclusion of that restrictive interpretation in the second subparagraph of Article 2(2) of Regulation No 1998/2006 must therefore be understood as introducing a clarification and not as adding a new condition to the application of the *de minimis* rule.

312 Consequently, the argument advanced by the interveners to the effect that the Commission should have confined itself to requiring the Region of Sardinia to recover the part of the amount of aid paid which exceeded the ceiling of EUR 200 000 or, at the very least, the ceiling of EUR 100 000, must be rejected. The argument put forward by SF Turistico Immobiliare to the effect that the Commission should have taken into account only the part of the expenditure incurred before the submission of the

application for aid for the purposes of the application of the *de minimis* rule must likewise be rejected.

313 This does not preclude the possibility that, in the context of the assessment of each individual case which the Italian authorities will have to conduct when recovering the disputed aid, it may be established that certain projects — which were started before the submission of the application for aid and therefore cannot benefit from aid under the scheme introduced by Act No 9/1998 — are functionally independent of other projects which were started only after the date of submission of the application for aid and, therefore, could benefit from aid under that same scheme. However, this is a not question for the Court to settle in the context of the present cases.

314 The plea in law alleging infringement of the provisions relating to *de minimis* aid must therefore be rejected.

315 Consequently, the actions must be dismissed in their entirety.

Costs

316 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. As the applicants and the interveners have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Joins Cases T-394/08, T-408/08, T-453/08 and T-454/08 for the purposes of the judgment;**

2. **Dismisses the actions;**

3. **Orders the applicants to pay the Commission's costs, excluding those incurred by it as a result of the intervention, and their own costs;**

4. **Orders the interveners in Case T-394/08 to bear the Commission's costs relating to the intervention and their own costs.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 20 September 2011.

[Signatures]

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