JUDGMENT OF THE COURT (Grand Chamber)

15 April 2008 *

In Case C-390/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunale ordinario di Roma (Italy), made by decision of 14 June 2006, received at the Court on 19 September 2006, in the proceedings

Nuova Agricast Srl

v

Ministero delle Attività Produttive,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, A. Borg Barthet, M. Ilešič (Rapporteur), J. Malenovský, J. Klučka, E. Levits and C. Toader, Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 11 September 2007,

after considering the observations submitted on behalf of:

— Nuova Agricast Srl, by M.A. Calabrese, avvocato,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by V. Russo, avvocato dello Stato,

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

after hearing the Opinion of the Advocate General at the sitting on 27 November 2007,

gives the following

Judgment

1 The question referred for a preliminary ruling concerns the validity of the decision of the Commission of 12 July 2000 not to raise objections against an aid scheme for

investment in the less-favoured regions of Italy until 31 December 2006 (State Aid No N 715/99 — Italy) ('the contested decision'), a summary notice relating to which was published in the *Official Journal of the European Communities* (OJ 2000 C 278, p. 26).

2 That question was raised in proceedings brought by Nuova Agricast Srl ('Nuova Agricast'), an undertaking established in the region of Apulia in Italy, against the Ministero delle Attività Produttive (Italian Ministry of Productive Activities), seeking damages alleged to arise from its failure to receive State aid as a result of the wrongful conduct of the Italian authorities in discussions with the Commission of the European Communities which preceded the adoption of the contested decision.

Legal context

Regulation (EC) No 659/1999

3 As the second recital in its preamble makes clear, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) codifies and reinforces the practice developed by the Commission of the European Communities, in accordance with the Court's case-law, with regard to the review of State aid.

4 Article 1(c) of that regulation provides that 'new aid' is to mean 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

5 Article 2 of Regulation No 659/1999 states:

‘1. Save as otherwise provided in regulations made pursuant to Article [89] of the Treaty or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification.

2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as “complete notification”).’

6 Article 4(2) to (4) of Regulation No 659/1999 provides:

‘2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) of the Treaty, it shall decide that the measure is compatible with the common market (hereinafter referred to as a “decision not to raise objections”). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) of the Treaty (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

7 Article 5(1) of Regulation No 659/1999 states: 'where the Commission considers that information provided by the Member State concerned with regard to a measure notified pursuant to Article 2 is incomplete, it shall request all necessary additional information'.

The aid schemes for investment in the less-favoured regions of Italy authorised until 31 December 1999

8 By Decree-law No 415 on the refinancing of Law No 64 of 1 March 1986 laying down provisions governing special intervention measures in the Mezzogiorno (Rifinanziamento della legge 1° marzo 1986, n. 64, recante disciplina organica dell'intervento straordinario nel Mezzogiorno) of 22 October 1992 (GURI nº 249 of 22 October 1992, p. 3), converted, after amendment, into a Law, by Law No 488 of 19 December 1992 (GURI No 299 of 21 December 1992, p. 3 and corrigendum, GURI No 301, of 23 December 1992, p. 40), itself amended by Legislative-decree No 96 of 3 April 1993 (GURI No 79 of 5 April 1993, p. 5) ('Law No 488/1992'), the Italian legislature put in place financial measures intended to encourage companies to develop certain productive activities in less-favoured regions of the country.

9 On 1 March 1995 and 21 May 1997, the Commission adopted two decisions not to raise objections, initially until 31 December 1996 and then until 31 December 1999, against the successive aid schemes based on Law No 488/1992 and on various provisions implementing that law (State aid Nos N 40/95 and N 27/A/97). Summary notices regarding those decisions were published in the *Official Journal of the*

European Communities on 18 July 1995 in relation to the decision of 1 March 1995 (OJ 1995 C 184, p. 4) and on 8 August 1997 in relation to the decision of 21 May 1997 (OJ 1997 C 242, p. 4) ('the 1997 decision').

10 The detailed rules relating to the aid scheme authorised by the 1997 decision ('the 1997-1999 aid scheme') were put in place, first, by resolution of the Comitato interministeriale per la programmazione economica (Inter-departmental committee for economic planning) laying down provisions regulating the award of grants for the purposes of Article 1(2) of Law No 488/1992 (direttive per la concessione di agevolazioni ai sensi dell'art. 1, comma 2, del decreto-legge 22 ottobre 1992, n. 415, convertito nella legge 19 dicembre 1992, n. 488, in tema di disciplina organica dell'intervento straordinario nel Mezzogiorno) of 27 April 1995 (GURI No 142 of 20 June 1995, p. 17), as amended by resolution of that Committee of 18 December 1996 (GURI No 70 of 25 March 1997, p. 35), secondly, by Decree No 527 of the Ministero dell'Industria, del Commercio e dell'Artigianato (Ministry of Industry, Commerce and Crafts) ('the MICA') laying down provisions governing the detailed rules and the procedures for the award and allocation of grants for productive activities in the less-favoured regions of the country (regolamento recante le modalità e le procedure per la concessione ed erogazione delle agevolazioni in favore delle attività produttive nelle aree depresse del Paese) of 20 October 1995 (GURI No 292 of 15 December 1995, p. 3), as amended by Decree No 319 of that ministry of 31 July 1997 (GURI No 221 of 22 September 1997, p. 31), and, thirdly, by Circular No 234363 of the MICA of 20 November 1997 (Ordinary Supplement to GURI No 291 of 15 December 1997).

11 Those detailed rules provided in particular, as follows:

— the financial resources for each year were divided in two equal parts and allocated through an invitation to apply; however, on the basis of the funds available in

the year to which the resources related, the rules for their distribution could be modified by decree, in particular by allowing the funds in question to be allocated through a single invitation to apply;

— the applications submitted under an invitation to apply were examined by banks appointed for that purpose, which awarded a certain number of marks based on regulatory criteria, known as 'indicatori' (hereinafter, 'indicators');

— on the basis of the results of the banks' investigations, the MICA established regional ranking lists, in which the applications were recorded in descending order by reference to the number of marks awarded and adopted a decree awarding the aid to the applicants, starting with the first on the list, until the funds allocated to the invitation to apply in question were exhausted;

— expenditure was eligible provided it was incurred on or after the day following the closing date of the invitation to apply preceding the invitation to which the application referred, except for expenditure on engineers' reports and on other reports, and for expenditure incurred in connection with the acquisition and development of land belonging to the undertaking, which was eligible with effect from the 12th month preceding the date on which the application was lodged;

— undertakings whose applications were placed on a regional list but which had been unable to obtain grants because the funds allocated to the invitation to apply in question were less than the total amount of aid applied for, could either resubmit the same project, once only, under the first appropriate invitation to apply immediately following the invitation under which their application had originally been submitted, without amending the information in the application taken into account by the indicators (a procedure known as 'automatic inclusion'

of the application), or waive such automatic inclusion and resubmit the same project under the first appropriate invitation to apply following the invitation in respect of which they had waived automatic inclusion, but with amendments to some or all of the indicators in order to make the application more competitive, provided that those amendments did not alter the substance of the project (a procedure known as 'reformulation' of the application); in both cases, the conditions applicable to the original applications remained in effect for the purposes of determining the eligibility of the expenditure.

The guidelines on national regional aid

12 In 1998, the Commission published guidelines on national regional aid (OJ 1998 C 74, p. 9) ('the guidelines'). The third subparagraph of point 4.2 of those guidelines provides that 'aid schemes must lay down that an application for aid must be submitted before work is started on the projects'.

13 The first subparagraph of point 6.1 of the guidelines states that 'except for the transitional provisions set out in points 6.2 and 6.3 below, the Commission will assess the compatibility of regional aid with the common market on the basis of these Guidelines as soon as they are applicable'.

The contested decision and the aid scheme for investment in the less-favoured regions of Italy authorised for the period from 1 January 2000 to 31 December 2006

14 On 18 November 1999, the Italian authorities notified to the Commission pursuant to Article 88(3) EC a planned aid scheme which was to be applicable from 1 January 2000 and was based on Law No 488/92. The Commission registered the scheme under number N 715/99.

15 Following a number of exchanges of correspondence and a meeting between representatives of the Italian Government and the Commission, that planned aid scheme was amended by the Italian authorities.

16 By the contested decision, adopted on 12 July 2000 and notified to the Italian Republic by letter SG(2000) D/105754 of 2 August 2000, the Commission decided not to object to that aid scheme for the period until 31 December 2006 ('the 2000-2006 aid scheme').

17 The contested decision contains a transitional provision designed to give express approval of the measures comprised in that aid scheme which provide for a transition with the 1997-1999 aid scheme ('the transitional provision'). That provision states:

'Only on the occasion of the first implementation of the scheme in question, that is to say on the occasion of the first invitation to apply to be organised on the basis of that scheme, it being understood that applications for aid must in any case be submitted before work is started on the investment project, applications submitted under the last invitation to apply organised under [the 1997-1999 aid scheme] which were considered eligible for aid but in respect of which no aid was granted because insufficient funds were allocated to that invitation, will exceptionally be eligible.'

18 Following that decision, the MICA adopted the Decree specifying the maximum limits for grants to promote productive activities in the less-favoured regions of the country referred to in Law No 488/1992 for the regions of Basilicata, Calabria, Campania, Apulia, Sardinia and Sicily (misure massime consentite relative alle agevolazioni in favore delle attività produttive nelle aree depresse del Paese di cui alla legge n. 488/1992 per le regioni Basilicata, Calabria, Campania, Puglia, Sardegna

e Sicilia) of 14 July 2000 (GURI No 166 of 18 July 2000, p. 9), and Circular No 9003 of 14 July 2000 (Ordinary Supplement to GURI No 175 of 28 July 2000), for the purpose of laying down the detailed rules for implementing the 2000-2006 aid scheme.

19 The first subparagraph of the second paragraph of the sole article to that decree provides that aid may be granted 'on the basis … of the expenditure held to be eligible under programmes relating to the last appropriate invitation to apply, which have been examined and approved but in respect of which grants were not awarded because the necessary funds were not available'.

The main proceedings and the question referred for a preliminary ruling

20 On 1 December 1997, the MICA published, under the 1997-1999 aid scheme, the third invitation to apply for aid in the industrial sector, relating to the first semester of 1998 ('the third invitation to apply').

21 Undertakings having an interest had until 16 March 1998 to lodge their applications for aid. They could apply for the funding of expenditure incurred from the day after the expiry of the period for lodging applications under the previous invitation to apply (the second invitation to apply), that is to say, 1 January 1997.

22 On 9 February 1998, Nuova Agricast lodged an application for aid under the third invitation to apply. That application was held to be eligible and was entered in the list of applications for the Apulia Region by Decree of the MICA of 14 August 1998. However, because of the ranking of that application, Nuova Agricast did not obtain the aid applied for since insufficient funds were available.

23 In the meantime, the fourth invitation to apply for aid in the industrial sector, relating to the second semester of 1998 ('the fourth invitation to apply'), was published.

24 On 16 September 1998, Nuova Agricast waived automatic inclusion of its application on the list relating to the fourth invitation to apply, so as to be able to lodge a new, reformulated, application under the next appropriate invitation to apply following that invitation.

25 However, the Italian authorities published no relevant invitation to apply before 31 December 1999, when the 1997-1999 aid scheme expired.

26 On 14 July 2000, that is to say, after the entry into force of the 2000-2006 aid scheme, the Italian authorities published the eighth invitation to apply for aid in the industrial sector ('the eighth invitation to apply').

27 In the light of the conditions applying under the 2000-2006 aid scheme, the reformulated application submitted by Nuova Agricast — which was unable to benefit from the transitional provision included in the contested decision — was held to be inadmissible and was not entered on the list relating to the eighth invitation to apply.

28 Nuova Agricast, together with other Italian undertakings in the same situation, thereupon brought its first action before the Court of First Instance of the European Communities, seeking the annulment of the contested decision. By order of 15 June 2005 in Case T-98/04 *Nuova Agricast and Others* v *Commission* (not published in the European Court Reports), the Court of First Instance dismissed that action as inadmissible, on the ground that it had been brought after the expiry of the period of two months laid down by the fifth paragraph of Article 230 EC.

29 On 21 September 2005, Nuova Agricast brought a second action before the Court of First Instance, which was registered under number T-362/05, seeking compensation from the Commission in respect of the damage allegedly suffered by it as a result of the adoption of the contested decision. Those proceedings are currently pending.

30 In addition, Nuova Agricast has brought an action before the Tribunale ordinario di Roma (Rome District Court) seeking compensation from the Ministero delle Attività Produttive, which has taken over the responsibilities of the MICA, in respect of the damage allegedly suffered by it by reason of the non-payment of the aid applied for.

31 In those proceedings, Nuova Agricast has claimed in particular that in its discussions with the Commission which led to the renewal of the aid scheme after 31 December 1999, the Italian State failed properly to protect the rights acquired by undertakings which, like Nuova Agricast, had waived automatic inclusion in the list relating to the fourth invitation to apply — which, in the event, was the last invitation to apply in the industrial sector before the expiry of the 1997-1999 aid scheme — in order to lodge a reformulated application under the first appropriate invitation to apply following that invitation. The Italian State misled the Commission by failing to inform it that those undertakings were also the holders of acquired rights, and in so doing it infringed the legitimate expectation which those undertakings had that they would be able to lodge a reformulated application.

32 The national court is of the opinion that Nuova Agricast had a 'relevant legal interest' in having its amended application entered on the list relating to the first appropriate invitation to apply following the invitation in respect of which it waived its right to automatic inclusion of its original application.

33 As a result, the legitimate expectation of Nuova Agricast was definitively frustrated by the contested decision, since that decision amended the 2000-2006 aid scheme by comparison with the 1997-1999 aid scheme by providing that only expenditure for implementing approved projects incurred after the lodging of the application was

eligible (the principle that aid must be necessary), while allowing, on a transitional and exceptional basis, a derogation from that principle in respect solely of applications that had not been satisfied under the last invitation to apply published under the 1997-1999 aid scheme.

34 The national court states that in order to give a ruling on Nuova Agricast's application for damages, it must determine whether a causal link exists between the conduct of the Italian State which is complained of and the damage which is alleged.

35 In so far as the contested decision — which the national court regards as the event giving rise to loss (*eventum damni*) — is interposed between the conduct of the Italian Government which is complained of, that is to say, the failure to inform, or the failure fully to inform, the Commission, and the occurrence of the damage alleged by Nuova Agricast, the national court considers that in order to establish the causal link between that conduct and that damage it must determine whether that damage could have been avoided if the Italian State had conducted itself differently and, for that purpose, determine whether the Commission would have adopted a different transitional provision were it to have been 'provided with full and accurate information on the legal situations of the undertakings having an interest in obtaining grants under Law No 488/1992'.

36 According to the national court, proof of the certainty of a different result which would have been favourable to Nuova Agricast requires the invalidity of the transitional provision contained in the contested decision to be established on the ground that that provision is contrary to the rules and principles of the Community legal order.

37 The national court asks, first, whether, since the transitional provision does not benefit undertakings in the situation of Nuova Agricast, it should not be held to be invalid on the basis that it infringes the principle of equal treatment.

38 That court takes the view that on the expiry of the authorisation for the 1997-1999 aid scheme, there were three categories of undertakings:

— undertakings such as Nuova Agricast, whose application for aid had been entered on the list under the third invitation to apply, which did not obtain the aid applied for under that invitation by reason of there being insufficient funds available and which had then waived their right to automatic inclusion of their application in the list relating to the fourth invitation to apply in order to submit a reformulated application under the next appropriate invitation to apply following that invitation ('undertakings in the first category');

— undertakings whose application had been entered on the list relating to the fourth invitation to apply, which did not obtain the aid applied for by reason of there being insufficient funds available ('undertakings in the second category');

— undertakings which had not yet submitted an application for aid, although work on their investment project had already started ('undertakings in the third category').

39 It takes the view that the undertakings in the first category and those in the third category, which were also precluded from taking advantage of the transitional provision, were not in the same situation and thus did not have to be treated in the same way. It also considers that the undertakings in the first category and those in the second category were in similar legal situations and accordingly that the former should have been in a position to take advantage of the transitional position, in the same way as those in the second category.

40 The national court asks, secondly, whether the transitional provision should not be held to be invalid as infringing the obligation to state reasons for Community acts laid down in Article 253 EC.

41 The Tribunale ordinario di Roma therefore decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is [the contested decision valid] as regards only the transitional provision, which lays down an exceptional derogation from the principle "that aid must be necessary" — on the occasion of the first implementation of the scheme in question — solely for applications "made under the last invitation to apply organised on the basis of the preceding scheme approved by the Commission until 31 December 1999, which were considered eligible for aid but in respect of which no aid was granted because insufficient funds were allocated to that invitation" …, with the consequent unjustified passing-over — in breach of the principle of equal treatment and of the obligation to state the reasons on which the decision was based pursuant to Article 253 EC — of applications which had not been satisfied because of a lack of available funds and which were waiting to be included automatically in the next invitation to apply or to be reformulated and resubmitted in the first "appropriate" invitation to apply under the new scheme[?]'

The question referred for a preliminary ruling

Preliminary observation

42 It must be noted at the outset that, by its question, the national court has considered it necessary to ask the Court to review the validity of the contested decision only in the light of the principle of equal treatment and of the obligation to state reasons.

43 According to established case-law, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-208/05 *ITC* [2007] ECR I-181, paragraph 48; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 18).

44 That being so, even though Nuova Agricast put forward other grounds of invalidity as regards the contested decision in the main proceedings, it is inappropriate to extend the inquiry into the validity of that decision to those other grounds of invalidity, which the national court has not referred to (see, by way of analogy, *Ordre des barreaux francophones et germanophone and Others*, paragraphs 17 to 19).

Admissibility

45 The Commission contends that the link referred to by the national court between any liability there may be on the Italian State's part and the validity of the contested decision has not been established, with the result that the question referred for a preliminary ruling has no connection with the main proceedings.

46 First, it is possible for the Italian State to have infringed the principle of equal treatment when it notified the 2000-2006 aid scheme without there being any defect whatsoever in the contested decision, by which the Commission adjudicated on the

scheme proposed by the Member State which notified it. Secondly, there is no link between liability on the part of the Italian State and the possibility that the decision may be invalid by reason of a purely formal defect, such as a failure to state reasons.

47 In that regard, as was mentioned in paragraph 35 of this judgment, the national court takes the view that the contested decision is the event occasioning loss and is interposed between the conduct of the Italian Government which is complained of by Nuova Agricast and the occurrence of the damage alleged by the latter. Consequently, if the contested decision were to be declared invalid by reason of its having infringed the principle of equal treatment or by reason of a failure to state reasons, such a finding would be liable to have an impact on the reasoning of the national court at the time at which it came to rule on the damages applied for by Nuova Agricast.

48 The question referred for a preliminary ruling is therefore admissible in its entirety.

The validity of the contested decision in the light of the principle of equal treatment

49 First, the Commission argues that the contested decision is not capable of having infringed the principle of equal treatment, since the transitional provision which it contains is the result of a choice freely made by the Italian authorities.

50 In that regard, it is clear from the general scheme of the Treaty that the procedure under Article 88 EC must never produce a result which is contrary to the specific provisions of the Treaty (see, inter alia, Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41, and Case C-456/00 *France* v *Commission* [2002] ECR

I-11949, paragraph 30). Accordingly, State aid, certain conditions of which contravene other provisions of the Treaty, cannot be declared by the Commission to be compatible with the common market (see Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 78 and the case-law cited there).

51 Similarly, State aid, certain of the conditions of which contravene the general principles of Community law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the common market.

52 The Commission's argument summarised in paragraph 49 of this judgment must therefore be rejected.

53 Secondly, the Commission contends that the Italian authorities did not draw its attention to the particular case of the undertakings in the first category, and that it cannot therefore be criticised for not having taken into account the specific situation of those undertakings nor, as a result, can any defect in the contested decision be founded on that ground.

54 In that regard, it is established case-law that the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see, inter alia, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 168; and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31).

55 Even though that case-law has, until now, been applied only in the case of an action directed against a decision taken by the Commission at the end of the procedure laid down under Article 88(2) EC, it is all the more relevant where what is at issue is the validity of a decision not to raise objections against an aid measure or an aid scheme, such as the contested decision.

56 With respect more particularly to the latter category of decisions, that case-law appears justified in the light of the general scheme of the review procedure for State aids laid down by the Treaty.

57 Under the procedure for reviewing State aid, it is necessary to distinguish between the preliminary stage of the procedure for reviewing aids under Article 88(3) EC, which is governed by Articles 4 and 5 of Regulation No 659/1999 and is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, and the investigation stage envisaged by Article 88(2) EC, which is governed by Articles 6 and 7 of that regulation and is designed to enable the Commission to be fully informed of all the facts of the case (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 20).

58 The Commission may restrict itself to the preliminary stage under Article 88(3) EC in order to take a decision favourable to an aid measure if can satisfy itself, after having undertaken a preliminary investigation, that the project concerned is compatible with the Treaty.

59 It is only where that preliminary investigation has led the Commission to the opposite conclusion or if such an investigation does not permit all the difficulties involved in determining whether the aid is compatible with the common market to be overcome, that the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 88(2) EC (see to that effect, inter alia, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; *Cook* v *Commission*, paragraph 29; *Matra* v *Commission*, paragraph 33; *Commission* v *Sytraval and Brink's France*, paragraph 39; and *Portugal* v *Commission*, paragraph 33).

60 If the validity of a decision not to raise objections against an aid measure or an aid scheme were to fall to be determined by reference to information which could not have been available to the Commission after the preliminary investigation has been concluded, the Commission would be encouraged systematically to initiate the investigation procedure under Article 88(2) EC and to give the parties concerned notice to submit their comments, in order to prevent the information which could not be available to it leading to the annulment of its decision to authorise the aid measure or the aid scheme in question. As the Advocate General noted in point 71 of his Opinion, this would undermine the division of the review of State aid into two distinct stages, the second of which is not always required. Such a division was intended by the authors of the Treaty and confirmed by the Community legislature in Regulation No 659/1999.

61 In the main proceedings, the contested decision refers, in the section entitled 'legal basis', to the implementing provisions relating to Law No 488/1992 which laid down the detailed rules governing the 1997-1999 aid scheme, summarised in paragraphs 10 and 11 of this judgment, and include the choice between automatic inclusion of the original application and the lodging of a reformulated application, given to undertakings which did not receive aid by reason of there being insufficient funds allocated to a particular invitation to apply.

62 Consequently, even though the Italian authorities did not inform the Commission's services specifically and in detail of the legal situations of the undertakings having an interest in obtaining grants under Law No 488/1992, the order for reference shows that the Commission must have been aware of the existence of both the undertakings in the first category and those in the second category.

63 In the light of the above, the request by Nuova Agricast to invite the Commission to produce certain correspondence exchanged as part of its discussions with the Italian authorities prior to the adoption of the contested decision, in order to establish whether those authorities had, or had not, given notice to the Commission's services of the existence of the undertakings in the first category, is devoid of any purpose.

64 In those circumstances, it is necessary, thirdly, to consider whether, by not raising any objections against an aid scheme in which only undertakings in the second category could benefit from the transitional provision, the Commission infringed the principle of equal treatment.

65 It must be pointed out in that regard that the only undertakings that were able to benefit from the transitional provision were those in the second category which had not begun to implement their investment proposals prior to lodging their application for aid under the fourth invitation to apply.

66 The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 72 and the case-law cited there).

67 It is apparent that in the main proceedings the undertakings in the first category and those in the second category were not in a comparable situation as regards the requirement that State aid be necessary, which is set out inter alia in the third subparagraph of point 4.2 of the guidelines.

68 As is clear from Case 730/79 *Philip MorrisHolland* v *Commission* [1980] ECR 2671, paragraph 17, aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market (see also, to that effect, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18, and Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, paragraphs 12, 20 and 21).

69 A finding that an aid measure is not necessary can arise in particular from the fact that the aid project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities. In such a case, the aid concerned cannot operate as an incentive.

70 Under the 1997-1999 aid scheme, undertakings in the second category had an absolute right to have their application included automatically, without amendment of any kind, in the list relating to the appropriate invitation to apply immediately following the invitation under which it had first been submitted. No action on their part was required in this regard.

71 Conversely, the undertakings in the first category had to submit an application under the first appropriate invitation to apply following the invitation in respect of which they had waived automatic inclusion of their original application. The application in question was, moreover, a reformulated one.

72 It is true, as Nuova Agricast claims, that the original application and the amended application both sought to obtain funding in respect of the same project and that the reformulation could not relate to the essential elements of the project but only to the elements taken into account by the indicators, which served to establish the ranking of the application in the list drawn up under the invitation to apply under which it was lodged.

73 However, the indicators were themselves representative of significant elements contained in the application. In particular, they related to the share of own funds invested by the undertaking concerned, by comparison with the total investment, to the number of jobs created by the project by comparison with the total investment and by comparison with the amount of the grant applied for and the maximum grant that could be awarded.

74 Moreover, the mere fact that the amendment of the factors taken into account by the indicators increases the possibility of the aid applied for being granted suffices to show that the true position was that the reformulation of the application resulted in the application being a different one from that which was originally lodged.

75 In addition, in so far as, by changing the information that would be reflected in the indicators, the reformulation was designed to improve the ranking of the amended application in order for it to be included in the list with a ranking that would enable it to be successful when the funds were allocated to the invitation to apply concerned in descending order, the result of extending the benefit of the transitional provision to the undertakings in the first category would be that the chances of those undertakings' projects of obtaining the aid applied for would be better than those of undertakings competing for the first time, for which the necessity of the aid was not in doubt.

76 Conversely, such a result could not arise with the automatic inclusion in the list under the eighth invitation to apply of applications already made under the fourth invitation by undertakings in the second category because, there being no possibility of those applications being amended, the indicators remained unchanged.

77 In the light of the above, it must be held that the undertakings in the first category and those in the second category were not in a comparable situation.

78 Accordingly, it does not appear that, in authorising the 2000-2006 aid scheme, the Commission infringed the principle of equal treatment.

The validity of the contested decision in the light of the obligation to state reasons

79 As is clear from established 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 Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees

of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, *Commission* v *Sytraval and Brink's France*, paragraph 63; Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 73; and Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 80).

80 As the national court points out, it is impossible to discern any criterion in the contested decision for distinguishing between the different categories of undertakings which had made an application for aid under the 1997-1999 aid scheme and had a legal interest in having their application entered on the list under the next invitation to apply.

81 However, the obligation to state reasons is in principle restricted to the reasons for which a given category of operators is to benefit from a given measure and does not mean that it is necessary to justify the exclusion of all other operators which are not in a comparable situation. Since the number of categories excluded from the benefit of a measure is potentially unlimited, the Community institutions cannot be under a duty to provide specific reasoning in relation to each of them.

82 None the less, where the beneficiaries of the measure, on the one hand, and other excluded operators, on the other, are in a comparable situation, the Community institution which is the author of the act is under a duty to explain in what way the difference in treatment thus introduced is objectively justified and to give specific reasons in that regard.

83 As regards the transitional provision, the reasoning on the basis of which the Commission authorised a transitional regime in favour of the undertakings in the second category is apparent to the requisite legal standard from the background to the contested decision and all of the legal rules governing the matter in question.

84 The transitional provision refers by implication to the possibility given to undertakings under the 1997-1999 aid scheme of obtaining automatic inclusion of their application for aid in the appropriate list immediately following the invitation to apply in respect of which the application was first submitted. The national legislation providing for that possibility is not only expressly referred to in the section of the contested decision entitled 'legal basis' but was also known to all the parties concerned.

85 Thus, in the context of the contested decision, the wording of the transitional provision is sufficient to show that the Italian State intended to introduce, for the benefit of the undertakings which had competed in the last invitation to apply published under the 1997-1999 aid scheme, transitional measures between that aid scheme and the 2000-2006 aid scheme, and that the Commission found that measure to be compatible with the common market.

86 On the other hand, as was held in paragraphs 67 to 77 of this judgment, the undertakings in the first category and those in the second category were not in a comparable situation. Thus, although it did not state the reasons for which the benefit of the transitional provision was not extended to the undertakings in the first category, the Commission did not fail to comply with the duty to state reasons.

87 In the light of the above, the answer must be that examination of the question submitted has revealed nothing which might affect the validity of the contested decision.

Costs

88 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 (Grand Chamber) hereby rules:

Examination of the question submitted has revealed nothing which might affect the validity of the decision of the Commission of 12 July 2000 not to raise objections against an aid scheme for investment in the less-favoured regions of Italy until 31 December 2006 (State aid No N 715/99 — Italy).

[Signatures]