

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 27 October 2005<sup>1</sup>

1. In this case the Italian Corte Suprema di Cassazione refers to the Court several questions concerning the compatibility with Community law of the tax regime applicable to entities arising out of the privatisation of Italian public sector banks and, more precisely, to the banking foundations which replaced traditional savings banks.

validity of a Commission decision declaring some aspects of the disputed tax regime not to be State aid within the meaning of Article 87(1) EC.

2. The national court seeks in essence clarification, first, on whether those banking foundations qualify as undertakings for the purposes of the competition rules of the EC Treaty and, in particular, of the provisions on State aid.

4. The national court finally asks the Court to consider the disputed tax regime in the light of Articles 12, 43 et seq. and 56 et seq. EC.

**Relevant Community law provisions**

3. Depending on the answer to that question, the national court then wishes to know whether the tax regime in question amounts to State aid for the purposes of the EC Treaty. In that context it also questions the

5. Article 12(1) EC states that 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

6. Articles 43 and 56 EC come within Part Three, Title III of the Treaty, 'Free movement

<sup>1</sup> — Original language: English.

of persons, services and capital'. Article 43 is in Chapter 2, 'Right of establishment', and Article 56 in Chapter 4, 'Capital and payments'.

7. Article 43 EC provides that:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

8. Article 56(1) and (2) EC provide that 'within the framework of the provisions set out in this chapter', all restrictions on the movement of capital and on payments between Member States and between Member States and third countries are to be prohibited.

9. Pursuant to Article 87(1) EC, 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

### The national legislative framework

10. The relevant national legislative framework can be summarised as follows.

11. The two national tax provisions at stake in the present case are Article 10a of Law No 1745 of 29 December 1962<sup>2</sup> ('Law

2 — Istituzione di una ritenuta d'acconto o di imposta sugli utili distribuiti dalle società e modificazioni della disciplina della nominatività obbligatoria dei titoli azionari (GURI No 5, of 7 January 1963, p. 61), as supplemented by Article 6 of Decree-Law No 22/1967 of 21 February 1967, nuove disposizioni in materia di ritenuta d'acconto o di imposta sugli utili distribuiti dalle società (GURI No 47, of 22 February 1967, p. 1012), converted into a law, with amendments, by Law No 209 of 21 April 1967 (GURI No 101 of 22 April 1967, p. 2099).

No 1745/62') and Article 6 of Presidential Decree No 601 of 29 September 1973, on tax advantages ('Decree No 601/73').<sup>3</sup>

public sector credit institutions in Italy and in particular to the banking foundations which replaced traditional savings banks. That process started in 1990, well after the two tax provisions were adopted, and has undergone two main phases.

12. Law No 1745/62 introduced, *inter alia*, the retention of an advance payment on account of tax due on dividends distributed by companies. Article 10a thereof however exempts from that measure legal persons governed by public law and foundations not liable to corporation tax which pursue exclusively aims of social welfare, education, teaching, study and scientific research.<sup>4</sup>

15. The first phase was initiated by Law No 218 of 30 July 1990 and the related Legislative Decree No 356 of 20 November 1990 ('Decree No 356/90'), both of which provided for the restructuring of public sector banks into public limited banking companies (hereinafter 'the original legislative regime').

13. Article 6 of Decree No 601/73 provides for a 50% reduction in corporation tax for bodies active in the fields of social assistance, health, education, culture and similar sectors.

16. Article 1 of Decree No 356/90 allowed public credit institutions, including savings banks ('allocating entities'), to allocate their banking concerns to public limited companies established by them and of which they remained the sole shareholders. The newly created public limited companies (hereinafter 'assignee banks') performed the banking activities previously carried out by the allocating entities.

14. The national proceedings are concerned with the application of those provisions to entities arising out of the privatisation of

17. Article 12 of the same decree required allocating entities to pursue aims of public interest and social assistance, mainly in the sectors of scientific research, education, art and health.

<sup>3</sup> — *Disciplina delle agevolazioni tributarie* (GURI No 268, of 16 October 1973, p. 3).

<sup>4</sup> — In its order for reference the national court describes Article 10a as an exemption from withholding tax rather than from a retention of an advanced payment on account of tax due. See points 51 and 101 below.

18. The same provision further provided that allocating entities could carry out all financial, commercial, real estate and asset operations necessary for the fulfilment of their aims. They could manage their shareholding in the assignee bank but were prohibited from directly carrying out any banking activity or owning any controlling holding in banking or financial undertakings other than the assignee bank itself.

19. Allocating entities were entitled, however, to acquire or dispose of minority holdings in other banking or financial undertakings. On a transitional basis, in order to ensure operational continuity, the members of the allocating entity's management committee or equivalent were to be appointed to the bank's board of administrators and the members of the supervisory body in the allocating entity to the supervisory committee of the assignee bank.

20. Article 13 of Decree No 356/90 governed the relinquishment by allocating entities of their shareholdings in assignee banks. Public sale of shares had to be pursuant to a public sale offer, although the sale of listed shares through the stock market was unrestricted up to an overall limit of 1 % of the assignee bank's capital. Sale through any other procedure was subject to the prior authorisation by the Treasury. Authorisation was also required whenever as a result of the relinquishment of shares the allocating entity lost, even temporarily, control over the

majority of shares giving voting rights in the ordinary general meeting of the assignee bank. Finally, once the allocating entity had disposed of its controlling holding, it could acquire a controlling holding in another banking company, subject to prior authorisation by the Treasury.

21. The second main phase of the process of privatisation began with the modifications introduced to the original legislative regime by Law No 461 of 23 December 1998.<sup>5</sup> Legislative Decree No 153 of 17 May 1999 ('Decree No 153/99'), which was adopted on the basis of that law, contained detailed implementing provisions (hereinafter the 'new legislative regime').

22. The new legislative regime introduced substantial changes in the regulation of banking foundations involving tightened control.

23. Article 1 of Decree No 153/99 codifies existing practice and redesignates allocating entities as foundations (hereinafter 'banking foundations').

5 — By which the Italian Parliament delegated to the government the task of reorganising civil and tax law provisions applicable to the allocating entities referred to in Article 11(1) of Legislative Decree No 356, as well as the tax regime of banking restructuring operations. GURI No 4, of 7 January 1999, p. 4.

24. Article 2(1) of the same decree defines banking foundations as non-profit making private law entities, enjoying full management autonomy, and having exclusively aims of social assistance and the promotion of economic development, in accordance with their respective statutes.

possible relevant sectors was later extended at the end of 2001.<sup>6</sup>

25. Article 3 provides that banking foundations may pursue their aims by all means compatible with their legal nature as defined in Article 2; they may only control undertakings which are directly 'instrumental' to the fulfilment of their statutory aims and operate exclusively in the so-called 'relevant sectors' ('instrumental undertakings'); they are not entitled to exercise banking functions and they are prohibited from subsidising, either directly or indirectly, bodies or undertakings other than instrumental undertakings.

27. Pursuant to the original wording of Article 4(3) of Decree No 153/99, members of the management body of the banking foundation are prohibited from becoming members of the board of administrators of the assignee bank. That provision was modified at the end of 2003<sup>7</sup> to prohibit persons holding administrative, management or supervisory positions in the banking foundation from occupying the same positions in the assignee bank or in companies controlled by it or in which it has a shareholding. In addition, persons performing functions relating to the definition of strategy (*orientation*) in a banking foundation were prohibited from holding those positions in the assignee bank.

26. 'Relevant sectors' were, pursuant to Article 1 of Decree No 153/99 as originally drafted: scientific research, education, art, preservation and promotion of cultural heritage and activities and of environmental resources, health and assistance to underprivileged social categories. The number of

6 — Article 11 of Law No 448 of 28 December 2001, concerning the 2002 State budget added the following to the relevant sectors: family and related values; growth and development of young people; education, teaching and training, including the acquisition of publications for schools; voluntary and charity work, philanthropy; religion and spiritual development; assistance to the elderly; civil rights, crime prevention and public safety; food safety and high-quality agriculture; social development and building of social housing at local level; consumer protection; civil protection; public health, preventive and rehabilitative medicine; sport, prevention and rehabilitation of drug addiction; mental and psychological conditions; scientific and technological research, environmental protection; art, cultural activities and cultural heritage.

7 — Law No 350 of 24 December 2003 concerning the 2004 State budget.

28. The original wording of Article 5(1) of Decree No 153/99 provided that a banking foundation's assets had to be fully committed to the pursuit of its statutory aims and that, in managing their assets, banking foundations should respect prudential risk criteria in order to preserve their value and obtain an adequate return. Article 11 of Law No 448/01 later added that asset management must be consistent with the banking foundation's non-profit making nature operating according to the principles of transparency and morality.

29. Article 6(1) provides that the banking foundations may possess controlling holdings only in entities and companies having as their exclusive object the management of instrumental undertakings.

30. Article 25(1) and (2) of Decree No 153/99 provided, in their original wording, that controlling holdings in assignee banks could be maintained for a period of no longer than four years from the date of the entry into force of the decree. In the absence of a sale by that deadline, the holding could be maintained for an extra period of no longer than two years.

31. Controlling holdings in companies other than assignee banks, with the exception of instrumental undertakings, had to be relinquished by the deadline fixed by the Supervisory Authority, and, in any event, by the end of the four year period mentioned above.

32. Under amendments introduced in 2001 and 2003, the original four year period was replaced by the deadline of 31 December 2005. Controlling shareholdings in companies other than assignee banks, with the exception of instrumental undertakings, had to be relinquished, in any event, before 31 December 2005.<sup>8</sup>

33. Pursuant to Article 25(3) of Decree No 153/99, if banking foundations fail to meet those deadlines, the Supervisory Authority is empowered to proceed to the divestment of controlling shareholdings to the extent necessary to bring control to an end.

34. With respect to the applicable tax regime, Article 12(1) of Decree No 153/99 provides that banking foundations which

<sup>8</sup> — Article 11 of Law No 448/01 of 28 December 2001 and Article 4 of Decree-Law No 143 of 24 June 2003, transformed into law, with modifications, by Law No 212 of 1 August 2003.

have adapted their statutes to its provisions are considered to be non-commercial entities, even if they pursue their statutory aims through instrumental undertakings.

### The main proceedings and the questions referred

35. Article 12(2) of the same decree extended the regime laid down in Article 6 of Decree No 601/73, that is to say, the 50% reduction in corporation tax,<sup>9</sup> to banking foundations which had adapted their statutes to the provisions of Decree No 153/99 and were operating in the 'relevant sectors'. The same applied, until their statutes were adapted to the requirements of Decree No 153/99, to banking foundations not having the nature of commercial entities that had pursued principally public interest and social assistance aims in the sectors listed in Article 12 of Decree No 356/90 as subsequently modified.

37. Fondazione Cassa di Risparmio di San Miniato, a banking foundation,<sup>10</sup> applied under Article 10a of Law No 1745/62 to be exempted from retention for the 1998 tax year on account of tax due on the income arising from its shareholdings in Cassa di Risparmio di San Miniato SpA and Casse Toscane SpA, two banks. The application was refused by the tax authorities in Tuscany on grounds that management by a banking foundation of its shareholdings in an assignee bank was a commercial activity which was incompatible with the exemption under Article 10a of Law No 1745/62.

38. Fondazione Cassa di Risparmio di San Miniato, together with Cassa di Risparmio di San Miniato SpA and Cassa di Risparmio di Firenze SpA, which took over Casse Toscane SpA ('the defendants in the main

36. Finally, Article 12(3) of Decree No 153/99 states that the banking foundations lose their non-commercial nature and cease to benefit from the tax exemptions provided if, after 31 December 2005, they are still in control of an assignee bank.

10 -- The description of the national proceedings given in the order for reference by the national court differs on some points from that given by the parties who have submitted observations. Thus, in its order for reference, the national court does not mention the fact that the dispute at national level concerns a request for tax exemption lodged for 1998 and therefore precedes the adoption of Decree No 153/99. Only the parties submitting observations have made that qualification. The account of the role played by the various parties to the national proceedings does not always coincide. The order for reference mentions, for instance, Cassa di Risparmio di San Miniato SpA rather than its holding Fondazione as the original applicant. It appears from the observations submitted by the other parties that it was in fact the Fondazione which was at the origin of the initial request for the exemption. Those differences do not however affect the substance of the case to a significant degree. See also points 51 and 101 below.

9 -- See point 13 above.

proceedings'), as the entities responsible for effecting the retention on the dividends to be paid to the Fondazione, unsuccessfully challenged that decision before the Florence Provincial Tax Tribunal.

and principles of the EC Treaty, both in relation to competition — in particular Articles 87 to 88 EC on State aid — and in relation to the principles of non-discrimination (Article 12 EC), freedom of establishment (Article 43 EC et seq.) and free movement of capital (Article 56 EC et seq.).

39. On appeal, the Tuscany Regional Tax Tribunal overruled the decision of the lower court and held that the new legislative regime explicitly provided for the application of the tax advantages in question to banking foundations. Since there was no evidence that the commercial activities of Fondazione Cassa di Risparmio di San Miniato prevailed over its public interest and social assistance aims, the court held that the Fondazione was entitled to benefit from the 50% reduction on corporation tax by virtue of Article 6 of Decree No 601/73 and, consequently, to the exemption from retention on account of tax due on dividends in accordance with Article 10a of Law No 1745/62, solely in respect of its objectives of public interest and social benefit in certain sectors.<sup>11</sup>

41. As regards Article 87 EC et seq., the national court notes that in its Decision 2003/146/EC of 22 August 2002 on the tax measures for banking foundations implemented by Italy ('the Commission Decision'),<sup>12</sup> the Commission examined the tax measures provided for by Article 12(2) of Decree No 153/99 in the light of the State aid provisions of the EC Treaty. In that decision the Commission considered that in the case of banking foundations that did not directly exercise any activity in the relevant sectors, the national measures examined did not constitute State aid within the meaning of Article 87(1) EC, as the beneficiaries did not qualify as undertakings for the purposes of that provision.

40. The Ministero dell'Economia e delle Finanze appealed against that decision to the Corte Suprema di Cassazione, which considers that in order to resolve the case before it, it is first necessary to ascertain whether the tax advantages for banking foundations are compatible with the rules

42. The national court points out that there is disagreement at national level as to whether banking foundations have a commercial nature.

<sup>11</sup> — There seems to be a link between those two provisions under national law. See point 67 below.

<sup>12</sup> — OJ 2003 L 55, p. 56.

43. Whereas Italian tax authorities have consistently maintained that banking foundations have a commercial character and are therefore subject to the regular tax regime, the Italian Government argued in the framework of the procedure leading to the adoption of the Commission Decision that banking foundations could not be regarded as undertakings for the purposes of the EC rules on competition. In the judicial context, the national court points out that even its own case-law shows inconsistencies on that point.

44. The national court further notes that pursuant to some national case-law, Article 12(2) of Decree No 153/99 extending the tax advantages under Article 6 of Decree No 601/73 to banking foundations is considered to have a merely interpretative character, so that the tax advantage would apply also to tax years prior to the entry into force of Decree No 153/99.

45. It further considers that it is necessary to examine the validity of the Commission Decision. In essence it takes the view that the Commission failed properly to apply the EC Treaty and properly to assess the tasks, nature and role of banking foundations in the Italian banking market. The national court also considers that the Commission did not adequately reason its decision and failed to carry out a proper analysis of the banking foundations' activity in relation to

the acquisition and management of holdings in undertakings other than an assignee bank.

46. In the national court's view, the existence of an economic activity is also clear from the fact that controlling holdings in banking companies are assigned to specially constituted entities, that that situation is maintained for a considerable period, and that proceeds from the disposal of such holdings are used to acquire and manage substantial holdings in other undertakings in order to achieve different corporate objectives, including the economic development of the system.

47. In addition, the national court wonders whether the tax regime in question does not amount to discrimination to the detriment of other undertakings operating on the market in question and, at the same time, a breach of the principles of the right of establishment and the free movement of capital.

48. In view of the above, the national court has decided to stay proceedings and seek a preliminary ruling by the Court on the following questions:

'(1) Must a group of bodies (namely banking foundations), created on the basis of

Law No 218/90 and Legislative Decree No 356/90, as subsequently amended, in order to hold controlling holdings in companies engaged in banking activity and in order to administer those holdings, in relation to a very large number of bodies operating on the market, with the proceeds of the controlled undertakings devolving to the latter, be considered to be subject to the Community rules on competition — even where they are assigned objects of social benefit? With regard to the rules introduced by Legislative Decree No 153/99, does the possibility afforded those entities of using the proceeds of the disposal of such holdings to acquire and manage substantial shareholdings in other undertakings — including banking undertakings — and also controlling shareholdings in non-banking undertakings for different purposes, including the economic development of the system, similarly constitute a commercial activity for the purposes of the application of Community law on competition?

- (2) Consequently, are those entities, under the rules contained in Law No 218/90 and Legislative Decree No 356/90, as subsequently amended, as well as the reform contained in Law No 461/98 and Legislative Decree No 153/99, subject to

the Community rules on State aid (Articles 87 to 88 EC), in relation to a preferential tax regime which applies to them?

- (3) If question (2) above is answered in the affirmative, does or does not the system of direct tax relief on dividends received, which is at issue in this case, constitute State aid, within the meaning of Article 87 EC?
- (4) Again, if question (2) above is answered in the affirmative, is the Decision of the European Commission of 22 August 2002, in which the rules on State aid were held to be inapplicable to the foundations of banking origin, valid, having regard to the issues of lawfulness and the lack and/or inadequacy of reasoning set out in this order for reference?
- (5) Leaving out of consideration the question whether the rules on State aid are applicable, does according more favourable tax treatment to the distribution of the profits of the — exclusively national — assignee banks, controlled by the foundations, and received by the latter, or of those undertakings in which holdings were acquired using the proceeds from the disposal of holdings in assignee banks, constitute discrimination in favour of the undertakings

invested in as compared with the other undertakings operating on the market and, at the same time, infringe the principles of freedom of establishment and the free movement of capital, in relation to Articles 12, 43 et seq. and Article 56 et seq. EC?’

## Assessment

### *Admissibility*

49. The parties submitting observations have raised objections to the admissibility of all the questions referred by the national court.

The first, second, and third questions

50. The defendants in the main proceedings argue that the first three questions should be held inadmissible on the following grounds.

51. First, contrary to what the national court states in its order for reference, the exemption under Article 10a of Law No 1745/62 does not concern a withholding tax as such but a retention on account of tax due; secondly, neither that article, which precedes the establishment of banking foundations, nor any other provision provides for the application of the exemption contained therein to banking foundations; and, thirdly, the preliminary questions posed are of purely internal interest in that they seek only to establish whether the banking foundations enjoy the right to benefit from the tax advantages provided by Article 10a of Law No 1745/62.

52. The first and second of those objections concern alleged misinterpretations by the national court of the domestic rules applicable to the facts in the main proceedings.

53. Pursuant to settled case-law, under Article 234 EC the interpretation of national law is beyond the Court’s jurisdiction, as it is for the national court to assess the scope of the national provisions and the manner in which they must be applied.<sup>13</sup>

<sup>13</sup> — See, *inter alia*, Case C-45/94 *Ayuntamiento de Ceuta* [1995] ECR I-4385, at paragraph 26.

54. As regards the defendants' third objection, it is also settled case-law that it is for the national courts alone to determine both the need for a preliminary ruling and the relevance of the questions which they put to the Court. Consequently, where the questions put by national courts concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling.<sup>14</sup>

55. It appears from the order for reference that the national court is not asking the Court whether the national provisions at stake apply to banking foundations in Italy — a question on which the national court seems to have already formed an opinion — but how those national provisions stand as regards the EC rules on competition. In such circumstances the Court is bound to assist the national court.

56. The Commission submits that the Court should ignore those parts of the first and third preliminary questions concerning Decree No 153/99. That decree entered into force after the facts in the main proceedings took place in 1998 and bears therefore no relation with the case before the national court.

57. Pursuant to settled case-law, questions referred may only be rejected if it is 'quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or to its purpose, [or] where the problem is hypothetical'.<sup>15</sup>

58. I do not think that that is the case here. Even though the parties submitting observations may not share its views, the fact remains that the competent national court considers that Decree No 153/99 is of relevance to the resolution of the dispute before it. It also appears from the case-file that the decree's provisions concerning the tax regime have in some instances been found by Italian courts to have a retroactive effect as regards banking foundations, making it applicable before 1998. The interpretative issue under Community law concerning Decree No 153/99 appears *prima facie* relevant to the main proceedings.

59. That being so, the conditions set out in the Court's case-law for holding the first, second and third questions inadmissible are in my view not met.

14 — See, *inter alia*, Case C-145/03 *Keller* [2005] ECR I-2529, at paragraph 33.

15 — See, *inter alia*, Case C-380/01 *Gustav Schneider* [2004] ECR I-1389, at paragraph 22 and the case-law cited therein.

## The fourth question

question the lawfulness of that decision before the national courts in an action brought against the national implementing measure.

60. The defendants in the main proceedings consider that the Commission Decision has become final since Italy has not challenged it within the time-limits provided for under Article 230 EC. They refer to the *TWD* judgment to support their conclusion.<sup>16</sup>

61. I do not think that the present circumstances are analogous to those in *TWD*.

63. The present case, by contrast, concerns a Commission decision addressed to Italy which is general in nature and whose validity has not been called into question before the national court by any of the parties involved in the national proceedings. The question of validity has been raised *ex proprio motu* by the national court in the exercise of its prerogatives under Article 234 EC. Thus, the potential abuse of procedure by a party who should have challenged the decision directly before the Court but did not, which in my view lies at the heart of the *TWD* case-law, is here absent.

62. In that case, the question was whether the applicant in the national proceedings was time-barred from pleading the unlawfulness of a Commission decision in support of an action brought against the administrative act by which the national authority, in implementation of that Commission decision, revoked the aid which it had received. The Court, emphasising the need to safeguard legal certainty, concluded that it was not possible for a person who could have challenged the decision and who allowed the mandatory time-limit in the third paragraph of Article 230 EC to expire, to call into

64. Article 234 EC does not lay down any time-limit for national courts to request a preliminary ruling on the validity of acts of the EC institutions. Pursuant to the case-law, preliminary questions are admissible if they appear relevant for the resolution of the national proceedings and the legal and factual context is sufficiently explained. It is when assessing the validity of the referred Community act, which is a matter of substance, that the Court will consider all the factors that may affect it, including the requirements arising from the principle of legal certainty.

<sup>16</sup> — Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

65. The Commission also suggests that the fourth question is inadmissible. Its decision examined the compatibility with the State aid rules of the Treaty of the tax exemptions arising from Decree No 153/99, which entered into force after the material time in the main proceedings. Furthermore, it related to tax exemptions other than the one provided in Article 10a of Law No 1745/62, which is the provision in issue in the national proceedings. The Commission Decision is therefore of no relevance to the resolution of the case before the national court.

vant to the facts or the subject-matter of the main proceedings.<sup>17</sup>

68. It follows that the fourth question should also be held admissible.

#### The fifth question

66. Italy argues along the same lines as the Commission and points out that since the Commission Decision did not consider the situation of banking foundations under the original legislative regime, the question of its validity is of no consequence to the main proceedings.

69. The defendants in the main proceedings object that the fifth question is too vague. The national court has failed to specify which aspects of the national legislation in question might amount to an obstacle to the exercise of the freedoms guaranteed by the EC Treaty or which banking companies or foundations would benefit from possible discrimination.

67. Whether Article 12 of Decree No 153/99 applies retroactively or not, whether Article 6 of Decree No 601/73 and Article 10a of Law No 1745/62 are in any way linked under national law and whether they are relevant to the resolution of the case in the main proceedings are issues which only the national court is competent to determine. In addition, as discussed above, it is not obvious that the questions posed are irrele-

70. It is true that, on its own, the fifth question is somewhat imprecise. However, taken as a whole, the extensive order for reference provides the legal and factual material necessary to enable the Court to provide a useful and relevant reply on the subject-matter of the fifth question.<sup>18</sup>

<sup>17</sup> — See points 57 and 58 above and the case-law cited there.

<sup>18</sup> — See Case C-18/01 *Korhonen* [2003] ECR I-5321, paragraph 20 and the case-law cited therein.

71. The fifth question should also be held admissible.

Do the banking foundations perform an economic activity?

### *Substance*

The first and second questions

72. By its first and second questions the national court is seeking in essence clarification as to whether, by reason of the fact that they own and manage controlling holdings in assignee banks and other undertakings, banking foundations qualify as 'undertakings' for the purposes of the competition rules of the EC Treaty, in particular those concerning State aid.

73. It appears to me that, pursuant to the case-law of the Court, banking foundations will qualify as undertakings for the purposes of Community law in two cases: first, if they themselves carry out an 'economic activity' within the meaning of the case-law and/or, second, if they are directly or indirectly involved in the management of undertakings which perform such an economic activity.

74. It is commonplace that the Court has sanctioned a functional notion of undertaking for the purposes of the EC competition rules. Whether an entity qualifies as an undertaking is determined by whether it engages in an 'economic activity', regardless of its legal status and the way in which it is financed.<sup>19</sup> According to the case-law an entity engages in an 'economic activity' when it is 'offering goods or services on the market'. The Court has further held that the non-profit making nature of the entity in question or the fact that it seeks non-commercial objectives is irrelevant for the purposes of qualifying it as an undertaking.<sup>20</sup>

75. In order to determine whether the Italian banking foundations themselves carry out an 'economic activity' within the meaning of that case-law, their various tasks and activities under the two legislative regimes outlined above must be examined.

19 — Case C-41/90 *Höfner* [1991] ECR I-1979, at paragraph 21. More recently, see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* [2005] ECR I-5425, at paragraph 112 and the case-law cited therein. See also my Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, at point 25.

20 — See, inter alia, Case C-244/94 *FFSA* [1995] ECR I-4013, at paragraph 21, and Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, at paragraph 117 and the case-law cited therein.

## Management of controlling shareholdings

76. Under the original legislative regime, the management of a controlling shareholding in an assignee bank appears to be limited to the sale and/or acquisition of shareholdings, the exercise of shareholding rights and the use of the return therefrom in the pursuit of the banking foundations' statutory public interest and social assistance goals.

77. As the Commission and the defendants in the main proceedings argue, none of those operations can be equated with 'the offering of goods or services on the market'. Thus, on a strict interpretation of the case-law, they do not constitute an economic activity for the purposes of the competition rules of the EC Treaty.

78. I would however go beyond that interpretation. I agree with the Italian Government's observations that an entity should qualify as an undertaking for the purposes of the EC competition rules not only when it offers goods and services on the market but also when it carries out other activities which are economic in nature and which could lead to distortions in a market where competition exists. As I have suggested in a previous

Opinion, the emphasis when interpreting whether an activity is economic in nature should be placed on whether that activity 'could, at least in principle, be carried on by a private undertaking in order to make profits'.<sup>21</sup>

79. That interpretation is justified by the need to ensure the full effectiveness of the competition rules of the Treaty, in particular when read in the light of their ultimate rationale, namely, to avoid any distortions of competition in the market caused by the conduct of any entity, whether public or private. The Court has relied on that interpretation when, applying a combined reading of the competition rules of the Treaty including Article 3(1)(g) EC, together with Article 10 EC, it extended the prohibition of anti-competitive behaviour to the action of public authorities.<sup>22</sup>

80. In the instant case, as Italy observes and as suggested in the Commission Decision,<sup>23</sup> the possibility cannot be excluded that a competitive market for controlling shareholdings in banking companies exists. When managing their shareholdings, banking foundations would be important players in such a market, in particular since, subject to Treas-

21 — See my Opinion in *AOK*, cited in footnote 19 above, at point 27 and the case-law referred to therein.

22 — See Case 66/86 *Ahmed Saeed* [1989] ECR 803, at paragraph 48 and the case-law cited therein; Case C-153/93 *Delta* [1994] ECR I-2517 at paragraph 14 and the case-law cited therein.

23 — At paragraph 9, third indent.

ury authorisation, they could sell their controlling shareholding in one assignee bank to acquire a new one in another. Those operations could lead to distortions of competition if, for instance, the purchasing position of banking foundations was enhanced by State aid or if they colluded with other undertakings to alter the price of their controlling shareholdings. Yet, on a restrictive reading of the case-law as proposed by the Commission and the defendants in the main action, that anti-competitive behaviour would escape the EC competition rules. Clearly, such a reading should be avoided.

have to be relinquished by an established deadline, later extended to 31 December 2005. If those deadlines are not met, the Supervisory Authority is empowered to order compulsory divestment to bring control over the company to an end.

82. By imposing those obligations, the new regime has largely removed the banking foundations' potential to affect the market for controlling shareholdings, if any such market exists. It now seems unlikely that they will distort competition in that market.

83. It is of course up to the national court to determine whether the conditions in points 81 and 82 above are met and, in particular, whether a relevant market for controlling shareholdings exists.

81. The situation appears to be different after the entry into force of Decree No 153/99. Under the new legislative regime — which as it appears from the parties' observations at the hearing was partly justified by the fact that the previous regime had not achieved its objective of ensuring a full separation between banking foundations and assignee banks — banking foundations may only possess and manage controlling shareholdings, directly or indirectly, in 'instrumental undertakings' which directly foster the realisation of their statutory public interest aims and operate exclusively in the defined 'relevant sectors'. Shareholdings in assignee banks and any other companies

Activities carried out directly by banking foundations in the realisation of their public interest and social assistance aims

84. I agree with the Commission that in pursuing their public interest and social assistance aims, banking foundations may engage in activities entailing the offering of

goods or services on markets where competition exists. The sectors in which the banking foundations are active, under both the original and the new regimes, such as scientific research, education, art and health, often operate under market conditions and are served by undertakings acting in competition and seeking profit.

85. Since the absence of a profit making motive is not a ground for exemption, banking foundations could in those circumstances qualify as undertakings within the meaning of the case-law.

86. It is up to the national court to assess whether in carrying out their statutory aims banking foundations directly engage in an economic activity consisting in offering goods or services in a market where competition exists. Whether that is the case must be determined on a case-by-case basis.

Banking foundations as parent entities of undertakings

87. In the Court's case-law, an 'undertaking' must be understood as designating an

'economic unit' for the purposes of competition law.<sup>24</sup> Whenever a subsidiary does not freely determine its conduct on the market but carries out instructions given to it directly or indirectly by the parent company by which it is wholly controlled, they form an economic unit and should be treated as one for the purposes of EC competition law.<sup>25</sup>

88. A similar rationale underlies the case-law on the notion of economic activity developed by the case-law of the Court on the Sixth VAT Directive, which the Commission cites in support of its arguments, according to which a company whose sole

24 — Case 170/83 *Hydrotherm* [1984] ECR 2999, at paragraph 11. See also *Dansk Rorindustri*, cited in footnote 19 above, at paragraph 112 and the case-law cited therein. Similarly, the Court of First Instance has held that 'Article 85(1) of the EEC Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision'. Case T-11/89 *Shell v Commission* [1992] ECR II-757, at paragraph 311.

25 — Case T-102/92 *Viho* [1995] ECR II-17, at paragraph 51. See also Case C-73/95P *Viho* [1996] ECR I-5457, at paragraph 16 and the case-law cited therein, and Case 15/74 *Centrafarm* [1974] ECR 1147, at paragraph 41. It is also worth mentioning that under Article 3 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13) (Merger Regulation), a subsidiary is not considered to be independent if there is the possibility for the parent company 'of exercising decisive influence on an undertaking'. See also the criteria for the consolidation of accounts between parent and subsidiary undertakings contained in the 7th Company Law Directive (Council Directive 83/349/EEC of 13 June 1983, OJ 1983 L 193, p. 1) and the Opinion of Advocate General Warner in *Commercial Solvents* where he suggested as a rule of thumb that whenever a parent company has a majority shareholding the subsidiary is, in principle, not independent (Joined Cases 6/73 and 7/73 [1974] ECR 223, at pp. 262 to 265).

purpose is to acquire holdings in other undertakings, without involving itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not carry out an economic activity within the meaning of the Sixth Directive.<sup>26</sup> It follows that a company that directly or indirectly manages such undertakings performs an economic activity.

89. Since assignee banks clearly constitute undertakings for the purposes of the competition rules of the Treaty, banking foundations under the original legislative regime would also qualify as undertakings where their holding was accompanied by direct or indirect involvement in the management of those assignee banks. The Court has identified as possible evidence of such an involvement the supply of administrative, accounting and information technology services to the subsidiaries.<sup>27</sup>

90. Whether those conditions are present is a matter of fact to be determined by the national court on a case-by-case basis. In doing so, the national court should assess the powers which the banking foundations enjoyed over the assignee banks and how those powers could be, or have actually been, exercised under the applicable national rules. The fact that banking foundations held a majority shareholding, could nominate some of the members of their own management and control organs to the board of administrators and supervisory committee of their assignee banks and that, even though only transitionally, the operational continuity between banking foundations and controlled assignee banks had to be ensured, should in my view be balanced against the prohibition on banking foundations becoming 'directly' involved in any banking activity or in any other activity not related to their statutory aims of public interest and social assistance.

91. The introduction of the new legislative regime on the other hand appears to have weakened the means by which banking foundations could exercise a 'decisive influence' on their assignee banks. It is, of course, for the national court to decide whether that is the case. In reaching its conclusion the national court should, in my view, take into account the fact that members of the banking foundations' management organs are now explicitly prohibited from acting as members of the board of administrators of a bank, and that that prohibition was later extended in 2003 to management or supervisory positions in companies controlled by

26 — Case C-142/99 *Flordienne and Berginvest* [2000] ECR I-9567, at paragraphs 17 to 19 and the case-law cited therein. I agree that, for the sake of coherence and uniformity, the same concepts in different areas of Community law should, as a general rule, be given identical meaning, unless otherwise justified by the nature or specific features of the area in which that concept is being inserted and which may warrant an ad hoc reading. In this particular case, it seems reasonable to accept the Commission's proposition that the case-law on the Sixth VAT Directive can apply by analogy for the purposes of the competition rules.

27 — *Flordienne and Berginvest*, cited above, *ibid*.

the assignee bank or in which it has a shareholding and to persons defining the strategy in the banking foundation. The national court should also consider that banking foundations are explicitly prohibited from exercising banking functions and from carrying out either directly or indirectly any form of funding, disbursement or subsidy to entities which have profit making aims or in favour of undertakings, whatever their nature, other than instrumental undertakings.

carrying on an economic activity and would be subject to the competition rules of the EC Treaty.

93. Finally, as the Italian Government points out, where banking foundations have not adapted their statutes to or have not yet relinquished their controlling shareholdings as required by the new legislative regime, the considerations I have developed as regards the old regime remain valid.

### The third question

92. As regards the relationships with instrumental undertakings under the new legislative regime, if, by virtue of the rights arising from their shareholdings, banking foundations may exercise a decisive influence on those undertakings, then they will, pursuant to the case-law above,<sup>28</sup> qualify as undertakings, provided of course that the instrumental undertakings themselves qualify as such. The fact that instrumental undertakings must not be profit making and must be active in one of the relevant sectors does not exclude the possibility that they may operate by offering goods or services in sectors where competition exists between private parties. If that is so, banking foundations would, by reason of their decisive influence over the instrumental undertakings, be also

94. By its third question the national court asks whether the system of tax advantages and relief as described in the order for reference constitutes State aid within the meaning of Article 87 EC.

95. The Commission submits that, were the beneficiaries of the tax exemption — the banking foundations — to qualify as undertakings, the tax regime would in principle qualify as State aid under Article 87(1) EC unless it were justified by the nature or general scheme of the system of which it forms part.

<sup>28</sup> — See footnotes 24, 25 and 26 above.

96. Italy accepts that if Article 12 of Decree No 153/99 is interpreted as extending the tax advantages contained in Article 6 of Decree No 601/73, in combination with Article 10a of Law No 1745/62, retroactively to banking foundations under the original legislative regime, those tax advantages constitute State aid within the meaning of Article 87(1) EC.

97. The defendants in the main proceedings submit that the contested tax regime fails to fulfil the selectivity condition necessary to constitute State aid under Article 87(1) EC.

98. In my view, the tax advantages in question, if granted to undertakings within the meaning of the case-law discussed in the context of the first and second questions,<sup>29</sup> would constitute State aid under Article 87(1) EC.

99. According to the case-law, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore

being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid under Article 87(1) EC.<sup>30</sup>

100. Those measures include tax advantages granted by Member States, even though they do not involve, strictly speaking, a transfer of State resources. Tax advantages fulfil the criterion of providing a gratuitous advantage in that they place persons to whom they apply in a more favourable financial situation than other taxpayers.<sup>31</sup> By extending the tax relief to banking foundations the contested measures appear to do precisely that for their beneficiaries.

101. It is irrelevant whether the tax advantage consists in exempting the banking foundations from withholding tax, as the order of reference states, or from retention on account of tax due, as the parties submitting observations argue. In both cases a gratuitous advantage is conferred upon the beneficiaries of the exemption — either the non-payment of full taxes or a significant delay in doing so.

30 — See, *inter alia*, Case C-6/97 *Italy v Commission* [1999] ECR I-2981, at paragraph 15 and the case-law cited therein.

31 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, at paragraph 14. See also Case C-156/98 *Germany v Commission* [2000] ECR I-6857, at paragraphs 25 and 26 and the case-law cited therein.

29 — See points 73 to 93 above.

102. With respect to the criterion of selectivity pursuant to which the measure must benefit certain undertakings or the production of certain goods, the Commission is in my view right in arguing that by benefiting certain undertakings by virtue of their legal nature (foundations or entities governed by public law) and the specific sector (education, public health, etc.) in which they operate, Article 10a of Law No 1745/62 fulfils *prima facie* that criterion.

103. The same reasoning applies as regards Article 12 of Decree No 153/99 in connection with Article 6 of Decree No 601/73, in so far as it extends the 50 % corporation tax reduction to banking foundations subject to the condition that they limit their activities to the relevant sectors.

104. Pursuant to the Court's case-law, the national court should however consider whether those tax provisions may be justified by the nature or general scheme of the system of which they are part, in which case they would fall outside the scope of Article 87(1) EC.<sup>32</sup> The extension to banking foundations of the disputed tax advantages would appear to arise from the object sought by the national legislation, that is, to benefit certain entities having public interest or

social assistance aims, rather than from the internal logic of the tax rules or the taxing technique. If that is so, the advantages granted to the banking foundations would fulfil the selectivity criterion.

105. Finally, according to the case-law, the fact that the measures in question pursue social benefit and public interest aims is irrelevant as regards their characterisation as State aid under Article 87(1) EC.<sup>33</sup>

106. Thus, provided that the other elements of the notion of State aid — namely, a distortion of competition and an effect on trade between Member States — are present and that the tax advantages are not justified by the nature or general scheme of the system, which it is for the national court to assess, the tax advantages in question in the main proceedings, whether the exemption of the retention on account of tax due or the reduction in corporation tax, would fulfil the conditions for qualification as State aid under Article 87(1) EC if granted to 'undertakings' within the meaning of the competition rules of the Treaty as discussed in the context of the first and second questions.

32 — See, *inter alia*, Case C-308/01 *GIL Insurance Ltd* [2004] ECR I-4777, at paragraph 72 and the case-law cited therein.

33 — See footnote 20 above.

The fourth question

economic assessment for that of the Commission.<sup>34</sup> That case-law concerns Commission decisions adopted under Article 81(3) and 87(3) EC, where it enjoys a wide discretion, but also under Article 87(1) EC.<sup>35</sup>

107. By its fourth question the national court requests the Court to rule on the validity of the Commission Decision.

108. The validity of the Commission Decision must be appraised by reference to its specific subject-matter; that is, the analysis of the new legislative regime.

110. In other cases, however, the Court has held that since State aid is 'a legal concept which must be interpreted on the basis of *objective factors* ... the Community courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a

109. Some preliminary remarks appear necessary. The case-law is not entirely consistent on the proper scope of review by the Court. Where a Commission decision involves a complex economic appraisal, the case-law has generally limited the Court's role to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers, and has barred Community courts from substituting their own

34 — See, *inter alia*, Case C-56/93 *Belgium v Commission* [1996] ECR I-723, at paragraph 11 and the case-law cited therein; Case C-169/95 *Spain v Commission* [1997] ECR I-135, at paragraph 34; Case T-380/94 *Aliffass* [1996] ECR II-2169, at paragraph 56; Case T-395/94 *Atlantic Container* [2002] ECR II-875, at paragraph 257; Joined Cases T-371/94 and T-394/94 *British Airways* [1998] ECR II-2405, at paragraph 79.

35 — As regards the Court of First Instance, see Case T-296/97 *Alitalia* [2000] ECR II-3871, at paragraph 105; Joined Cases T-126/96 and T-127/96 *BFI* [1998] ECR II-3437, at paragraph 81; Case T-36/99 *Lenzing* [2004] ECR II-3597, at paragraph 150; Case T-358/94 *Air France* [1996] ECR II-2109, at paragraphs 71 and 72. The Court has also reasoned in the same vein in Joined Cases C-328/99 and C-399/00 *Italy and SIM v Commission* [2003] ECR I-4035, at paragraph 39. All those cases concerned the application by the Commission of the 'private investor test', which involves a complex economic appraisal, in order to determine whether the State measures in question constituted State aid under Article 87(1) EC. See also *Belgium v Commission*, cited in footnote 34 above.

*comprehensive review* as to whether a measure falls within the scope of Article [87(1)] of the Treaty'.<sup>36</sup>

112. A contrary approach would also be at odds with the fact that the Court has required national courts to apply a full economic analysis of all relevant factors when determining whether a State measure constitutes State aid under the Treaty.<sup>37</sup>

113. However, it is unnecessary to resolve the issue here because the Commission Decision could not in any event, in my view, be regarded as invalid.

111. I would be inclined to favour a more intensive scrutiny by the Court of Commission decisions on whether a State measure constitutes a State aid under Article 87(1) EC, although admittedly that might present practical problems in Article 234 EC proceedings. The objective nature of the concept of State aid and the fact that, contrary to the Commission's exclusive and wide discretion under Articles 87(3) EC or 81(3) EC, it shares the role of interpreting and applying Article 87(1) EC, albeit for different purposes, with national courts, require, in my view, that the review powers of the Court should not be limited to any specific grounds. As a corollary, the Community Courts may, where appropriate, substitute their own economic assessment for that of the Commission, however complex the latter may be.

114. It is apparent that the correct procedure was respected. The steps followed and the reasons for initiating the procedure under Article 88(2) EC are clearly explained in the Commission Decision.<sup>38</sup>

115. According to the case-law, 'the statement of reasons required by Article 253 EC must be appropriate to the act 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 and to enable the competent court to exercise its power of review. ... It is

36 — Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25 (emphasis added). See also Case T-98/00 *Linde* [2002] ECR II-3961, at paragraph 40. The Court of First Instance has summed up its interpretation of the case-law in its judgment in *Valmont*, where it held that the exception to the principle of a comprehensive review by the Court as to whether a measure falls within the scope of Article 87(1) EC is where a complex economic appraisal is involved, in which case review by the Court is restricted (Case T-274/01 [2004] ECR II-3145, at paragraph 37).

37 — Case C-39/94 *SFEI* [1996] ECR I-3547, at paragraph 62.

38 — At paragraph 9.

not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.<sup>39</sup>

116. The decision starts with the initial assessment of the contested measures that led the Commission to initiate the Article 88(2) EC procedure. It then proceeds to a thorough description of the competence, roles and functions of banking foundations under the new regime and of the tax advantages concerned. It also contains the observations made by the addressee of the Decision, Italy, and a summary of the comments submitted by interested third parties.

117. Against that background, the Commission proceeds to develop the legal reasoning on which its conclusions are based, including not only reference to but a brief discussion of

the case-law supporting it.<sup>40</sup> In my view, the reasoning is expressed in a 'clear and unequivocal fashion' and thus meets the standards set by the Court.

118. With respect to the obligation to accurately state the facts, it must be noted that the order for reference does not question factual statements made by the Commission, but rather their legal assessment in the light of the competition rules of the Treaty. In any event, as stated above, it is apparent that the factual background is properly described and therefore the Commission Decision does not fail in that regard either.

119. There are in my opinion also no grounds to conclude that the Commission has erred in its economic assessment of the national measures under scrutiny. In essence the national court criticises the Commission for failing to take properly into consideration the effects that banking foundations' management, and eventual disposal, of their controlling shareholdings in assignee banks could have in the banking market, in particular in the light of their task of 'economic development of the system'. The national court also criticises the Commission for not properly examining the relationship between the banking foundations and their 'instrumental undertakings'.

39 — Case, inter alia, C-310/99 *Italy v Commission* [2002] ECR I-2289, at paragraph 48 and the case-law cited therein.

40 — At paragraphs 44 and 49.

120. Paragraphs 36 to 39, 43 to 45 and 48 to 50 of the Commission Decision are devoted to the examination of those issues.

121. On the basis of that examination the Commission concluded that the obligation to relinquish any controlling shareholdings within a specified time-limit, together with the obligations and restrictions imposed by the new legislative regime on the members of the internal bodies and executives of the banking foundations as regards their relationships with assignee banks — in particular the prohibition on performing administrative, managerial or supervisory duties in assignee banks or any other financial or banking undertaking — and the limitations as regards the management of their assets, reinforced the separation between banking foundations and financial institutions, thereby helping ‘to allay the corresponding concerns expressed in the decision to initiate the procedure’.<sup>41</sup> It concluded that the management of their assets was not an economic activity and therefore did not make banking foundations undertakings within the meaning of Article 87(1) EC.<sup>42</sup>

122. The Commission also noted that banking foundations were not entitled to own any controlling shareholding in undertakings other than instrumental undertakings. In the latter case, the Commission held that

where the activities of instrumental undertakings consisted in providing services in a market where competition exists, the ability of banking foundations ‘to control undertakings is liable to distort competition and their activities cannot be entirely immune to competition control’.<sup>43</sup> The Commission concluded that ‘the possibility of acquiring control of instrumental undertakings, ... would not make [banking] foundations undertakings in so far as it did not imply direct involvement in the activity of the controlled undertaking’.<sup>44</sup>

123. On that basis, the Commission decided that banking foundations did not qualify as undertakings for the purposes of Article 87(1) EC unless they carried out an economic activity in the meaning of the case-law, that is, by offering goods or services on a market where competition exists, even in one of the ‘relevant sectors’.

124. Despite the national court’s misgivings, and as my reasoning above indicates,<sup>45</sup> I agree in essence with the Commission’s assessment and its conclusion as regards the nature of banking foundations under the new legislative regime. The order for refer-

41 — At paragraph 43.

42 — At paragraph 59.

43 — At paragraph 49.

44 — At paragraph 52.

45 — See points 81 and 82 and 91 to 93 above.

ence does not in my view offer additional legal or economic elements or an alternative analysis which could cast doubt on the appraisal carried out by the Commission.

The fifth question

125. As regards the national court's concern that the Commission's analysis gives insufficient weight to the banking foundations' task of 'economic development of the system', it is settled case-law that State measures qualify as State aid not because of their aims but because of their effects. The fact that banking foundations have as one of their tasks the 'economic development of the system' does not by itself turn them into undertakings for the purposes of the EC Treaty rules on competition.

128. The wording of the fifth question is not completely clear. However, read in the context of the order for reference it appears that the national court seeks in essence to ascertain whether the tax advantages at stake in the national proceedings could amount to discrimination prohibited under Article 12 or infringe the right of establishment under Article 43 et seq. and the free movement of capital under Article 56 et seq. EC, both of which constitute specific expressions of the principle of non-discrimination.

126. I therefore conclude that the Commission Decision is not flawed by any error of assessment.

129. According to the case-law, even if, in the current state of Community law, direct taxation does not as such fall within the scope of the Community's jurisdiction, Member States must nevertheless exercise their retained powers in compliance with Community law, which includes respect for the provisions on right of establishment and free movement of capital.<sup>46</sup>

127. In view of the foregoing, the answer to the fourth question is that there are no grounds for declaring invalid Commission Decision 2003/146.

<sup>46</sup> — Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, at paragraph 44 and the case-law cited therein.

130. Even though it is ultimately for the national court to decide on the scope of the national provisions, it appears from the case-file that the tax advantages at issue are not specifically designed for banking foundations. Article 10a of Law No 1745/62 does not only cover dividends arising from banking activities but applies generally to dividends obtained in Italy by non-commercial entities pursuing social or public interest aims. That provision applies to any dividend obtained in Italy by any entity that fulfils the criteria specified therein without distinction by reason of their place of establishment.

advantages appear to be granted to any entity subject to corporation tax in Italy that fulfils the conditions, irrespective of nationality or place of establishment.

132. In conclusion, nothing in the order for reference indicates that the national legislative provisions at issue are, on their own, directly or indirectly discriminatory in a manner contrary to Article 12 EC, or constitute obstacles to the right of establishment or the free movement of capital under Articles 43 et seq. EC and 56 et seq. EC, respectively.

131. The same is true for the 50% reduction in corporation tax in favour of non-commercial entities seeking aims of social and public interest, which Article 12 of Decree No 153/99 extends to banking foundations which have adapted their statutes to its general provisions and are operating in the 'relevant sectors'. Banking foundations become eligible because they become exclusively devoted to the pursuance of public interest and social assistance aims. Such tax

133. In view of the foregoing, the fifth question should be answered to the effect that a tax regime providing for tax advantages on their income raised in Italy for banking foundations because of their public interest and social assistance aims without distinguishing by reason of nationality or place of establishment does not infringe Articles 12, 43 et seq. and 56 et seq. EC.

## Conclusion

134. In view of the foregoing, the questions of the Corte Suprema di Cassazione should be answered as follows:

(1) (Questions 1 and 2) Banking foundations as regulated by Law No 218 of 30 July 1990 and the related Legislative Decree No 356 of 20 November 1990, as subsequently amended, and by Law No 461 of 23 December 1998 and Legislative Decree No 153 of 17 May 1999, as subsequently amended, would qualify as undertakings for the purposes of the competition rules of the EC Treaty and, in particular, Article 87(1) EC on State aid if they carried out an economic activity within the meaning of the case-law of the Court of Justice. That would be the case if:

- when managing their controlling shareholding in assignee banks of any other undertaking, there is a relevant market where private undertakings may carry out that same activity in order to make profits;

or

- when carrying out their statutory public interest and social assistance aims they offer goods or services in a market where competition exists;

or

- when, by virtue of the rights arising from their controlling shareholdings or otherwise, they directly or indirectly involve themselves in the management of undertakings which themselves perform an economic activity within the meaning of the case-law.

(2) (Question 3) Provided that the other elements of the notion of State aid — namely, a distortion of competition and an effect on trade between Member States — are present and that the tax advantages are not justified by the nature or general scheme of the system, which it is for the national court to assess, the tax regime in question in the main proceedings would fulfil the conditions for qualification as State aid under Article 87(1) EC if granted to ‘undertakings’ within the meaning of the competition rules of the Treaty as discussed in the context of the first and second questions.

(3) (Question 4) There are no grounds for declaring Commission Decision 2003/146/EC invalid.

(4) (Question 5) A tax regime providing for tax advantages on the income raised in Italy granted, inter alia, to banking foundations because of their public interest and social assistance aims that applies without distinguishing by reason of nationality or place of establishment does not infringe Articles 12, 43 et seq. and 56 et seq. EC.