JUDGMENT OF THE COURT (Second Chamber)

10 January 2006 *

In Case C-222/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 23 March 2004, received at the Court on 28 May 2004, in the proceedings

Ministero dell'Economia e delle Finanze

v

Cassa di Risparmio di Firenze SpA,

Fondazione Cassa di Risparmio di San Miniato,

Cassa di Risparmio di San Miniato SpA,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, R. Silva de Lapuerta and G. Arestis, Judges,

Advocate General: F.G. Jacobs,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2005,

after considering the observations submitted on behalf of:

— Cassa di Risparmio di Firenze SpA, by P. Russo and G. Morbidelli, avvocati,

— Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA, by A. Rossi and G. Roberti, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by R. Lyal and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC et seq., 56 EC et seq., 87 EC and 88 EC, as well as the validity of Commission Decision 2003/146/EC of 22 August 2002 on the tax measures for banking foundations implemented by Italy (OJ 2003 L 55, p. 56).

2 The reference was made in the course of proceedings between, on the one hand, Cassa di Risparmio di Firenze SpA (hereinafter 'Cassa di Risparmio di Firenze'), Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA (hereinafter 'Cassa di Risparmio di San Miniato'), established in Italy, and, on the other hand, the Ministero dell'Economia e delle Finanze (Italian Ministry of Economy and Finance) regarding an application by Fondazione Cassa di Risparmio di San Miniato seeking exemption from retention of tax on dividends for the 1998 tax year.

I — National legal framework

3 In Italy, dividends distributed by companies limited by shares are subject to a retention on account of tax due, under Article 1 of Law No 1745 of 29 December 1962 introducing retention on account or tax on dividends distributed by companies and amending the legislation on the mandatory registration of shareholders' names (GURI No 5 of 7 January 1963, p. 61), as amended by Decree-Law No 22 of 21 February 1967, containing new provisions in respect of retention on account or tax on dividends distributed by companies (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) (hereinafter 'Law No 1745/62').

4 Article 10 of Law No 1745/62 provides that dividends accruing to organisations of persons or entities not subject to corporation tax, since they are excluded from the scope of that tax, and to funds taxable on the basis of their balance sheet, but exempt from corporation tax, are to be subject to a tax retention of 30%, instead of the retention on account under Article 1 of that law.

5 Article 10a of Law No 1745/62 exempts from the retention under Article 10 dividends accruing to legal persons governed by public law or to foundations exempt from corporation tax which pursue exclusively aims of social welfare, education, teaching, and study and scientific research.

6 Article 6 of Decree No 601 of the President of the Republic of 29 September 1973 regulating tax advantages (GURI, Ordinary Supplement, No 268 of 16 October 1973, p. 3, hereinafter 'Decree No 601/73') provides for a reduction by half of the tax on

the income of legal persons for social assistance organisations and establishments, mutual aid societies, hospital organisations, social welfare and charitable organisations, educational establishments and non-profit-making establishments for study and experimentation in the public interest, scientific bodies, academies, historical, literary, scientific, experimental and research foundations and associations pursuing exclusively cultural aims, as well as organisations whose aims are assimilated by law to charitable and educational aims.

7 A process of privatisation of the Italian public banking system was undertaken by Law No 218 of 30 July 1990 containing provisions on the capital restructuring and consolidation of credit institutions governed by public law (GURI No 182 of 6 August 1990, p. 8, hereinafter 'Law No 218/90'), and Legislative Decree No 356 of 20 November 1990 containing provisions for the restructuring and regulation of the banking industry (GURI, Ordinary Supplement, No 282 of 3 December 1990, p. 5, hereinafter 'Decree No 356/90').

8 Article 1 of Decree No 356/90 provided, in particular, for the possibility for public banking establishments, including savings banks, to transfer their banking business to a public limited company formed by them. The transferring organisation, called in practice a 'banking foundation' (hereinafter 'the banking foundation'), became the sole shareholder of the company so formed (hereinafter 'the banking company'), whose purpose was the carrying on of the banking activity previously carried on by the banking foundation.

9 Article 11 of Decree No 356/90 provided that banking foundations would be governed by that decree and by their statutes, would be endowed with full legal capacity under public and private law and would remain subject to the legal provisions relating to the appointment of their administrative and supervisory boards.

10 Article 12 stated that banking foundations with non-shareholder capital funds would have to pursue socially beneficial aims in the public interest, mainly in the sectors of scientific research, education, art and health and that the original purposes of assistance and protection of disadvantaged social groups could be maintained.

11 The same article added, in particular, that:

— banking foundations could carry out the financial, commercial, real estate and asset operations necessary or opportune for the fulfilment of those aims;

— they were to manage their shareholding in the banking company so long as they continued to own it;

— however, they could neither carry out directly any banking activity nor hold any controlling shareholding in the capital of banking or financial undertakings other than the banking company;

— by contrast, they could acquire or dispose of minority shareholdings in the capital of other banking and financial undertakings;

— on a transitional basis, operational continuity between the banking foundation and the banking company had to be ensured by requirements that the members

of the management committee or equivalent body of the banking foundation would be appointed to the board of directors and members of the supervisory body to the banking company's supervisory committee;

— banking foundations had to transfer a certain portion of the receipts from their shareholdings in the banking companies to a special reserve for subscribing to increases in the capital of those companies;

— that reserve could be invested in securities of companies in which banking foundations held a shareholding or in securities issued or guaranteed by the State;

— banking foundations could contract debts to the banking companies or receive guarantees from the latter within specified limits.

12 Under Article 13 of Decree No 356/90:

— public sales of shares in banking companies had to be effected by means of a public offer for sale;

— within an overall limit of 1% of the banking company's capital, sales of quoted shares on the stock exchange could be freely transacted;

— recourse to other methods was to be subject to the authorisation of the Minister for the Treasury;

— if, because of sale or any other transaction, the banking foundation were to lose, even temporarily, control of the majority of shares carrying the right to vote at the banking company's ordinary general meetings, the transaction had to be approved by decree of the Minister for the Treasury;

— a banking foundation which had transferred the controlling shareholding could acquire another controlling shareholding in a banking company after obtaining authorisation by decree of the Minister for the Treasury.

13 Article 14 of Decree No 356/90 made banking foundations subject to the supervision of the Treasury, to which they had to transmit their provisional budgets and annual balance-sheets.

14 Under the same provision:

— banking foundations had in addition to transmit to the Treasury and to the Bank of Italy the information, including periodic information, demanded of them; and

— the Treasury could order the carrying out of audits.

15 Article 1(7a) of Decree-Law No 332 of 31 May 1994 providing for acceleration of the procedures for the disposal of the State's and public bodies' shareholdings in joint stock companies (GURI No 126 of 1 June 1994, p. 38), converted into law, with amendments, by Law No 474 of 30 July 1994 (GURI No 177 of 30 July 1994, p. 5), repealed the provisions of Article 13 of Decree No 356/90, referred to in paragraph 12 above, which required the consent of the Minister for the Treasury, on the one hand, for any transaction by which the banking foundation would lose control of the banking company, and, on the other hand, for the acquisition of another controlling shareholding in a banking company.

16 The regime introduced by Law No 218/90 and Decree No 356/90 was implemented in detail by Law No 461 of 23 December 1998 delegating powers to the Government to revise the civil and tax provisions applicable to the transferring entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990, as well as the tax provisions applicable to restructuring operations in the banking sector (GURI No 4 of 7 January 1999, p. 4, hereinafter 'Law No 461/98'), and by Legislative Decree No 153 of 17 May 1999 concerning the civil and tax provisions applicable to the transferring entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990 and the tax provisions applicable to restructuring operations in the banking sector, implemented in accordance with Article 1 of Law No 461 of 23 December 1998 (GURI No 125 of 31 May 1999, p. 4, hereinafter 'Decree No 153/99').

17 Article 30 of Decree No 153/99 repealed, in particular, Articles 11, 12, 13 and 14 of Decree No 356/90.

18 Article 1 of Decree No 153/99, adopting the term which was used in practice, states that 'foundation' must be understood to mean the entity which transferred the banking business for the purposes of Decree No 356/90.

19 Article 2(1) of Decree No 153/99 provides that:

— banking foundations are to be non-profit-making legal persons under private law, endowed with corporate independence and the widest powers of management;

— they are to pursue exclusively socially beneficial aims and the promotion of economic development, in accordance with the provisions of their respective statutes.

20 Article 3 adds that:

— banking foundations are to pursue their aims by all means compatible with their legal nature as defined in Article 2;

— they are to operate in accordance with the principles of operational profitability;

— they may manage only instrumental undertakings which directly serve the fulfilment of their statutory aims and exclusively in the relevant sectors;

— they are not entitled to carry on banking functions;

— they are prohibited from any form of financing, payment or subsidy, direct or indirect, to or of profit-making bodies or for undertakings, whatever their nature, with the exception of instrumental undertakings and social cooperatives.

21 'Relevant sectors' had, pursuant to Article 1 of Decree No 153/99 as originally drafted, to be chosen from among the following sectors: scientific research, education, art, conservation and promotion of cultural heritage and activities and of environmental resources, health and assistance to underprivileged social categories.

22 After the amendment of that provision by Article 11 of Law No 448 of 28 December 2001 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2002) (GURI, Ordinary Supplement, No 301 of 29 December 2001, p. 1, hereinafter 'Law No 448/01'), 'relevant sectors' must now be chosen from among the following: family and related values; growth and development of young people; education, teaching and training, including the acquisition of publications for schools; voluntary and charitable work, philanthropy; religion and spiritual development; assistance to the elderly; civil rights; crime prevention and public safety; food safety and high-quality agriculture; local development and building of social housing at local level; consumer protection; civil defence; public health, preventive and rehabilitative medicine; sport, prevention and treatment of drug addiction; mental and physiological conditions and disorders; scientific and technical research; environmental protection; art, cultural activities and heritage.

23 Article 4(3) of Decree No 153/99, in the original version, provided that the members of the management body could not be appointed members of the board of directors of the banking company.

24 In the version resulting from Law No 350 of 24 December 2003 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2004) (GURI, Ordinary Supplement, No 299 of 27 December 2003, p. 1), the same provision states that:

— individuals who carry out the duties of administration, management or supervision in the banking foundation may not perform administrative, managerial or supervisory duties in the banking company or in companies which it controls or in which it has a shareholding;

— individuals who carry out the duties of strategic planning in the banking foundation may not perform administrative, managerial or supervisory duties in the banking company.

25 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 were to manage risks by observing prudential standards in order to preserve their value and obtain an adequate return. Article 11 of Law No 448/01 added a requirement that its management must be consistent with the banking foundation's non-profit-making nature operating according to the principles of transparency and morality.

26 Article 6(1) of Decree No 153/99 provides that banking foundations may possess controlling holdings only in entities and companies having as their exclusive object the management of instrumental undertakings.

27 As regards shareholdings in banking companies, the original version of Article 25(1) and (2) provided that:

— controlling shareholdings in those companies could be kept for a period of four years from the date of the decree's entry into force, for the purposes of their disposal;

— in the absence of a disposal by that deadline, the shareholdings could be kept for an additional period not exceeding two years;

— controlling shareholdings in companies other than banking companies, excluding those held by banking foundations in instrumental undertakings, had to be disposed of within the time-limit fixed by the Supervisory Authority, account being taken of the requirement to preserve the assets' value and, in any event, by the end of the prescribed four-year period.

28 Following amendment of those provisions by Article 11 of Law No 448/01, then by Article 4 of Decree-Law No 143 of 24 June 2003 (GURI No 144 of 24 June 2003), converted into law, with amendments, by Law No 212 of 1 August 2003 (GURI, Ordinary Supplement, No 185 of 11 August 2003) (hereinafter 'Decree-Law No 143/03'):

— the maximum period of four years for keeping controlling shareholdings was replaced by a deadline of 31 December 2005;

— the possibility was introduced of entrusting shareholdings in the banking companies to savings management companies chosen in compliance with the procedures for competitive tendering and required to manage those shareholdings in their own name in accordance with criteria of professionalism and independence, the banking foundation retaining in certain cases the ability to give instructions for the purposes of extraordinary general meetings and as to the disposal of those shareholdings being required to take place, in any event, no later than the expiry of the third year following 31 December 2005;

— the Minister for Economy and Finance and the Bank of Italy are to exercise the powers conferred on them by the provisions applicable in respect of banking and credit;

— controlling shareholdings in companies other than banking companies, excluding those held by banking foundations in instrumental undertakings, must be disposed of within the time-limit fixed by the Supervisory Authority, and, in any event, no later than 31 December 2005.

29 Article 25(3) of Decree No 153/99, prior to its amendment by Law No 448/01, provides that, where banking foundations, after the expiry of the periods fixed for the retention of controlling shareholdings, continue to hold them, the Supervisory Authority is to dispose of them to the extent necessary to terminate the control.

30 With respect to the applicable tax regime, Article 12(1) of Decree No 153/99 states that banking foundations which have adapted their statutes to its provisions are considered to be non-commercial entities, even if they pursue their statutory aims through instrumental undertakings.

31 At the date of the order for reference, Article 12(2) provided that:

— the regime laid down in Article 6 of Decree No 601/73 was applicable to banking foundations which had adapted their statutes to the provisions of Decree No 153/99 and were operating in 'relevant sectors';

— the same regime applied, until their statutes were adapted to the requirements of Decree No 153/99, to banking foundations not having the nature of commercial entities which had pursued principally socially beneficial aims in the public interest in the sectors listed in Article 12 of Decree No 356/90 and its subsequent amendments.

32 Article 12(3) of Decree No 153/99, as amended by Decree-Law No 143/03, states that banking foundations lose their non-commercial nature and cease to benefit from the tax relief provided for if, after 31 December 2005, they still hold a controlling shareholding in the banking companies.

II — The main proceedings and the questions referred for a preliminary ruling

33 The Fondazione Cassa di Risparmio di San Miniato applied to the Italian tax authorities, on the basis of Article 10a of Law No 1745/62, for exemption from the retention on the dividends accruing to it for the 1998 tax year, which it received on account of its shareholdings in the Cassa di Risparmio di San Miniato and the company Casse Toscane SpA, to whose rights Cassa di Risparmio di Firenze has succeeded.

34 That application was refused on the ground that the management by a banking foundation of its shareholdings in banking companies was to be regarded as a commercial activity which was incompatible with the exemption under Article 10a of Law No 1745/62.

35 Fondazione Cassa di Risparmio di San Miniato, together with Cassa di Risparmio di San Miniato and Cassa di Risparmio di Firenze, challenged that decision before the Commissione tributaria provinciale di Firenze (Florence Provincial Tax Tribunal).

36 Their action was dismissed.

37 The three applicants appealed against the decision of the Commissione tributaria provinciale di Firenze before the Commissione tributaria regionale di Firenze (Tuscany Regional Tax Tribunal) which allowed their appeal.

38 According to the referring court, the Commissione tributaria regionale di Firenze held that the Fondazione Cassa di Risparmio di San Miniato, because of its socially beneficial or public interest aim in specified sectors, must be entitled to the reduction by half of the tax on the income of legal persons under Article 6 of Decree No 601/73 and that that reduction was accompanied by the exemption from the retention under Article 10a of Law No 1745/62, regardless of the fact that a banking foundation may carry on, otherwise than as its main activity, a business activity.

39 Also according to the referring court, the Commissione tributaria regionale di Firenze referred, in that regard, to the new regime arising from Law No 461/98 and Decree No 153/99, which provides expressly that the tax advantage in question applies to banking foundations.

40 It considered that, in the case before it, it had not been shown that the business activity took precedence over the socially beneficial aims.

41 The Ministero dell'Economia e delle Finanze appealed in cassation against the decision given.

42 It relies, in particular, on breach of Article 10a of Law No 1745/62, Article 6 of Decree No 601/73 and Article 14 of the preliminary provisions of the Italian Civil Code, by virtue of which laws which form exceptions to general rules or to other laws do not apply outside the cases and circumstances for which they provide.

43 In its order for reference, the Corte suprema di cassazione observes that the outcome of the main proceedings on the basis of national law must take into account the question of the compatibility of the tax regime applicable to banking foundations with Community law, in particular with Articles 12 EC, 43 et seq. EC, 56 et seq. EC, and 87 EC and 88 EC. It notes that, according to the Court's settled case-law, the national authorities must apply, if need be of their own motion, the rules of Community law, if necessary not applying national rules contrary thereto.

44 As regards Articles 87 EC and 88 EC, the national court notes that, if the tax measures in question in the main proceedings had to be regarded as amounting to State aid in favour of certain undertakings or certain products, they could not be implemented without a prior decision of the Commission as to their compatibility. Until the adoption of such a decision, the national courts would, as a result of the direct effect of Article 88(3) EC, have to decline to apply them.

45 In that regard, the national court states that Decision 2003/146 examined the tax measures laid down in Article 12(2) of Decree No 153/99 in the light of Articles 87 EC and 88 EC.

46 Under that decision, the measures examined, implemented in favour of banking foundations which do not directly carry on an activity in the sectors listed in Article 1 of that decree, as amended by Law No 448/01, do not amount to State aid within the meaning of Article 87(1) EC on the ground that they are not granted to 'undertakings' within the meaning of that provision.

47 The referring court states that there is disagreement as to whether or not banking foundations are commercial in nature.

48 The Italian tax authorities have steadfastly maintained that banking foundations are commercial in nature, so that they are subject to the normal tax regime.

49 The Italian Government, in the course of the procedure which led to Decision 2003/146, maintained for its part that banking foundations cannot be regarded as 'undertakings' for the purposes of the competition rules.

50 Differences exist even within the referring court. Certain decisions have accepted the non-commercial nature of banking foundations, on the ground that the management of shareholdings in banking undertakings, as well as of shareholdings in undertakings other than the banking company, is merely instrumental in procuring the financial resources essential to the pursuit of the social and cultural

objects assigned to the body. Other decisions have been to the contrary effect, accepting that the social and cultural objects were immaterial for the purposes of the tax relief regime, once the entities in question could operate on the banking market and other markets in competition with other undertakings.

51 The referring court points out that Article 12(2) of Decree No 153/99 expressly extends the regime provided for by Article 6 of Decree No 601/73, until their adoption of provisions adapting their statutes to Decree No 153/99, to banking foundations which do not have the nature of commercial entities and which have pursued mainly socially beneficial aims in the public interest.

52 It adds that, according to some national case-law, Article 12(2) of Decree No 153/99 is an aid to construction, so that the tax regime in question applies also to tax years prior to the entry into force of Decree No 153/99.

53 It considers that it is therefore necessary to examine the validity of Decision 2003/146. In that regard, if banking foundations had to be regarded as undertakings by nature, the decision would be invalid.

54 The national court takes the view that the simultaneous assignment, on the basis of a statutory requirement, to legal entities specially constituted for that purpose, of dominant ownership of a large proportion of banking undertakings and the maintenance of that situation for a considerable period, as well as the use of the proceeds from the disposal of such holdings to acquire and manage substantial holdings in other undertakings, with different corporate objectives, including the economic development of the system, gives rise to an economic activity through which income is obtained, even if that income cannot be distributed and must be used predominately for non-profit-making purposes.

55 The referring court points out that, at the end of the 1995-1996 financial year, the banking foundations had net assets of ITL 50 billion and that, at 31 December 2002, their book value amounted to EUR 37 000 million, not counting any appreciation in the shareholdings owned, which are normally entered at their historical book value.

56 The referring court notes that the carrying on of non-profit-making activities by the banking foundations cannot hide the characteristic element of the system, that is, that those banking foundations' purpose, both organically and functionally, is to assume the ownership and administration of a large number of banking undertakings by exercising over them powers of control, among which are the appointment and removal of directors.

57 Such a function cannot be regarded as falling outside the competition rules. That function is a vital aspect of the public banking system and, according to the principles of Community law, always constitutes the exercise of an economic activity. It unquestionably represents a potential element of distortion of the market and intra-Community trade, particularly because banking foundations could also acquire shareholdings in other undertakings, including banking undertakings.

58 Banking foundations thus exist in a legal and economic symbiosis with the public banking system, so that they are not alien to that system or the market in question.

59 The national court asks, in addition, whether the tax regime in question in the main proceedings is in breach of the principle of non-discrimination enshrined in Article 12 EC, and, at the same time, in breach of the principles of freedom of establishment and free movement of capital, established in Articles 43 EC and 56 EC respectively.

60 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 EC and 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 relief from direct tax 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 [Decision 2003/146], 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 ...?

(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 EC, 43 et seq. EC and Article 56 et seq. EC?'

III — The questions referred

A –Admissibility of the questions

1. The admissibility of the first, second, and third questions

(a) Observations submitted to the Court

61 The defendants in the main proceedings submit that the first three questions are inadmissible on the grounds that:

— contrary to the referring court's statement, the exemption provided for by Article 10a of Law No 1745/62 concerns only a retention on account of tax and not a withholding tax;

— the questions referred raise a purely national point, which is simply to establish whether, in the light of the general rules laid down in Article 10a of Law 1745/62, the banking foundations are entitled to the exemption under that provision.

62 The Italian Government and the Commission do not contest the admissibility of the first three questions referred.

(b) Findings of the Court

63 According to settled case-law, the Court has no power, within the framework of Article 234 EC, to give preliminary rulings on the interpretation of rules pertaining to national law (Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177, 186 and Case C-341/94 *Allain* [1996] ECR I-4631, paragraph 11). The jurisdiction of the Court is confined to considering provisions of Community law only (Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraph 5). It is for the national court to assess the scope of the national provisions and the manner in which they must be applied (Case C-45/94 *Cámara de Comercio, Industria y Navegación de Ceuta* [1995] ECR I-4385, paragraph 26).

64 In the main proceedings, it is thus for the referring court to determine whether the exemption under Article 10a of Law No 1745/62 concerns a retention on account of tax due or a withholding tax.

65 It is also for that court to evaluate whether the defendant banking foundation is entitled to such exemption for the tax year in question, by the effect of the combined application of Article 10a of Law No 1745/62 and Article 6 of Decree No 601/73, and, if necessary, the retrospective application of Article 12(2) of Decree No 153/99.

66 If so, the referring court will have to decide whether the corresponding tax advantage amounts to State aid within the meaning of Article 87(1) EC. If that is the case, that tax advantage cannot, under Article 88(3) EC, be implemented unless it has been notified to the Commission.

67 The question which, if necessary, the national court will have to decide concerns Community law.

68 In those circumstances, the first three questions referred for a preliminary ruling, since they contain that question, are admissible.

2. The admissibility of the fourth question

(a) Observations submitted to the Court

69 The defendants in the main proceedings maintain that the fourth question referred, relating to the validity of Decision 2003/146, is inadmissible on the ground that that decision has become final in respect of the Italian Republic which, having had the opportunity to do so, has not brought proceedings for annulment on the basis of Article 230 EC (Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833).

70 The Italian Government submits that the fourth question is irrelevant, since Decision 2003/146 was adopted with respect to the banking foundations' regime as amended by Decree No 153/99.

71 The Commission also submits that that question is inadmissible because the main proceedings cover the situation existing in 1998, whereas Decision 2003/146 examined the tax reliefs accorded to banking foundations by Decree No 153/99, reliefs which, in addition, correspond to tax advantages other than the exemption under Article 10a of Law No 1745/62.

(b) Findings of the Court

72 The question seeking determination of the validity of Decision 2003/146 was not referred at the request of a legal entity which, having had the opportunity to bring proceedings for annulment of that decision, has not done so within the period laid down by Article 230 EC.

73 The question was referred by the national court of it own motion.

74 Consequently, it cannot be declared inadmissible by virtue of the case-law resulting from *TWD Textilwerke Deggendorf*.

75 Nevertheless, it must be recalled that, according to settled case-law, the Court may decide not to give a preliminary ruling determining the validity of a Community act where it is quite obvious that that determination, requested by the national court,

bears no relation to the actual facts of the main action or its purpose (Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 16).

76 Decision 2003/146 examines, in the light of Article 87 EC et seq., in particular, Article 12(2) of Decree No 153/99, relating to the grant of the reduction by half of the tax provided for under Article 6 of Decree No 601/73.

77 That reduction is a tax advantage distinct from the exemption from retention accorded by Article 10a of Law No 1745/62.

78 In paragraph 61 and Article 1 of Decision 2003/146, the Commission concludes that the measure introduced by Article 12(2) of Decree No 153/99 does not constitute State aid in favour of banking foundations which do not directly carry out activities in the sectors listed in Article 1 of that decree, as amended by Law No 448/01 (see paragraph 22 above).

79 It will therefore be for the referring court to decide whether or not Article 12(2) of Decree No 153/99 has, in domestic law, any effect on the application of Article 10a of Law No 1745/62 in the main proceedings (see paragraph 65 above), in relation to the 1998 tax year.

80 If so, that court will have to determine whether the tax advantage in question amounts to State aid within the meaning of Article 87(1) EC.

81 If not, it will have to undertake the same determination if it holds that Article 10a of Law No 1745/62 benefits the defendant in the main proceedings in connection with its application in combination solely with Article 6 of Decree No 601/73.

82 However, its determination cannot in any event be affected by Decision 2003/146.

83 The Commission's conclusion that the measure provided for by Article 12(2) of Decree No 153/99 does not constitute State aid is based on the finding that the banking foundations are not 'undertakings' within the meaning of Article 87(1) EC.

84 That finding is the outcome of the analysis by the Commission of the new regime for banking foundations resulting from Law No 461/98, Decree No 153/99 and Law No 448/01, a regime which entered into effect after the 1998 tax year, which is the one in question in the main proceedings.

85 That new regime differs significantly, as is clear from the account of the national legal framework given in paragraphs 7 to 32 above, from the previous regime, and, apart from Article 12(2) of Decree No 153/99, it is not submitted that it applies retrospectively.

86 On the legal level, the Commission's evaluation as to whether the banking foundations were to be classed as 'undertakings' was therefore based on a regime different to that applicable in the course of the tax year in question in the main proceedings.

87 In that regard, in paragraph 43 of Decision 2003/146, the Commission notes, as important factors, that:

— Decree No 153/99 introduced, as regards the control of commercial undertakings by banking foundations, 'specific safeguards', which are analysed in paragraphs 36 to 39 of that decision;

— Law No 448/01 reinforced the separation between banking foundations and financial institutions, thus helping to allay the concerns expressed on that point in the decision to initiate the procedure.

88 In addition, in the factual area, the Commission took into account in its assessment of whether the banking foundations carried on directly activities in the sectors covered by the applicable provisions the description of a factual situation existing after the 1998 tax year, furnished by the Italian authorities by letter of 16 January 2001.

89 In paragraph 51 of its decision, the Commission observes that the Italian authorities stated in that letter that 'for the time being', none of the foundations was taking advantage of the possibility, provided for by law, of directly carrying out an activity in those sectors, and, in paragraph 54 of that decision, it maintains that that information led it 'to revise its preliminary view, as expressed in its decision to initiate the procedure, regarding the nature of foundations as undertakings'.

90 In that context, the evaluation by the Commission of the treatment of the banking foundations under their new regime cannot determine the evaluation of their treatment under their previous regime, if necessary in the light of a factual situation which is itself different.

91 Therefore, it is obvious that the referring court's question relating to the validity of Decision 2003/146 bears no relation to the purpose of the main proceedings, with the result that it is irrelevant to the resolution thereof.

92 It must therefore be declared inadmissible.

3. The admissibility of the fifth question

(a) Observations submitted to the Court

93 The defendants in the main proceedings submit that the fifth question, relating to the existence of discrimination or restrictions on the freedom of establishment and the free movement of capital, is inadmissible because of its vagueness. The national court does not 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. Nor does it state clearly whether it is the banking foundations or the banking companies which benefit from discrimination.

94 The Italian Government and the Commission do not challenge the admissibility of the fifth question.

(b) Findings of the Court

95 Contrary to what the defendants in the main proceedings maintain, the referring court states expressly, in the fifth question, that:

— it is the tax advantage in question in the main proceedings which could give rise to discrimination and to restrictions on the freedom of establishment or the free movement of capital;

— the discrimination and restrictions exist for the benefit of undertakings, whether banking or not, in which the banking foundations own shareholdings.

96 The fifth question is therefore admissible.

B — The interpretation of the relevant provisions of Community law

97 By it first and second questions, which it is convenient to consider together and to read in the light of the considerations set out in paragraphs 84 to 90 of this judgment as regards the irrelevance of the new regime governing banking foundations resulting from Law No 461/98, Decree No 153/99 and Law No 448/01, the national court is asking, in essence, whether a legal person such as that in question in the main proceedings can, on account of the regime applicable at the period concerned, be treated as an 'undertaking' within the meaning of Article 87(1) EC, and, as such, subject at that period to the Community rules relating to State aid.

98 By its third question, in order to determine whether the State measure introduced without taking account of the preliminary examination procedure established by Article 88(3) EC should or should not be made subject to it, the same court is asking, in essence, whether an exemption from retention on dividends such as that in question in the main proceedings can be regarded as State aid within the meaning of Article 87(1) EC.

99 As regards the fifth question, it is appropriate to recall that the general prohibition of all discrimination on grounds of nationality laid down by Article 12 EC applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination (see, in particular, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 38). However, in relation to the right of establishment and the free movement of capital, the principle of non-discrimination was implemented by Articles 43 EC and 56 EC respectively. The fifth question must therefore be read as referring only to the latter provisions.

100 By that question, the national court is asking, in essence, whether a tax advantage such as that in question in the main proceedings constitutes a restriction of the freedom of establishment or of the free movement of capital provided for in Articles 43 EC and 56 EC, for the benefit of undertakings, whether banking or not, in which the banking foundations own shareholdings, compared to other undertakings operating on the market concerned, in which such foundations do not have shareholdings.

1. The first and second questions, relating to the meaning of 'undertaking' for the purposes of Article 87(1) EC

(a) Observations submitted to the Court

101 The defendants in the main proceedings submit that banking foundations are not 'undertakings' for the purposes of Community competition law. They are therefore

not subject to the State aid regime. They merely receive dividends linked to their shareholdings, in the same way as any proprietor of a building receives the rents due under a letting contract.

102 The Italian Government submits that, for the period relevant to the main proceedings, the foundations must be regarded as undertakings for the purposes of competition law. The controlling shareholdings in the banking companies are, in that regard, sufficient indication of the commercial nature of banking foundations and the regime thus applicable to the foundations indicates the existence of an organic and functional link between them and the Italian banking system. The banking foundations must, consequently, be subject to the rules of the Treaty relating to State aid.

103 The Commission argues that the activity of holding and managing assets carried on by the banking foundations does not involve the supply of services on the market. Under the case-law, the ordinary investor who receives dividends or interest on his capital offers neither goods nor services on the market. Consequently, the banking foundations have not carried on an economic activity. They could not therefore have been regarded as 'undertakings', in the absence of involvement in the activity of the controlled banking company.

104 As regards activities consisting in paying contributions to non-profit-making bodies in socially beneficial sectors, activities carried on by the foundations, they do not correspond to the activities of an 'undertaking'.

105 As regards financial, commercial, real estate, and asset operations necessary to or useful for socially beneficial aims in the public interest of banking foundations, activities which they were authorised to pursue under Article 12 of Decree No 356/90, they could, however, have included aspects of the activities of an undertaking in so far as they included a direct offer on the market for goods or services.

106 Finally, bodies such as banking foundations are not 'undertakings' within the meaning of Article 87 EC, unless they have offered goods or services directly on the market as part of operations necessary or useful in order to attain their socially beneficial aims in the public interest.

(b) The Court's reply

107 According to settled case-law, in the field of competition law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46).

108 Any activity consisting in offering goods or services on a given market is an economic activity (see, in particular, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75).

109 Usually the economic activity is carried on directly on the market.

110 However, that may be the case both of an operator in direct contact with the market and, indirectly, of another entity controlling that operator as part of an economic unit which they together form.

111 In that regard, it must be pointed out that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset.

112 On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking.

113 It must therefore itself, in that respect, be regarded as an undertaking within the meaning of Article 87(1) EC.

114 If that is not the case, the simple separation of an undertaking into two different entities, the first of which pursues directly the former economic activity and the second of which controls the first, being fully involved in its management, would be sufficient to deprive the Community rules relating to State aid of their practical effect. It would enable the second entity to benefit from subsidies or other advantages granted by the State or by means of State resources and to use them in whole or in part for the benefit of the former, in the interest, also, of the economic unit formed by the two entities.

115 It must be held that involvement in the management of a banking company by an entity like the banking foundation which is party to the main proceedings can occur in the context of a regime such as that which arose, for the period concerned, from Law No 218/90 and from Decree No 356/90.

116 In the context of that regime:

— a banking foundation controlling the capital of a banking company, while it cannot engage directly in the banking activity, must ensure the 'operational continuity' between itself and the controlled bank;

— to that end, provisions must require that the members of the management committee or the banking foundation's equivalent body are appointed to the board of directors and members of the controlling body to the supervisory committee of the banking company;

— the banking foundation must transfer a defined proportion of the income from the shareholdings in the banking company to a special reserve to be used for subscribing to increases in capital of that banking company;

— it may invest the reserve, in particular, in securities of the controlled banking company.

117 Such rules reveal a function of banking foundations going beyond the simple placing of capital by an investor. They make possible the exercise of functions relating to control, but also to direction and financial support. They illustrate the existence of organic and functional links between the banking foundations and the banking companies, which is confirmed by the maintenance, particularly under a provision like Article 14 of Decree No 356/90, of supervision by the Minister for the Treasury.

118 To see whether the banking foundation which is a defendant in the main proceedings is to be classed as an 'undertaking', it is for the national court to determine whether it not only held controlling shareholdings in a banking company, but, in addition, actually exercised that control by involving itself directly or indirectly in the management of the latter.

119 So far as concerns, moreover, the role entrusted to the banking foundations by the national legislature in the fields of public interest and social assistance, a distinction must be made between the simple payment of contributions to non-profit-making organisations and the activity carried on directly in those fields.

120 Treatment of the banking foundation as an 'undertaking' seems to be excluded in respect of an activity limited to the payment of contributions to non-profit-making organisations.

121 As the Commission observes, that activity is of an exclusively social nature and is not carried on on the market in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking.

122 On the other hand, where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health.

123 On that hypothesis, which is subject to the national court's assessment, the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators.

124 Where it is decided that it is to be treated as an undertaking, on account of control of a banking company and involvement in its management or on account of an activity in (inter alia) a social, scientific or cultural field, a banking foundation such as that in question in the main proceedings must, as a result, be subject to the application of the Community rules relating to State aid.

125 The reply to the first and second questions must therefore be that a legal person such as the banking foundation in question in the main proceedings may, after an examination which it is for the national court to conduct taking account of the regime applicable at the material time, be treated as an 'undertaking' within the meaning of Article 87(1) EC and, as such, subject at that time to the Community rules relating to State aid.

2. The third question, relating to the meaning of 'State aid' for the purposes of Article 87(1) EC

(a) Observations submitted to the Court

126 The defendants in the main proceedings submit that a measure such as that provided for by Article 10a of Law No 1745/62 does not amount to State aid within

the meaning of Article 87(1) EC. It is not selective. It can benefit, without distinction, all non-commercial entities with the characteristics required by Article 10a of Law No 1745/62. It amounts to a general measure. It does not derogate from the general tax system. The specific characteristics of non-commercial entities justify, for reasons connected to the internal coherence of different systems, the introduction of sectoral legislation restricted to that type of organisation.

127 According to the Italian Government, if the referring court were to hold that the defendant banking foundation in the main proceedings is entitled to the exemption from the retention provided for by Article 10a of Law No 1745/62, combined with the reduction by half of the tax on the income of legal persons under Article 6 of Decree No 601/73, the tax provision in question would have to be categorised as State aid. The undertaking would be put in a privileged competitive position compared to other undertakings operating in the reference market. A reduction by half of the tax due would enable banking foundations to benefit from a tax credit as against the State, since shareholders in a company are entitled to deduct the tax paid upstream by the company in which they are shareholders, and that tax would be greater than what they would be liable to pay after the reduction.

128 The Commission submits that any exemption such as that under Article 10a of Law No 1745/62 can be categorised as State aid. The advantage is financed by the State. It is selective, as being accorded by reference to the legal form of the undertaking and to its activity in certain sectors, and, being intended to benefit organisations regarded as socially deserving, it is not justified by the nature or general scheme of the system of which it forms part. As regards the existence of an effect on trade and of distortion of competition, it would have to be evaluated in each case by the national court.

(b) The Court's reply

129 For the purpose of replying to the third question referred, the national court must be provided with the criteria for interpreting the conditions required by Article 87(1)

EC for categorising a national measure as State aid, namely, (i) the financing of that measure by the State or through State resources, (ii) the selectivity of that measure, and (iii) its effect on trade between Member States and the distortion of competition resulting therefrom.

(i) The condition that the measure be financed by the State or through State resources

130 Article 87(1) EC covers 'any aid granted by a Member State or through State resources in any form whatsoever'.

131 According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and the case-law there cited, and Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 77).

132 Consequently, a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payment of tax normally due can amount to State aid (*Italy* v *Commission*, paragraph 78).

133 It must therefore be held that, whatever may be the national court's answer to the question, still under discussion, whether the exemption under Article 10a of Law No 1745/62 concerns a retention on account of tax due or a withholding tax, a national measure such as that which may be held to apply involves State financing.

(ii) The condition that the measure be selective

134 Article 87(1) EC prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid.

135 A measure such as that in question in the main proceedings does not apply to all economic operators. It cannot therefore be considered to be a general measure of tax or economic policy (*Italy* v *Commission*, paragraph 99, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 49).

136 As the Commission correctly maintains, the tax advantage concerned is accorded on account of the undertaking's legal form, a legal person governed by public law or a foundation, and of the sectors in which that undertaking carries on its activities.

137 It derogates from the ordinary tax regime without being justified by the nature or scheme of the tax system of which it forms part. The derogation is not based on the measure's logic or the technique of taxation, but results from the national

legislature's objective of financially favouring organisations regarded as socially deserving.

138 Such an advantage is therefore selective.

(iii) The condition that trade between Member States be affected and that competition be distorted

139 Article 87(1) EC prohibits aid which affects trade between Member States and distorts or threatens to distort competition.

140 For the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44; *Italy* v *Commission*, cited in paragraph 131 above, paragraph 111, and *Unicredito Italiano*, paragraph 54).

141 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (*Italy* v *Commission*, cited in

paragraph 131 above, paragraph 115, and *Unicredito Italiano*, paragraph 56, and the case-law there cited).

142 In that regard, the fact that an economic sector has been liberalised at Community level may serve to determine that the aid has a real or potential effect on competition and affects trade between Member States (see Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 75; *Italy* v *Commission*, cited in paragraph 131 above, paragraph 116, and *Unicredito Italiano*, paragraph 57).

143 In addition, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (*Italy* v *Commission*, cited in paragraph 131 above, paragraph 117, and *Unicredito Italiano*, paragraph 58).

144 In the main proceedings, it will be for the national court to determine in fact, in the light of the foregoing criteria for interpretation, whether the two requirements examined are satisfied.

145 Without prejudice to that determination, it may be observed that:

— the financial services sector has been involved in an important liberalisation process at Community level, enhancing the competition that may already have resulted from the free movement of capital provided for in the Treaty (*Italy* v *Commission*, cited in paragraph 131 above, paragraph 119, and *Unicredito Italiano*, paragraph 60);

— a tax advantage such as that in question in the main proceedings can strengthen, in terms of financing and/or funding, the position of the economic unit, active in the banking sector, formed by the banking foundation and the banking company;

— it can also strengthen the banking foundation's position in an activity carried on, in particular, in the social, scientific or cultural field.

146 Taking account of all the foregoing matters, the reply to the third question referred must be that an exemption from retention on dividends such as that in question in the main proceedings may, after an examination which it is for the national court to conduct, be categorised as State aid within the meaning of Article 87(1) EC.

3. The fifth question, relating to the definition of 'restrictions on the freedom of establishment' and 'restrictions on the free movement of capital' within the meaning of Articles 43 EC and 56 EC.

(a) Observations submitted to the Court

147 The defendants in the main proceedings deny the existence, suggested by the fifth question, of an obstacle to the freedom of establishment or to the free movement of capital in favour of the banking companies. They submit than an exemption like that under Article 10a of Law No 1745/62 does not favour those companies, which are simply responsible for the recovery of the tax due from the undertakings receiving the income. Those companies gain no advantage from the exemption from the retention on the profits distributed.

148 The Italian Government maintains that, because of the tax advantage in question in the main proceedings, the company in which a banking foundation owns shares may benefit from greater investments by it, which could give rise to an infringement of the freedom of establishment or to an infringement of the free movement of capital capable of creating distortions on the market concerned.

149 The Commission submits that the tax advantage benefits not the banking company, but the banking foundation.

(b) The Court's reply

150 In view of the replies given to the first three questions taking account of the facts and law relevant to the main proceedings, it is not necessary to consider the fifth question, whatever the referring court may decide as regards the treatment of the tax advantage in question in the light of the Community rules relating to State aid.

151 If the referring court categorises the tax advantage as State aid, that advantage will have to be withdrawn, with the result that there will remain no difference in treatment susceptible to analysis in the light of Articles 43 EC and 56 EC.

152 If, on the contrary, it decides not to categorise it as State aid, the question of the existence of restrictions on the freedom of establishment or on the free movement of capital will not arise.

Costs

153 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A legal person such as that in question in the main proceedings may, after an examination which it is for the national court to conduct taking account of the regime applicable at the material time, be treated as an 'undertaking' within the meaning of Article 87(1) EC, and, as such, subject at that time to the Community rules relating to State aid.**

2. **An exemption from retention on dividends such as that in question in the main proceedings may, after an examination which it is for the national court to conduct, be categorised as State aid within the meaning of Article 87(1) EC.**

[Signatures]