JUDGMENT OF THE COURT OF FIRST INSTANCE
(Sixth Chamber, Extended Composition)

28 November 2008 *

In Joined Cases T-254/00, T-270/00 and T-277/00,

Hotel Cipriani SpA, established in Venice (Italy), represented initially by M. Marinoni, G.M. Roberti and F. Sciaudone, and later by G.M. Roberti, F. Sciaudone and A. Bianchini, lawyers,

applicant in Case T-254/00,

Società italiana per il gas SpA (Italgas), established in Turin (Italy), represented by M. Merola, C. Tesauro, M. Pappalardo and T. Ubaldi, lawyers,

applicant in Case T-270/00,

supported by

Italian Republic, represented initially by U. Leanza, and later by I. Braguglia, acting as Agents, and by P. Gentili and S. Fiorentino, lawyers,

intervener in Case T-270/00,

* Language of the case: Italian.

Coopservice — Servizi di fiducia Soc. coop. rl, established in Cavriago (Italy),

Comitato 'Venezia vuole vivere', established in Venice,

represented by A. Bianchini and A. Vianello, lawyers,

applicants in Case T-277/00,

v

Commission of the European Communities, represented by V. Di Bucci, acting as Agent, and by A. Dal Ferro, lawyer,

defendant,

ACTION for annulment of Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 (OJ 2000 L 150, p. 50),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Sixth Chamber, Extended Composition),

composed of A.W.H. Meij (Rapporteur), President, V. Vadapalas, N. Wahl, M. Prek and V. Ciucă, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 April 2008,

gives the following

Judgment

Background to the dispute

A — *The scheme for relief from social security contributions under consideration*

1 The Italian Ministerial Decree of 5 August 1994, notified to the Commission, lays down the allocation criteria for the relief from social security contributions provided for in Article 59 of the Decree of the President of the Italian Republic of 6 March 1978 setting up a special scheme for relief from social security contributions owed by employers to

the Istituto Nazionale de la Previdenza Sociale ('INPS') (National Institute of Social Insurance) in the Mezzogiorno for the period between 1994 and 1996 ('the Mezzogiorno scheme').

2 By Decision 95/455/EC of 1 March 1995 on the arrangements for reducing the social security contributions paid by firms in the Mezzogiorno and for assigning to the State some of those contributions (OJ 1995 L 265, p. 23), the Commission declared the Mezzogiorno scheme compatible with the common market, subject to certain conditions. In particular, the decision of 1 March 1995 required the Italian authorities to notify to the Commission the measures adopted for implementing the plan for the progressive dismantling of the Mezzogiorno scheme, as provided for under that decision.

3 The scheme for relief from social security contributions at issue in the present case was introduced by Italian Law No 206/1995, which extended the Mezzogiorno scheme for 1995 and 1996, and widened it to cover undertakings established on the island territory of Venice and Chioggia. Later, Italian Law No 30/1997 extended the Mezzogiorno scheme for the year 1997, and again widened it to cover undertakings established on the island territory of Venice and Chioggia.

4 Article 1 of the Ministerial Decree of 5 August 1994 provides for a general reduction in the social security contributions owed by employers. Article 2 of the decree provides for an exemption from social security contributions for net job creation in undertakings for a period of one year from the date on which an unemployed worker is taken on.

5 It can be seen from Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 (OJ 2000 L 150, p. 50; 'the contested decision') that, according to data supplied by INPS for the period under consideration between 1995 and 1997, the reductions in social security contributions accorded to undertakings located on the island territory of Venice and Chioggia pursuant to Article 1 of the Ministerial Decree of 5 August 1994 ('the social security reductions at issue') amounted to an annual average of ITL 73 billion (EUR 37.7 million), shared between 1 645 undertakings. The exemptions accorded to undertakings located on the island territory of Venice and Chioggia pursuant to Article 2 of that decree ('the social security exemptions at issue') amounted to ITL 567 million (EUR 292 831) per year, shared between 165 undertakings.

B — *Administrative procedure*

6 By letter dated 10 June 1997, the Italian authorities communicated the text of the abovementioned Law No 30/1997 to the Commission, in accordance with the provisions of Decision 95/455 (see paragraph 2 above). By letter of 1 July 1997, followed by a reminder dated 28 August 1997, the Commission asked for further information concerning the extension of the scope of the abovementioned scheme to undertakings located in Venice and Chioggia.

7 Since it received no reply, the Commission notified the Italian Republic by letter dated 17 December 1997 of its decision to initiate the procedure laid down in Article 88(2) EC regarding the aid provided for by Law No 206/1995 and Law No 30/1997, which extended to the island territory of Venice and Chioggia the scope of the reduction of social security contributions for the Mezzogiorno.

8 The Italian authorities suspended the scheme for relief from social security contributions under consideration ('the scheme under consideration') with effect from 1 December 1997.

9 The decision to initiate the procedure was published in the *Official Journal of the European Communities* on 18 February 1998. By letter of 17 March 1998, the applicant — the Comitato 'Venezia vuole vivere' ('the Committee'), an association which brings together the principal organisations of industry and commerce in Venice and which was formed following the initiation of the abovementioned formal investigation procedure in order to coordinate action intended to remedy the disadvantageous situation of traders located in Venice — submitted its comments and a report, accompanied by a study carried out by the Consorzio per la ricerca e la formazione ('COSES') (Consortium for Research and Training) dated March 1998 concerning the difficulties encountered by undertakings operating in the area of the lagoon as compared with those located on the mainland. On 18 May 1998, the City of Venice also submitted comments, accompanied by an earlier study carried out by COSES on the same subject, dated February 1998. In its observations, the City of Venice explained that municipal undertakings providing public services of general economic interest were also beneficiaries of the scheme. It requested the application of Article 86(2) EC in favour of those undertakings. All of those comments were forwarded to the Italian Republic.

10 The Italian authorities notified their comments by letter dated 23 January 1999. By letter of 10 June 1999, they informed the Commission that they fully supported the comments submitted by the City of Venice.

11 By decision of 23 June 1999, the Commission gave the Italian Republic notice to provide it with all the documentation, information and data necessary to enable it to determine the role of the municipal undertakings and to assess the compatibility of the social security reductions at issue with the common market. The Italian authorities replied by letter of 27 July 1999. The Italian authorities met with the Commission's representatives at a meeting in Brussels on 12 October 1999.

C — *The contested decision*

12 The Commission finds in the contested decision that the relief from social security contributions provided for by the abovementioned laws, which refer to Article 2 of the Ministerial Decree of 5 August 1994, constitutes State aid which is compatible with the common market where it is granted to firms, located in the territories of Venice and Chioggia, which are small and medium-sized enterprises (SMEs) within the meaning of the Community Guidelines on State aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4), or firms located in an area eligible for a derogation under Article 87(3)(c) EC, or firms which hire groups of workers experiencing particular difficulties entering or re-entering the labour market as referred to in the Community Guidelines on aid to employment (OJ 1995 C 334, p. 4; first paragraph of Article 1 and recital 105 of the contested decision).

13 With regard to the categorisation of the scheme as State aid, the Commission states in its conclusions that it found, on the basis of its assessment of the measures considered in the contested decision (recital 110), that measures which comply with the *de minimis* rule do not fall within the scope of Article 87 EC except with regard to sectors covered by the ECSC Treaty, to shipbuilding, to transport, to agriculture or to fisheries, in accordance with its notice on *de minimis* aid (OJ 1996 C 68, p. 9).

14 Under the second paragraph of Article 1 of the contested decision, the aid provided for in Article 2 of the Ministerial Decree of 5 August 1994 is incompatible with the common market where it is granted to firms which are not SMEs and are located outside areas eligible for derogation under Article 87(3)(c) EC.

15 Under Article 2 of the contested decision, the social security reductions at issue constitute State aid which is incompatible with the common market.

16 Under Article 3 of the contested decision, the aid which the Italian Republic granted to ASPIV (Azienda servizi pubblici idraulici e vari, Venezia), a municipal undertaking, and Consorzio Venezia Nuova is compatible with the common market since it qualifies for a derogation under Article 86(2) EC and Article 87(3)(d) EC respectively.

17 Article 4 of the contested decision states that the measures which the Italian Republic has put into effect in favour of the municipal companies ACTV (Azienda del consorzio trasporti veneziano), AMAV (Azienda multiservizi ambientali veneziana) and Panfido SpA do not constitute aid within the meaning of Article 87 EC.

18 By Article 5 of the contested decision, the Commission requires the Italian Republic to recover from the beneficiaries the incompatible aid referred to in the second paragraph of Article 1, and in Article 2, of the decision, which has unlawfully been made available to them.

19 The contested decision was published in the *Official Journal of the European Communities* of 23 June 2000.

Procedure and forms of order sought

20 By applications lodged at the Registry of the Court of First Instance on 16 and 18 September 2000 respectively, the applicants brought the present actions.

21 In addition, 56 actions were brought by other applicants against the contested decision within the prescribed time-limit.

22 By separate documents lodged at the Registry of the Court of First Instance on 19 January 2001, the Commission raised preliminary pleas of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

23 By decision of 25 January 2001, the Court decided to refer the cases to the Second Chamber, Extended Composition, in accordance with Article 51(1) of the Rules of Procedure.

24 By application lodged at the Registry of the Court of First Instance on 7 March 2001, the Italian Republic applied for leave to intervene in Case T-270/00 in support of the forms of order sought by the applicant, Società italiana per il gas SpA (Italgas). By order of 19 June 2001, the President of the Second Chamber, Extended Composition, granted leave to intervene.

25 As measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court, having regard to the complexity of the criteria for compatibility set out in the contested decision, invited the Italian Republic to state inter alia, in respect of each of the applicants in the present cases, as well as in the 56 related cases mentioned above, whether it considered that it was required, in implementation of Article 5 of the contested decision, to recover the aid which had been granted and which is now at issue.

26 On receiving the replies of the Italian Republic of 25 September 2003 and 24 March 2004, the Court declared 22 actions wholly inadmissible and 6 actions partly inadmissible, with regard to undertakings which could not show an interest in bringing proceedings inasmuch as the competent national authorities had considered, when implementing the contested decision, that those undertakings had not received aid incompatible with the common market which must be recovered pursuant to that decision (orders of the Court of First Instance of 10 March 2005 in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission* [2005] ECR II-787; in Case T-266/00 *Confartigianato Venezia and Others* v *Commission* (not published in the ECR); in Case T-269/00 *Baglioni Hotels and Sagar* v *Commission* (not published in the ECR); in Case T-273/00 *Unindustria and Others* v *Commission* (not published in the ECR); and in Case T-288/00 *Principessa* v *Commission* (not published in the ECR)).

27 On 12 May 2005, an informal meeting took place before the Judge-Rapporteur, in which the representatives of the parties took part, in the 37 cases in which the action had not been declared wholly inadmissible. The parties represented submitted their observations and agreed to the choice of four test cases. Following that informal meeting, the present cases (T-254/00, T-270/00 and T-277/00) and Case T-221/00 were designated as test cases.

28 In the 29 other related cases, the Court ordered proceedings stayed at the joint request of the parties.

29 By order of 12 September 2005, the President of the Second Chamber, Extended Composition, after hearing the parties, ordered that Cases T-254/00, T-270/00 and T-277/00 be joined for the purposes of the written procedure, the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure.

30 The written procedures concerning the preliminary pleas of inadmissibility were terminated by the submission, between 5 and 23 December 2005, of written observations by the applicants in the three joined cases and by the Italian Republic in Case T-270/00.

31 By order of 18 May 2006, the Court (Second Chamber, Extended Composition) decided to reserve a decision on the preliminary pleas of inadmissibility for the final judgment. The written procedure was terminated on 23 February 2007 in Cases T-254/00 and T-277/00 and on 26 November 2007 in Case T-270/00.

32 As a result of changes in the composition of the Chambers of the Court of First Instance, the Judge-Rapporteur was assigned to the Sixth Chamber, Extended Composition, to which the present cases were consequently assigned.

33 As Judge T. Tchipev was unable to sit in the present cases, the President of the Court of First Instance designated Judge N. Wahl to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

34 On hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber, Extended Composition) decided to open the oral procedure. The Commission produced the requested documents within the time-limits laid down.

35 By order of 14 October 2008, Case T-221/00 was removed from the register as a result of the discontinuance of proceedings by the applicant.

36 The applicant in Case T-254/00 claims that the Court should:

— annul the contested decision;

— in the alternative, annul Article 5 of that decision;

— in the further alternative, annul Article 5 of the contested decision to the extent that the obligation to recover the aid set out therein includes the aid granted on the basis of the *de minimis* rule and/or annul that article to the extent that it provides for the payment of interest at a rate higher than the rate actually paid by it on its own debts;

— order the Commission to pay the costs.

37 The applicant in Case T-270/00 claims that the Court should:

— annul Articles 1 and 2 of the contested decision to the extent that they declare incompatible with the common market the aid in the form of tax exemptions provided for in the Ministerial Decree of 5 August 1994;

— annul Article 5 of the contested decision;

— order the Commission to pay the costs.

38 The applicants in Case T-277/00 claim that the Court should:

— annul the contested decision to the extent that it affects their interests;

— in the alternative, annul Article 5 of the contested decision to the extent that it imposes an obligation to recover the amount of the relief from social security contributions under consideration and to the extent that it provides that that amount should bear interest for the period under consideration in the contested decision;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the actions as inadmissible or unfounded;

— order the applicants to pay the costs.

Admissibility

40 In support of its preliminary plea of inadmissibility, the Commission alleges lack of locus standi both on the part of the applicant undertakings and on the part of the Committee. It first of all raises an objection of *lis alibi pendens* in respect of the action brought by the Committee in Case T-277/00.

A — *The objection of* lis alibi pendens *in Case T-277/00*

1. *Arguments of the parties*

41 In support of its plea of inadmissibility in respect of the action brought by the Committee in Case T-277/00, the Commission contends that the action is identical in all respects to the action brought by the Committee in Case T-274/00. In addition, it contends that the present action in Case T-277/00 seeks annulment of the same decision as was challenged in Case T-231/00 and is based on pleas in law which are largely analogous to those put forward in that case. The action in Case T-277/00 should therefore be declared inadmissible — to the extent that it has been brought by the Committee — partly on the ground of *lis alibi pendens* as regards the reliance on identical pleas in law and partly for infringement of Article 48(2) of the Rules of Procedure as regards the introduction of new pleas in law.

42 The Committee argues that its action is admissible.

2. *Findings of the Court*

43 Since the Committee discontinued its action in Case T-274/00 (order for removal from the register of 12 September 2005 in Case T-274/00 *Comitato 'Venezia vuole vivere'* v *Commission*), the plea of inadmissibility on grounds of *lis alibi pendens* retains a purpose solely in respect of the action brought by Adriatica di navigazione SpA and the Committee in Case T-231/00. However, it should be pointed out that the Committee has brought the action in Case T-277/00 jointly with Coopservice — Servizi di fiducia Soc. coop. rl ('Coopservice'), which means that, even if *lis alibi pendens* were to be established, it would have no effect on the admissibility of the present action to the extent that it has been brought by Coopservice and, in particular, no bearing on the substantive pleas considered by the Court in the present case inasmuch as they have

been put forward jointly by the two applicants. Accordingly, the Court cannot in principle be required to consider the objection of *lis alibi pendens* raised by the Commission in the present case.

44 In any event, it should be noted that the present action in Case T-277/00, brought, inter alia, by the Committee and seeking annulment of the same decision as in Case T-231/00 is not based on the same pleas in law as those relied on previously by the Committee in Case T-231/00. It follows that the conditions laid down in the case-law for the existence of *lis alibi pendens* are not satisfied in this case (see, to that effect, the order in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, cited in paragraph 26 above, paragraph 41 and the case-law cited). It must be held that a series of pleas alleging infringement of Article 88(3) EC and Article 15 of 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) and of Article 87(2)(b) EC and Article 87(3)(b) and (e) EC has been raised only in Case T-277/00.

45 With regard, in particular, to the plea alleging infringement of Article 88(3) EC and Article 15 of Regulation No 659/1999, it should be noted that this plea, which seeks to establish that the scheme under consideration constitutes existing aid, is based on the alleged continuity between Laws Nos 206/1995 and 30/1997, which introduced the aid scheme, and earlier legislation which also provided for undertakings located in certain regions of Italy to be granted exemptions from social security contributions under certain conditions. On the other hand, the plea raised in Case T-231/00 to the effect that the scheme under consideration was existing aid was based on a different idea, namely that the scheme under consideration was introduced, with regard to internal cabotage, only after the liberalisation of that sector by Community law in 1999 (Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraphs 143 and 167). It follows that the Committee's arguments, raised in Cases T-231/00 and T-277/00 respectively, to the effect that the scheme under consideration constitutes existing aid must be regarded as separate pleas.

46 Moreover, contrary to the Commission's interpretation, the prohibition laid down in Article 48(2) of the Rules of Procedure relates only to the introduction of new pleas in law in the course of proceedings where they are not based on matters of law or of fact which have come to light in the course of the procedure. It is completely irrelevant for the purposes of assessing the admissibility of an action with the same subject-matter as an earlier action, and between the same parties, but based on different pleas in law. The case-law (see paragraph 44 above) does not make the admissibility of such an action subject to the emergence of new matters of law or of fact. An action may be inadmissible on the ground of *lis alibi pendens* only if, in relation to an earlier action, it is between the same parties, it seeks annulment of the same decision and it is based on the same pleas in law.

47 The objection of inadmissibility based on *lis alibi pendens* must therefore be rejected.

B — *The alleged lack of locus standi on the part of the applicant undertakings in Cases T-254/00, T-270/00 and T-277/00*

1. *Arguments of the parties*

48 The Commission contends that the contested decision is not of individual concern to the applicant undertakings within the meaning of the fourth paragraph of Article 230 EC.

49 In the Commission's view, the beneficiaries of an aid scheme are not individually concerned by a decision finding that scheme incompatible with the common market and ordering recovery of the aid paid out because such a decision is of general application.

50 The Commission states that the potential beneficiaries of an aid scheme are not individually concerned by a decision declaring the scheme incompatible with the common market. In addition, the Community judicature has held to be inadmissible an action brought by a beneficiary of an unlawful aid scheme against the decision by which the Commission declared the scheme incompatible with the common market but did not require recovery of the aid paid out (Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15).

51 The imposition of an obligation to recover the aid does not, in the Commission's view, alter the nature of its decision and does not therefore allow it to be concluded that the decision is of individual concern to the beneficiaries of the aid scheme.

52 In that regard, the judgment of the Court of Justice in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855 must be read in the light of the specific situation of the applicant undertaking, Sardegna Lines — Servizi Marittimi della Sardegna SpA. That undertaking had in fact received individual aid, granted formally in the framework of an aid scheme. The aid scheme under consideration was applicable only to a very limited number of undertakings and Sardegna Lines received a large part of the aid paid out (at least ITL 9.6 billion out of a total of ITL 12 697 450 000). In addition, the aid scheme in question was noteworthy for the broad discretion accorded to the national authorities to grant individual aid under the scheme.

53 Similarly, in Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 39, the Court of Justice accepted that the undertakings which had received aid under the scheme in question were individually concerned inasmuch as the Commission knew the number of applications accepted and the amount budgeted for the aid in question. In addition, the aid scheme in question had been implemented by means of individual decisions.

54 The approach adopted by the EFTA Court in its judgment of 21 July 2005 in Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* v *EFTA Surveillance Authority*, referred to by the applicant in Case T-254/00 — Hotel Cipriani SpA — cannot be transposed to the present case inasmuch as the rules concerning the relationship between Member States of the European Free Trade Association (EFTA), the EFTA Surveillance Authority and the EFTA Court do not contain a provision similar to Article 234 EC, under which a reference may be made for a preliminary ruling for the purpose of assessing the validity of acts of the institutions.

55 Moreover, in its order in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, cited in paragraph 26 above, paragraph 29 et seq., the Court of First Instance declared certain actions inadmissible while accepting that the Commission could challenge the failure of the Member State concerned to recover the aid paid out. The inadmissibility of those actions thus did not depend on the recovery or otherwise of the aid from the applicants. Finally, in its judgment in Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraphs 33 and 34, the Court of Justice considered that it was not self-evident that an action brought by the beneficiaries of aid schemes intended for categories of persons defined in a general manner, seeking annulment of a Commission decision requiring recovery of the aid paid out, would be admissible.

56 The Commission therefore considers that *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, and *Italy* v *Commission*, cited in paragraph 53 above, do not alter settled case-law according to which actions brought by natural or legal persons against decisions concerning aid schemes are inadmissible.

57 The Commission admits in that regard, however, that where implementation of the aid scheme in question requires the adoption of individual implementing measures, implying a degree of latitude on the part of the competent administrative authority, the actual beneficiaries of such a scheme may be regarded as individually concerned by the Commission decision declaring the aid incompatible with the common market and ordering recovery of the aid paid out.

58 In the present case, the applicants are not individually concerned by the contested decision for two reasons. First, the relief from social security contributions was granted automatically to all undertakings located in Venice or Chioggia.

59 Secondly, the contested decision concerned an indeterminate and indeterminable number of undertakings on the basis of their objective characteristics, namely that they have employees and exercise their activities in a given geographical area. Even if the Commission, at the time that it adopted the contested decision, was perhaps — as the applicants claim — theoretically in a position to determine the beneficiary undertakings with the help of the national authorities, its task was to examine the aid scheme, not each specific case in which aid had been granted. The only exception concerned the municipal undertakings, whose situation was set out specifically in the observations submitted by the City of Venice and subscribed to by the Italian Government. The Commission therefore analysed the individual situation of those undertakings which — by contrast with the applicants — are for that reason individually concerned by the contested decision.

60 Since the Commission was not in a position to establish, on the basis of the tables supplied by INPS, the reductions granted to each individual undertaking, it could not have determined the aid granted to each beneficiary. The Member State concerned was therefore asked to identify the beneficiary undertakings which are required under the contested decision to repay the aid received. That identification requires a complex analysis based on a series of assessment criteria. It is for the national authorities to apply, in each individual case, the conditions concerning the existence of State aid

within the meaning of Article 87(1) EC and the criteria laid down in a general and abstract manner in the contested decision.

61 A review of that kind should be carried out by the competent national authorities in the context of genuine cooperation with the Commission. Where a disagreement arises, the Commission may refer the matter to the Court of Justice pursuant to the second subparagraph of Article 88(2) EC. The beneficiaries of the measure in question are entitled to challenge, before the national courts, any decisions requiring recovery of the aid which are adopted in their regard by pleading the unlawfulness of the Commission decision. Their judicial protection is guaranteed by Article 234 EC.

62 For all of those reasons, and unlike the decision considered in *Italy* v *Commission*, cited in paragraph 53 above, the contested decision left open the possibility that some of the social security reductions at issue might not be regarded as State aid or might constitute State aid compatible with the common market. In the present case, the Commission did not establish that State aid had been granted to each of the beneficiaries and did not therefore specify the undertakings required to repay the aid received under the scheme in question.

63 The Commission concludes that the applicant undertakings do not possess specific features or characteristics which were highlighted in the contested decision and that they cannot point to any specific adverse effect. They cannot therefore be regarded as individually concerned by the contested decision.

64 The applicants and the Italian Republic — which is intervening in support of the forms of order sought by Italgas and agrees with its observations — point out that a recovery

decision was addressed to the applicant undertakings in implementation of the contested decision. In similar circumstances, the Community judicature has accepted the existence of an individual connection.

65 In the first place, all the applicants and the Italian Republic argue that, contrary to the Commission's contentions, the contested decision is not general and abstract in nature since the actual beneficiaries of the aid scheme constitute a closed class and were identifiable when that decision was adopted. However, the adoption of a decision providing for recovery of aid incompatible with the common market, so as to nullify the effects of that aid, implies that the Commission must first have ascertained the effects of the aid. The applicants state in that regard that it is sufficient if the beneficiary undertakings can be identified by the competent national authorities during the recovery procedure. The actual beneficiaries may be regarded as the persons to whom the Commission decision is directly addressed. Moreover, Hotel Cipriani and Italgas deny that, when implementing the decision, the national authorities are entitled to ascertain in each individual case whether the conditions for the application of Article 87(1) EC are satisfied (see paragraphs 124 and 138 below).

66 Secondly, Hotel Cipriani and Coopservice also claim that a Commission decision concerning an aid scheme and requiring recovery of the aid paid out individually affects the interests of the actual beneficiaries of the aid and constitutes an act adversely affecting them.

67 All the applicants reject the Commission's argument that individuals enjoy effective judicial protection before the national courts. The procedure for referring questions to the Court of Justice for a preliminary ruling offers them a much narrower range of possibilities for putting forward their arguments. In addition, it is not at all certain that the national court will refer a question to the Court of Justice.

68 The Italian Republic points out that the social security reductions at issue were granted to undertakings on the sole condition that they be located in the island territory of Venice or Chioggia. That being so, there was no uncertainty, at the time that the decision was adopted, as to the identity of the recipients which were required to repay the aid received.

2. *Findings of the Court*

69 The Commission rightly acknowledges that, in the present cases, there is a direct connection for the purposes of the fourth paragraph of Article 230 EC. It points out that the Italian authorities are required by the contested decision to nullify the aid declared incompatible with the common market and to recover any such aid which has been unlawfully granted. It admits that the Italian authorities have no discretion when it comes to implementing the contested decision.

70 On the other hand, the Commission considers that the actual beneficiaries of an unlawful aid scheme are generally not individually concerned by a decision finding that the scheme is incompatible with the common market and ordering recovery of the aid paid out, because such a decision is based, in principle, on a general and abstract analysis of the scheme. The Commission explains its contention that there is no individual connection by pointing to the fact that the number of beneficiaries cannot be determined. When implementing the decision ordering recovery of the aid received, it is therefore for the Member State concerned to identify the beneficiary undertakings required to repay it.

71 First, the Commission denies that the case-law attributes locus standi to the actual beneficiaries of an aid scheme to challenge the decision finding the scheme

incompatible with the common market and ordering recovery of the aid declared incompatible. It suggests restricting locus standi to cases where the aid scheme is implemented through individual decisions (see paragraph 56 above).

72 Secondly, the Commission proposes that, when implementing a decision finding that an unlawful aid scheme is incompatible with the common market, the national authorities should be regarded as having the power to ascertain in each individual case whether the conditions for the application of Article 87(1) EC, concerning the exercise of an economic activity, and the effect on trade between the Member States and on competition, are satisfied.

73 It should be pointed out at the outset that, as the Commission contends, a Commission decision concerning an unlawful aid scheme and requiring recovery of the aid paid out is of general application with regard to the actual beneficiaries of the scheme inasmuch as it applies to objectively determined situations and involves legal effects vis-à-vis the beneficiaries of such a scheme considered in a general and abstract manner. The mere fact that the actual beneficiaries of such a scheme can be identified does not oblige the Commission to take account of their individual situation. Consequently, a decision concerning an aid scheme is based, in principle, on a general and abstract review of the aid scheme at issue, which is itself a measure of general application (see paragraphs 83, 209, 229 and 230 below). Accordingly, the scope of such a decision is, in principle, distinct from that of, for example, a decision under Article 81 EC, which can be regarded as a bundle of individual decisions addressed to the undertakings concerned (see, to that effect, Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraphs 39, 49 and 63). In particular, the fact that the Commission decision requires in a general and abstract manner recovery of the aid paid out is not such as to make that decision equivalent to a bundle of individual decisions (see, by analogy, the order of the Court of Justice in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 72). On the other hand, where the Commission examines the individual situation of some of the actual beneficiaries of an aid scheme, its decision is an individual decision in relation to those beneficiaries.

74 In addition, it is possible that, in certain circumstances, the provisions of a measure of general application may be of individual concern to a natural or legal person where that person is affected by reason of attributes peculiar to him or by reason of factual circumstances differentiating him from all other persons (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraphs 19 to 21; Case T-298/94 *Roquette Frères* v *Council* [1996] ECR II-1531, paragraph 37; and order of 11 September 2007 in Case T-28/07 *Fels-Werke and Others* v *Commission*, not published in the ECR, paragraph 60).

75 In that legal context, it is necessary to consider the Commission's position in the light both of the jurisprudential criteria for assessing whether there is an individual connection for the purposes of the fourth paragraph of Article 230 EC and of the system for the prior review of State aid as instituted by the Treaty and interpreted in the case-law. To that end, the relevance of the criterion concerning the detailed arrangements for the implementation of the aid scheme must first be assessed in the light of the case-law based on *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, and *Italy* v *Commission*, cited in paragraph 53 above, and having regard to the system for the review of State aid. The Court will then consider the Commission's argument concerning the extent of the powers of the Member State concerned when implementing the decision declaring an unlawful aid scheme incompatible with the common market and ordering recovery of the aid paid out.

(a) Assessment, in the light of the case-law, of the criterion based on the detailed arrangements for the implementation of the aid scheme

76 With regard, first of all, to the case-law, it should be noted at the outset that, contrary to the Commission's contention, the Court of Justice has not ruled out the possibility that the actual beneficiaries of an unlawful aid scheme could have locus standi to challenge a decision declaring the scheme incompatible with the common market, but not requiring recovery of the aid paid out. *Kwekerij van der Kooy and Others* v *Commission*, cited in paragraph 50 above, is not relevant in that regard. It is clear from the Opinion of Advocate General Sir Gordon Slynn in that case (ECR 240) that, in the decision at issue,

the Commission did not impose any recovery obligation. Although, in the last recital of the decision, it reserved the possibility of seeking recovery at a later stage, it informed the Court of Justice at the hearing that no such steps had been taken.

77 On the other hand, it clearly follows from *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, and *Italy* v *Commission*, cited in paragraph 53 above, that, where the Commission finds that an aid scheme is incompatible with the common market and requires that the aid paid out be recovered, all the actual beneficiaries of the scheme are individually concerned by the Commission's decision (see also Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 25; Joined Cases T-239/04 and T-323/04 *Italy and Brandt Italia* v *Commission* [2007] ECR II-3265, paragraph 44; and Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraphs 69 to 73).

78 Contrary to the Commission's argument, it does not emerge from the decision at issue in *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, that the individual situation of Sardegna Lines was taken into account by the Commission. In that decision, the Commission merely indicated, in the course of setting out the facts, that it had 'learned of the existence of the aid scheme in question from a complaint regarding a case in which the scheme was applied'. Even accepting that the Commission was aware of Sardegna Lines' situation, the fact remains that, on the one hand, that undertaking was not mentioned by name in the decision at issue and, on the other, no factor was mentioned which distinguished its specific situation. The Commission merely indicated the total amount of the aid granted to provide the loans and contributions at issue since the entry into force of the aid scheme at issue. The Commission then carried out a general and abstract examination of the aid scheme on that basis (see, in particular, point VII of the decision at issue). Accordingly, it cannot be inferred from *Italy and Sardegna Lines* v *Commission* that the Court of Justice considered that the Commission had taken the individual situation of Sardegna Lines into account. On the contrary, it was by contrasting the potential beneficiaries of an aid scheme viewed in an abstract manner with the actual beneficiaries of such a scheme

unlawfully implemented that the Court of Justice held that Sardegna Lines was individually concerned 'by virtue of being an actual beneficiary of individual aid granted under [the aid scheme for Sardinian shipowners], the recovery of which has been ordered by the Commission' (paragraph 34 of the judgment). The allusion to 'individual aid' manifestly refers to the aid granted to Sardegna Lines in implementation of the aid scheme in question. Contrary to the interpretation proposed by the Commission, it cannot be understood as referring to the Commission's taking into account of the individual situation of Sardegna Lines on the ground that the scheme in question was not applied automatically.

79 That analysis of *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, is corroborated by the Opinion of Advocate General Alber in *Italy* v *Commission*, cited in paragraph 53 above (ECR I-4092). In his Opinion, the Advocate General rejected the Commission's argument that the aid scheme under consideration in *Italy and Sardegna Lines* v *Commission* had been implemented by means of discretionary implementing decisions on the part of the national authorities. He pointed out in that regard that:

'[t]he Court [of Justice] … relies [in paragraph 34 of its judgment] only on the fact that the applicant, Sardegna Lines, is affected as a recipient of aid whose recovery the Commission had ordered. It makes no reference to other circumstances which set the applicant apart as an individual, for example, consideration of its case in the administrative procedure' (point 71 of the Opinion).

80 In *Italy* v *Commission*, cited in paragraph 53 above, the Court of Justice clearly confirmed the approach it had adopted in *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above. It should be pointed out that the sectoral aid scheme at issue in *Italy* v *Commission* concerned a large number of commercial road haulage companies. Unlike Sardegna Lines, none of the applicant hauliers could be distinguished from the other beneficiaries of the aid scheme in question whether in terms of the amount of aid received or in terms of a particular role played during the administrative procedure. The Court of Justice held that the applicant undertakings were in a different position from that of applicants for whom a Commission decision is in the nature of a measure of general application, because they were concerned 'by virtue of being actual recipients of

individual aid granted under that scheme, the recovery of which [had] been ordered by the Commission' (paragraph 39 of the judgment).

81 In addition, paragraph 39 of *Italy* v *Commission*, cited in paragraph 53 above, although brief, also contains important details regarding proof of locus standi on the part of undertakings which have benefited from an unlawful aid scheme. The Court of Justice pointed out in that judgment that the decision at issue mentioned 'the number of applications accepted and the amount budgeted for the aid in question' during the period under consideration and concluded that 'the Commission must therefore have known of the existence of those actual recipients'. It therefore expressly draws a distinction between the situation of the actual beneficiaries, who could be identified and whose situation was specifically affected by the recovery order, and the situation of potential beneficiaries.

82 In the light, in particular, of the Opinion of Advocate General Alber in *Italy* v *Commission*, cited in paragraph 79 above, points 74 to 85, paragraph 39 of the judgment in *Italy* v *Commission*, cited in paragraph 53 above, may therefore be understood as recognising that the applicant undertakings were differentiated from all other traders by the fact that they constituted a closed class of persons specifically affected by the recovery order. In particular, unlike potential beneficiaries of an aid scheme, the actual beneficiaries of that aid scheme constituted a limited group since implementation of the scheme had ceased even before the adoption of the decision at issue, with the result that the Commission was in principle able, with the help of the national authorities, to identify them when adopting the contested decision. Contrary to the Commission's argument, the Court of Justice did not make recognition of an individual connection subject to specific identification of the beneficiaries of the aid scheme under consideration and the analysis of their individual situations by the Commission.

83 It should be pointed out that, although a decision concerning an aid scheme is of general application, inasmuch as the Commission carries out a general and abstract

examination of the scheme (see paragraph 73 above), such a decision relates solely to a particular aid scheme. Thus it does not form part of the determination of a Community policy and is not legislative in nature, but relates rather to the implementation of the rules of Community law concerning, in this instance, State aid, unlike measures which are legislative in nature and which apply to all traders concerned (see, for example, Case 206/87 *Lefebvre* v *Commission* [1989] ECR 275; *Roquette Frères* v *Council*, cited in paragraph 74 above, paragraph 42; and the order in *Fels-Werke and Others* v *Commission*, cited in paragraph 74 above, paragraphs 61 and 63).

84 In that legal context, the fact of belonging to a closed class of actual beneficiaries of an aid scheme, particularly affected by the obligation to recover the aid paid out imposed by the Commission on the Member State concerned, is sufficient to differentiate those beneficiaries from all other persons, in accordance with the case-law (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107). Individualisation results, in such cases, from the specific adverse effect of the recovery order on the interests of the members of the closed class, who are fully identifiable.

85 If the locus standi of an actual beneficiary of an aid scheme were conditional upon an examination of its individual situation, locus standi would depend on whether or not the Commission chose in the contested decision to carry out such an individual examination in the light of the information communicated to it during the administrative procedure. That approach would be a source of legal uncertainty inasmuch as the Commission's knowledge of specific individual situations is frequently a matter of chance (Opinion of Advocate General Alber in *Italy* v *Commission*, cited in paragraph 79 above, point 83). In addition, if a beneficiary challenged, before the Court, the Commission's failure to carry out an individual examination — in the light, for example, of information concerning it supplied to the Commission during the administrative procedure — the admissibility of its action would be linked to the appraisal of the pleas in law going to the substance. In that situation, the complexity and the difficulty of predicting the outcome of the determination of admissibility would exacerbate the legal uncertainty.

86 Finally, it should be pointed out that the criterion of a closed class, the members of which are particularly affected by a Commission decision, was also used by the Court of Justice in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraphs 58 to 64. With regard, in particular, to the coordination centres whose authorisation was under way, the Court of Justice considered — along the lines of *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, and *Italy* v *Commission*, cited in paragraph 53 above — that such centres were individually concerned inasmuch as they were 'fully identifiable at the time when the [decision under challenge] was adopted' (*Belgium and Forum 187* v *Commission*, paragraph 61, and the Opinion of Advocate General Léger in that case, ECR I-5485, points 196 and 197). With regard to the centres whose applications for renewal of authorisation were pending at the time that the decision at issue was notified, the Court of Justice considered that those potential beneficiaries had locus standi, in the particular circumstances of the case, on the ground that they formed part of a closed class, the members of which were particularly affected by the decision at issue, as they could no longer obtain a renewal of their authorisation (*Belgium and Forum 187* v *Commission*, paragraphs 62 and 63, and the Opinion of Advocate General Léger in that case, point 211).

87 In the light of all that case-law, the criterion, proposed by the Commission, based on the detailed arrangements for the implementation of the aid scheme is irrelevant. In particular, a reading of *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, and *Italy* v *Commission*, cited in paragraph 53 above, does not reveal any account being taken by the Court of Justice of the fact, already relied on by the Commission in the cases which gave rise to those judgments, that the aid schemes in question were actually implemented by means of administrative implementing decisions involving a discretionary power. Moreover, it should be noted that the judgment in *CETM* v *Commission*, cited in paragraph 77 above, and the judgment of the EFTA Court in *Fesil and Finnfjord and Others* v *EFTA Surveillance Authority*, cited in paragraph 54 above, concerned aid schemes which automatically benefited undertakings which satisfied the conditions laid down for those schemes. It is clear from the EFTA Court's judgment (paragraph 46) that, in its observations, the Commission had already argued, by way of objection to the admissibility of the action, that the aid schemes under consideration in *Italy and Sardegna Lines* v *Commission* and *Italy* v *Commission* did not automatically apply to undertakings meeting certain conditions, but empowered the competent national authorities to grant advantages to beneficiaries by means of subsequent administrative acts. That distinction was not considered relevant by the EFTA Court, as shown by the fact that it concurred with the concise but clear reasoning of the above two judgments of the Court of Justice.

88 With regard to the order in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, cited in paragraph 26 above, referred to by the Commission (see paragraph 55 above), the applicants rightly point out that it is irrelevant for the purposes of assessing locus standi. In that order, the Court of First Instance did not consider the locus standi of the undertakings concerned but declared inadmissible, for lack of an interest in bringing proceedings, the actions brought by undertakings which had in the meantime been excluded from the procedure for recovering the aid in question undertaken by the national authorities in implementation of the contested decision. It should be noted that, in order to show its interest in bringing proceedings at the time of making the application initiating proceedings, it is sufficient for an undertaking to indicate in a relevant manner that it has received, under the scheme concerned, aid which could be covered by the declaration of incompatibility with the common market made by the Commission in the decision at issue. It is not for the Court, in the context of an action brought against a Commission decision concerning an aid scheme, to rule on the specific application of the criteria set out in that decision, in order to determine whether the aid at issue which has been granted to a specific undertaking must be regarded as aid incompatible with the common market under that decision. It is for the competent national authorities, when implementing such a decision, to apply those criteria in each individual case, subject to supervision by the Commission.

89 In that context, the order in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, cited in paragraph 26 above, merely excludes any interest in bringing proceedings on the part of an applicant undertaking where, after the application initiating proceedings has been lodged, it appears that the national authorities, in the implementation of the Commission decision, have concluded that the measures in favour of that undertaking, under the aid scheme at issue, do not have to be recovered pursuant to that decision, either because, according to that decision, they do not come within the scope of Article 87(1) EC or because they meet the criteria laid down in that decision for compatibility with the common market. In the above order (paragraph 26), the Court rejected, in particular, the undertakings' argument concerning the Commission's power, in the framework of its supervision of the implementation of its decision by the Member State concerned, to require the latter, at a date subsequent to the adoption of the decision, to recover the alleged aid from those undertakings on the ground, precisely, that such a circumstance was not future and uncertain in nature. In the present case, it is common ground that the national authorities addressed a recovery decision to the applicant undertakings, which confirms their interest in bringing proceedings.

90 In *Atzeni and Others*, cited in paragraph 55 above, also relied upon by the Commission, the Court of Justice merely stated that a reference for a preliminary ruling on a question of legality is not inadmissible where it relates to a Commission decision concerning an aid scheme on the ground that the locus standi of the undertakings concerned under the fourth paragraph of Article 230 EC required a complex analysis and was therefore not manifest. That judgment follows the line of authority flowing from the judgment of the Court of Justice in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, in which it was held that a preliminary plea of inadmissibility cannot be raised before a national court in respect of a plea, entered by way of preliminary objection, that the Commission's decision is illegal, except where the undertakings which had received aid were entitled beyond a doubt to challenge the Commission's decision and had been informed of that right (*TWD Textilwerke Deggendorf*, paragraph 24; Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraphs 15 and 16; and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 28). Moreover, it is clear from *Italy* v *Commission*, cited in paragraph 53 above, paragraph 31, that the Court of Justice has already impliedly rejected the Commission's argument that, if the undertakings which actually received aid were recognised as having locus standi to bring actions contesting the Commission decision declaring the aid scheme incompatible with the common market and requiring recovery of the aid paid out, any reference for a preliminary ruling concerning the recovery of such aid would be declared inadmissible in accordance with the case-law flowing from *TWD Textilwerke Deggendorf* (see, in that regard, the Opinion of Advocate General Alber in *Italy* v *Commission*, cited in paragraph 79 above, points 86 to 89). Moreover, it should be added that actual beneficiaries can in no circumstances be declared time-barred for the purposes of pleading before the national courts, by way of preliminary objection, that the Commission's decision is illegal, if, in view of the particular circumstances of the case or the complexity of the criteria laid down in that decision for defining the aid declared incompatible with the common market which must be recovered, the question whether those beneficiaries are required to repay the aid in question, in implementation of the Commission decision, could reasonably have given rise to doubt initially, so that their interest in bringing proceedings against that decision was not obvious (order in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, cited in paragraph 26 above, paragraph 31).

91 In the present cases, it is clear from the contested decision (recital 13), and is not contested by the applicants, that, just as in *Italy* v *Commission*, cited in paragraph 53 above, the Commission was aware of the precise number of beneficiary undertakings and the total amount accounted for both by the social security reductions at issue and the social security exemptions at issue during the period under consideration.

92 It follows that the beneficiaries of the aid scheme at issue were fully identifiable when the contested decision was adopted. Accordingly, it is clear from the foregoing that the applicant undertakings must be regarded as individually concerned by that decision.

93 The reading of the case-law (see paragraphs 74 to 85 above) on which that conclusion is based is confirmed by a consideration of the Community system for the review of State aid, which precludes acceptance of the criteria and arguments put forward by the Commission, as is clear from the following paragraphs.

(b) Assessment, in the light of the Community system for the review of State aid, of the criterion based on the detailed arrangements for the implementation of the aid scheme

94 Consideration of the Community system for the review of State aid confirms the irrelevance of the criterion, invoked by the Commission, based on the detailed arrangements for the implementation of the aid scheme.

95 If that criterion were accepted, it would lead to legal uncertainty for litigants because the determination made by the court having jurisdiction would first of all depend on the detailed arrangements for the implementation of the aid scheme in question and then, if the scheme were automatically applicable, on any examination which the Commission may have carried out of the individual situation of some of the beneficiaries (see paragraph 85 above). However, such a criterion is wholly unjustified in view of the condition relating to the existence of an individual connection, which forms part of the Community system for the review of State aid. The detailed arrangements for the implementation of an aid scheme have no bearing on whether or not the Commission is able to identify the beneficiaries; nor do they have any bearing on the review carried out by the Commission, or on the scope of the obligation to recover the aid from the beneficiaries.

96 First, it follows from the case-law that the actual beneficiaries of an aid scheme are individualised by dint of belonging to a closed class of persons particularly affected by the recovery order (see paragraphs 77 to 84 above). However, inasmuch as, in all cases, the actual beneficiaries constitute, precisely, a closed class, they are always fully identifiable when the Commission decision is adopted, regardless of whether the scheme is automatically applicable or requires the adoption of individual implementing measures.

97 Secondly, bearing in mind the general application of any aid scheme, there is no justification, a priori, for the nature and extent of the Commission's review varying according to whether the scheme provides for the aid to be granted automatically or by means of implementing measures. When confronted with an unlawful aid scheme, all the Commission is in principle obliged to do is to examine the general and abstract characteristics of the scheme (see paragraph 73 above). Consequently, even where the aid scheme has been implemented by means of individual decisions involving a discretionary power, the Commission is not thereby required to carry out an examination on a case-by-case basis of the decisions granting aid, and in each case assess, inter alia, whether the conditions for the application of Article 87(1) EC are satisfied.

98 Thirdly, during the national recovery procedure, the fact that the aid scheme was implemented automatically or by means of individual decisions has no effect on the scope of the Commission's decision with regard to the beneficiaries. In both situations, the national authorities are merely entitled to implement that general and abstract decision. It is not for them to ascertain whether the conditions for the application of Article 87(1) EC are satisfied in each individual case (see paragraphs 99 and 100 below).

99 Moreover, the fact that the aid was granted by means of individual decisions implementing an aid scheme does not necessarily reduce the complexity of the assessments which must be made by the authorities in order to implement the Commission decision, in which the abovementioned individual decisions are not, as a

rule, taken into account (see paragraph 97 above). In any event, since in all cases the national authorities merely implement the Commission decision, the level of complexity of their assessments when recovering the aid does not constitute a relevant criterion for establishing whether or not the actual beneficiaries are individually concerned by that decision. The argument relating to the complexity of such assessments, already raised by the Commission in its appeal in *Italy* v *Commission*, cited in paragraph 53 above, was already impliedly rejected by the Court of Justice in that judgment.

(c) The alleged power of the national authorities to ascertain in each individual case whether aid exists when implementing a recovery order

100 However, in order to show that the actual beneficiaries of an aid scheme are not individually concerned by a Commission decision finding that the scheme is incompatible with the common market and ordering recovery of the aid paid out, the Commission contends that, when that decision is being implemented, the Member State concerned has power not merely to apply the criteria set out in the decision at issue but also to ascertain in each individual case whether the conditions for the application of Article 87(1) EC are satisfied in the light of the subjective situation of the undertaking concerned.

101 All the same, the Commission provides no justification for that argument, other than that the aid scheme under consideration in the present cases is not sectoral but applies to all undertakings located in the island territory of Venice or Chioggia, with the result that the Commission was unable to assess whether the conditions for the application of Article 87(1) EC were satisfied in each of the many sectors of activity concerned. It is therefore for the Member State concerned to check this.

102 However, it must be stated at the outset that, on the one hand, the Commission seems to be suggesting that where the national authorities implement a decision finding that a multisectoral aid scheme is incompatible with the common market and requiring recovery of the aid paid out, they are automatically entitled to ascertain whether the conditions for the application of Article 87(1) EC are satisfied in the sectors of economic activity in respect of which the Commission has not examined the effect of the measures under consideration on trade between the Member States and on competition. The scope of the national authorities' power in that regard would thus depend on the extent of the examination carried out by the Commission, which is in turn dependent on the information communicated to it during the administrative procedure, with the result that the limits of the above powers on the part of the national authorities are a matter of legal uncertainty (see paragraph 85 above and paragraphs 229 to 234 below).

103 On the other hand, in the present cases, it is clear from the contested decision that the Commission excluded from the category of State aid within the meaning of Article 87(1) EC solely the social security exemptions at issue which comply with the *de minimis* rule (see paragraph 13 above). Even though the enacting terms of the contested decision make no mention of the *de minimis* rule, those enacting terms are indissociably linked to the reasons on which the decision is based and must therefore be interpreted in the light and in the context of all the reasons which led to its adoption (Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and *Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 163). Consequently, in so far as the Commission states, in recital 110 of the contested decision, that measures which comply with the *de minimis* rule do not fall within the scope of Article 87 EC, such measures are not covered by the recovery obligation laid down in Article 5 of the decision. Moreover, there is nothing in the contested decision to enable other exemptions from among the social security exemptions at issue to be excluded from the recovery obligation on the ground that they do not constitute State aid within the meaning of Article 87(1) EC.

104 In that context, the Commission's argument that the national authorities, when implementing the contested decision, have the power to ascertain in each individual case whether the conditions for the application of Article 87(1) EC are satisfied is not supported by the case-law. In its defence, the Commission relies solely on Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, in which the Court of Justice held, in the context of its consideration of a plea alleging that the statement of reasons was insufficient, that where the Commission considered the characteristics of the aid scheme in question and illustrated its analysis using as an example one sector of activity concerned by the scheme, it established to the requisite legal standard that the scheme

gave an appreciable advantage to beneficiaries as compared with their competitors and was likely to benefit in particular undertakings engaged in trade between Member States (paragraphs 88 and 89 of the judgment). Emphasising that '[t]here was no need for the contested decision to include an analysis of the aid granted in individual cases on the basis of the scheme', the Court of Justice added that '[i]t is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned' (paragraph 91). In the absence of any indication to that effect, there is nothing to allow the latter sentence to be interpreted as referring to an individual examination of the conditions for the application of Article 87(1) EC during the procedure for the recovery of the aid. On the contrary, in the context of that dispute, it seems more likely that the Court of Justice was merely emphasising the fact that the general and abstract analysis of the aid scheme carried out in the Commission decision was sufficient by pointing out that an examination of the individual situation of the recipients was necessary only to recover the aid pursuant to that very decision (see paragraphs 73 above and 209 below).

105 Moreover, the approach contended for by the Commission in the present case is at odds with settled case-law, which seeks to avoid treating unlawful aid more favourably than aid properly notified. In particular, it has been held that if new aid has been granted without prior notification, the Commission is not required to establish whether the aid has a real effect on trade and competition. Such a requirement would favour Member States which grant aid in breach of the obligation to notify, to the detriment of those which notify aid at the planning stage (*Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 79).

106 However, to accept that the Member State concerned may, when implementing a Commission decision concerning an unlawful aid scheme, ascertain in each individual case whether the conditions for the application of Article 87(1) EC are satisfied would amount to giving the Member State, where it is in breach of its obligation to notify, a power which the case-law has not as yet recognised as accruing to it, where a Commission decision has declared an aid scheme incompatible with the common market. Consequently, if the Commission's argument were to be accepted in the present case, the stumbling block of granting more favourable treatment to aid that has

not been notified could be avoided only by recognising that the Member State concerned enjoyed comparable powers when dealing with a Commission decision declaring notified aid incompatible with the common market.

107 It should be pointed out in that regard that the Court of Justice resolved certain questions concerning the scope of the obligation to notify laid down in Article 88(3) EC by holding that only State aid within the meaning of Article 87(1) EC is subject to the notification procedure (Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 32). By the same logic, with regard to measures granted in order to offset the costs incurred in discharging public service obligations, it follows from Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*'), paragraphs 87 and 94, that such measures do not fall within the purview of Article 87(1) EC and therefore do not have to be notified if they meet the conditions laid down in that judgment. On the other hand, the Community judicature has not yet been called upon to rule on the question whether measures granted under an aid scheme either, for example, to an entity which does not constitute an undertaking within the meaning of Article 87(1) EC or, by way of compensation, to an undertaking entrusted with discharging public service obligations under the conditions set out in *Altmark* are not to be regarded as State aid and may therefore be implemented without the Commission's authorisation, even if the latter has previously declared the aid scheme incompatible with the common market.

108 None the less, it should be pointed out that the power of the Member State concerned — confirmed by *Xunta de Galicia*, cited in paragraph 107 above — to define a measure in the light of the conditions for the application of Article 87(1) EC so as to establish whether it is subject to the notification and standstill obligations laid down in Article 88(3) EC does not enable that measure to escape the power of review conferred on the Commission by the Treaty once the Commission has decided to initiate the formal investigation procedure provided for in Article 88(2) EC. Regardless of whether it is the prior review of notified aid or the ex post review of unlawful aid, that review covers in principle both the categorisation of the aid and, if appropriate, its compatibility with the common market and is as a rule carried out by the Commission solely on the basis of the general characteristics of the aid scheme. The approach which the Commission proposes in the present cases would entail not only a significant transfer of power to the Member State concerned but also a substantive change in the

review of aid schemes, since the Member State could systematically take account of the individual situation of each beneficiary when implementing the Commission decision in order to categorise the measure in question, notwithstanding the Commission's finding that the aid scheme in question affects trade between the Member States and competition. However, even in the case of a multisectoral scheme, recognition of such a power cannot be justified for the purposes of an enlightened application of the conditions laid down in Article 87(1) EC. When such a scheme is being examined by the Commission, the Member State concerned may, by drawing the Commission's attention to the market situation in given sectors of activity, persuade that institution to ascertain in particular whether, in those sectors, the aid scheme is likely to affect trade between the Member States and distort competition (see paragraphs 231 to 233 below). Moreover, it is for the Member State concerned to draw the Commission's attention, if necessary, to the specific individual situation of certain undertakings (see paragraph 209 below).

109 In addition, the approach proposed by the Commission would entail a change in the courses of action open to it. If the Commission considered that the Member State concerned had committed an error when applying Article 87(1) EC in the procedure implementing the decision requiring recovery of the aid paid out, it would be obliged not to reopen the procedure provided for in the first subparagraph of Article 88(2) EC but to bring an action directly before the Court of Justice for failure to fulfil obligations under the second subparagraph of Article 88(2) EC.

110 On account of its scope, the approach contended for by the Commission in the present cases is therefore to be distinguished from the approach adopted with regard to public services in *Altmark*, cited in paragraph 107 above, which leaves it to the Member States to assess measures, granted in compensation for the assumption of responsibility for services of general economic interest, which are exempt, under certain conditions, from being regarded as State aid and, consequently, from the obligation to notify. Such measures may, however, undergo an ex post review by the Commission in the framework of the formal investigation procedure provided for in the first subparagraph of Article 88(2) EC.

111 As the Community rules on State aid and the case-law now stand, recognition that the Member State concerned has a power, when implementing a Commission decision declaring an aid scheme incompatible with the common market and ordering recovery of the aid paid out, to assess in each individual case whether all the conditions for the application of Article 87(1) EC have been satisfied would radically change the scope and effectiveness of the review carried out by the Commission in the framework of the formal investigation procedure provided for in Article 88(2) EC, during which that institution, as a rule, first determines whether a scheme falls properly to be regarded as State aid, before declaring it, if appropriate, incompatible with the common market.

112 It follows from all the foregoing considerations that the applicant undertakings have locus standi to challenge the contested decision.

C — *The alleged lack of locus standi of the Committee in Case T-277/00*

113 The Commission contends that the Committee, which brings together various professional associations, has produced no evidence to show that one or more of those associations were individually concerned by the contested decision, particularly as negotiators when the aid schemes examined in the contested decision were being set up. In addition, even the member undertakings of those associations are not individually concerned.

114 It is sufficient in that regard to point out that, in accordance with settled case-law, since the applicant undertaking, Coopservice, has locus standi, there is no need to consider whether the Committee has locus standi (see Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31). The action brought by Coopservice and by the Committee in Case T-277/00 is therefore admissible.

115 In addition, it must be added that, in any event, the Committee, as an organisation bringing together professional associations representing undertakings which are located in Venice or Chioggia and which received aid under the scheme at issue solely for that reason, is directly and individually concerned by the contested decision inasmuch as it acts on behalf of its members which could themselves have brought an action that would have been declared admissible (see Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60).

116 It follows that the present actions are admissible in their entirety.

Substance

117 The applicants challenge the contested decision in so far as it categorises the measures at issue as State aid incompatible with the common market and imposes an obligation to recover the aid paid out.

A — *The allegedly erroneous categorisation of the measures at issue as State aid incompatible with the common market*

118 The applicants put forward a series of pleas alleging: (i) infringement of Article 87(1) EC, Article 86(2) EC and the principle of equal treatment, as well as failure to state adequate reasons and the contradictory nature of the reasons stated; (ii) infringement of

Article 87(3)(c) EC; (iii) infringement of Article 87(3)(d) EC; (iv) infringement of Article 87(3)(e) EC; and (v) infringement of Article 87(3)(b) EC and Article 87(2)(b) EC.

1. *The alleged infringement of Article 87(1) EC, Article 86(2) EC and the principle of equal treatment, as well as the alleged failure to state adequate reasons and the allegedly contradictory nature of the reasons stated*

(a) Arguments of the parties

The applicants' arguments

— Case T-254/00

119 The applicant — Hotel Cipriani — alleges infringement of Article 87(1) EC and failure to state adequate reasons for the contested decision.

120 First, it argues that the contested decision (recitals 49, 50 and 58) is vitiated by an inadequate statement of the reasons on which it is based, as a result of the failure to take into account the local nature of the market concerned.

121 It maintains that the Commission is required to analyse the characteristics, detailed arrangements and content of the measures under consideration so as to be able to assess their effects on trade and competition on a sector-by-sector basis.

122 Moreover, limitation of the obligation to state the reasons on which a decision is based with regard to aid schemes would impair the comprehensive review by the Community judicature of the categorisation of a measure in the light of Article 87(1) EC.

123 In the present case, the contested decision contains no reference, even summary, to the markets for the products and services concerned; nor does it refer to the flows of imports and exports or to the position on those markets of the undertakings concerned. In particular, no mention is made of the hotel and catering sectors.

124 Contrary to the Commission's contentions, it is not for the Italian authorities to determine and assess the situation of each beneficiary in the framework of the procedure for the recovery of the aid. The Italian authorities are required to adopt automatically the conclusions formulated by the Commission in the contested decision. None the less, in the present case, the Italian authorities should — precisely because of the lack of adequate reasons for that decision — have asked the Commission for further explanations so as to be able to identify which undertakings had benefited from measures meeting the criterion of affecting trade between the Member States (see the Commission's answers of 29 August and 29 October 2001, annexed to the Italian Government's answers of 12 March 2004 to questions put to it by the Court).

125 Secondly, the applicant claims that the Commission committed a manifest error of assessment and thus misapplied Article 87(1) EC by relying on a 'generic' presumption rather than taking into account the local nature of the market concerned.

126 At the hearing, the applicant pointed out that the Commission could not rely on such a presumption since it was in a position to know that the measures under consideration in favour of certain categories of undertaking were not likely to affect trade between the Member States and competition.

127 However, the local nature of the hotel and catering sectors has been confirmed in a general way, in particular by the Community Guidelines on State aid for undertakings in deprived urban areas (OJ 1997 C 146, p. 6). Consumers choose a hotel in, or as near as possible to, the locality in which they intend to stay.

128 In addition, in any event, the hotel market in Venice is special. By reason of the power of attraction of the city, the hotel undertakings in Venice are not in competition with undertakings in the same sector located in other cities. The criterion on the basis of which consumers choose is not the price of the hotels, but the location. The measures at issue are therefore unlikely to affect, even potentially, trade between the Member States and competition.

129 In the present case, the Commission was in possession of the necessary information concerning, in particular, the special nature of the hotel sector in Venice, thanks, inter alia, to the participation of the Committee in the administrative procedure. In addition, the information relating to the sectors concerned and the number of beneficiary undertakings was sent to the Commission by the Italian authorities (recitals 6 and 13 of the contested decision). In any event, it was for the Commission to ask the Italian

authorities for additional information on the situation of the various beneficiaries, in accordance with the procedures laid down in Regulation No 659/1999, without there being any need for an injunction.

130 Under those circumstances, the contested decision is, in addition, incomprehensible and contradictory inasmuch as, in taking account of the local dimension, the Commission considered only certain public services.

131 Thirdly, the Commission committed a manifest error of assessment and thus misapplied Article 87(1) EC by failing to take into account the additional costs borne by undertakings trading in Venice when assessing whether the measures at issue were of such a nature as to confer an actual economic advantage on their beneficiaries. In addition, on the same point, the statement of reasons in the contested decision is insufficient.

132 The additional costs mentioned above amount to between 8% and 12% of the turnover of the undertakings concerned, according to a report by a firm of experts dated 8 September 2000, submitted by the applicant. Contrary to the Commission's contentions, those costs were calculated on the basis of specific and objective points of reference.

133 Those additional costs were not the result of macroeconomic factors — linked, for example, to the cost of credit, or to taxation or exchange rates — but solely of the fact that the activity is exercised in Venice. They are only partly offset by the measures at issue, which explains why the prices charged by the Hotel Cipriani are higher than those normally charged by establishments located elsewhere.

— Case T-270/00

134 The applicant — Italgas — points out that the Italian authorities had supplied the Commission with the data relating to the social security exemptions at issue, broken down by sector. It was therefore for the Commission to carry out an overall examination, even if summary, of the likely effect of the measures under consideration on trade between the Member States and on competition in the sectors of activity concerned.

135 In addition, the Guidelines on aid to employment of 12 December 1995 expressly provide that measures in favour of employment 'in respect of activities that do not involve trade between Member States (e.g. neighbourhood care services, certain local employment initiatives)' do not fall within the scope of Article 87(1) EC.

136 Under those circumstances, the applicant claims first that the contested decision is vitiated by an inadequate statement of the reasons on which it is based, inasmuch as it does not contain a sufficient examination of the facts.

137 The applicant disputes that, in its decisions concerning aid schemes, the Commission can rely on the 'worst case scenario'. If such a decision examined only the worst case scenario and none the less included a general obligation to recover the aid, it would be necessary to specify which authority, under which circumstances and on the basis of which criteria, could determine whether the scenario envisaged had actually happened and with regard to which traders or categories of trader.

138 At the hearing, the applicant pointed out that, when the Commission considers an aid scheme, it alone has the power to apply the substantive provisions of Article 87 EC. Under the present system for the Community review of State aid, the Commission is not entitled to delegate its discretionary powers of assessment to the national authorities. Its decision must therefore contain a sufficient statement of reasons to enable the Community judicature to review the decision and to enable the national authorities to implement the recovery order, subject to review by the national courts, which need only ensure compliance with the Commission's decision.

139 In the present case, the applicant claims that the contested decision did not contain the information necessary to implement it with regard to Italgas. In order to require the repayment of the alleged aid, the national authorities therefore took as their basis the assessment contained in the Commission's letter of 29 October 2001, mentioned above. However, inasmuch as that assessment was carried out after the adoption of the contested decision, it cannot usefully give rise to a reference to the Court of Justice for a preliminary ruling.

140 Under those circumstances, to accept that the Commission could rely on presumptions when dealing with an aid scheme would ultimately weaken its obligation to undertake a diligent and impartial investigation, which would in turn reduce the possibility of challenging the Commission decision.

141 Secondly, according to the applicant, the Commission committed a manifest error of assessment and thus infringed Article 87(1) EC by refusing to take into account the compensatory nature of the measures at issue, without even undertaking a summary analysis of market conditions.

142 In the present case, during the administrative procedure, the Italian authorities — on the basis of the COSES report — referred to the additional costs borne by the undertakings operating on the islands in the lagoon. They considered that such undertakings are in a situation comparable — particularly as regards the instability of work — to that of undertakings in the Mezzogiorno. The social security reductions at issue are intended solely to compensate, at least partly, for the unfavourable conditions in the employment market in the area of the lagoon and thereby slow down the exodus of undertakings towards the mainland. Since those measures were legitimately intended to align the costs borne by the undertakings concerned with those borne by undertakings located on the mainland, the additional costs had to be calculated by reference to costs on the mainland. In any event, the contested decision fails to state reasons on that point inasmuch as the Commission has not shown that the costs borne by the undertakings located in the area of the lagoon are within the Community average.

143 Thirdly, the statement of the reasons on which the decision is based is insufficient; it contains manifest contradictions and is discriminatory with regard to the application of Article 87(1) EC, particularly in conjunction with Article 86 EC.

144 With regard to the municipal undertakings, the Commission verified individually whether the conditions for the application of Article 87(1) EC were satisfied.

145 By contrast, the Commission did not analyse the situation of all the other undertakings which were, essentially, in a situation similar to that of the municipal undertakings. That difference in treatment is not justified by the fact that a derogation under Article 86(2) EC had been invoked in favour of the municipal undertakings.

146 The insufficient nature of the statement of reasons, the contradictory nature of the reasons given and the infringement of the principle of equal treatment are even more manifest with regard to Italgas. At the time under consideration (1995–96), the urban gas distribution sector, in which Veneziana Gas, later absorbed by Italgas, traded, had not been liberalised. Given the total absence of trade and competition, the exemptions obtained by Veneziana Gas would thus not have been capable of affecting trade between the Member States and the free play of competitive forces. Liberalisation of the gas market was commenced at Community level by Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1). In addition, during the period under consideration, Veneziana Gas enjoyed a municipal statutory monopoly in the form of an exclusive concession for the distribution and supply of gas in the territory of the City of Venice.

147 In addition, the distribution of gas at municipal level constituted a service of general economic interest. Responsibility for the operation of that service had been attributed to Veneziana Gas by a municipal act dating from 1970 which clearly indicated the nature and the duration of the public service obligations and the local territory concerned. The measure in question provided that the competent authorities were to fix the applicable tariffs in accordance with uniform parameters for the whole of Italy.

148 In order to assess the additional costs borne by Veneziana Gas, the costs borne by the company should logically have been compared with those of other undertakings to which the same tariff system, laid down at national level, applies.

149 In the present case, the situation of Veneziana Gas, at the time under consideration, could be assimilated, in particular, to that of the municipal undertaking, ASPIV. However, in the contested decision, the Commission found that the exemptions

granted to ASPIV, responsible for integrated water management, were intended exclusively to offset the additional costs incurred as a result of carrying out the public service tasks assigned to the undertaking.

150 The Italian Republic, intervening in support of the forms of order sought by Italgas, argues that, in view of the relatively small amount accounted for by the social security exemptions at issue, the Commission should have identified the sectors concerned and determined, in a duly substantiated manner, which of those sectors was marked by lively competition. In the present case, the Commission did not dispute the statements of the Italian authorities and of the interested third parties that undertakings located in the lagoon area of Venice are generally engaged either in local public services or in commercial or craft activities closely linked to the island territory, with the result that they are not in competition with undertakings located outside that territory.

151 In addition, the Italian Government points to the compensatory nature of the measures under consideration. It relies, in particular, on Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraphs 40 to 47, in which the Court of Justice held that the fact that the relief from social security contributions is only the quid pro quo for the additional costs which undertakings in certain sectors agreed to assume as a result of the negotiation of collective agreements cannot exclude them from being categorised as State aid. It follows, *a contrario*, that, although the additional costs do not flow from the free choice made by the undertaking concerned with regard to advantages obtained in certain areas in exchange for concessions accepted in other areas, the measures intended to compensate for those 'involuntary' additional costs cannot be regarded as State aid. In the present case, however, the additional costs referred to are necessarily borne by all the undertakings trading in the island area. Partial compensation for them through the measures under consideration cannot therefore be regarded as State aid.

— Case T-277/00

152 The applicants — Coopservice and the Committee — allege infringement of Article 87(1) EC and of the obligation to state the reasons on which the contested decision is based.

153 In the first place, the measures at issue are intended to compensate undertakings located in the lagoon area for their contribution to the conservation of the architectural and cultural heritage of Venice. According to the COSES report, mentioned above, the measures represent 2.9% of the turnover of the beneficiary undertakings, whereas the additional costs resulting from their location in Venice represent 9.5% of turnover. Furthermore, the need to offset the additional costs borne by traders in the island regions was accepted in Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam and to Article 130a of the EC Treaty (now Article 158 EC).

154 In the present case, the Commission has not shown that the costs borne by undertakings located on the mainland, to which the Italian authorities referred as a basis for comparison, reflect a reality more favourable than the Community average nor, on the other hand, that the costs borne by undertakings located in the lagoon area were in line with the Community average.

155 In addition, the Commission — when it ascertained whether the measures at issue constituted State aid within the meaning of Article 87(1) EC — failed to respect the pre-eminence of the rules of economic and social cohesion over the competition rules. It gives precedence to the latter, contrary to Article 2 EU. However, the measures under consideration were intended, in the applicants' view, to achieve the objectives laid down in Article 2 EU.

156 Secondly, the applicants point to the limited amount represented by the social security exemptions at issue, on average, in the case of each of the traders concerned. They argue that most of the undertakings which had benefited from the measures under consideration carried on their activities at a purely local level. In that regard, the applicants mention, in particular, undertakings in the hotel, local transport and cleaning sectors. The exclusion of undertakings operating solely at local level from the scope of Article 87(1) EC has also been confirmed by the Commission, not merely, for example, in the Guidelines on aid to employment of 12 December 1995 and in the Information concerning Community guidelines on State aid for SMEs of 23 July 1996, but also in the contested decision itself (recitals 90, 91 and 93) with regard to certain municipal undertakings.

157 In that context, the contested decision is also vitiated by a contradictory statement of reasons and by an infringement of the principle of equal treatment.

158 The applicants, on the basis of the documents produced by the Commission at the Court's request, pointed to the similarity between the information and the applications, submitted to the Commission during the administrative procedure, not to apply Article 87(1) EC in relation to the municipal undertakings, on the one hand, and certain local sectors of activity, on the other.

159 The City of Venice did not identify the undertakings in respect of which it sought a derogation under Article 86(2) EC and did not refer to the local nature of the market in which they operated. None the less, the Commission found in the contested decision that, in the case of the municipal undertakings ACTV and AMAV, and of Panfido, the exemptions at issue did not constitute State aid by reason of the local nature of the markets concerned. However, in their observations of 23 January 1999, the Italian authorities supplied a list of the sectors in which undertakings were unlikely to engage in trade, which included the building industry, commerce, the hotel sector and services of general economic interest. In addition, the INPS tables, mentioned above, annexed to those observations, listed the number of beneficiary undertakings and the number of

workers concerned, by sector of activity. Furthermore, in its observations of 17 March 1998, the Committee pointed out that the special, principally local, nature of the activities exercised by most of the beneficiary undertakings prevented them from establishing themselves in a market in which there was strong competition, with the consequence that even any possible effect on the volume of trade between the Member States would in any event have been minimal. Finally, the COSES report, dated March 1998, analyses, in particular, the commerce, the hotel sector, the services and the craft activities sectors, such as the Murano glass industry, in which the markets are limited to the historic centre or, at most, to the territory of the City of Venice.

160 Under those circumstances, the Commission should have asked the larger undertakings for additional information by means, for example, of an injunction to the Italian authorities, as it did in the case of the municipal undertakings.

161 In the present case, the applicants consider that the situation of Coopservice was similar to that of AMAV (recital 93 of the contested decision) inasmuch as both undertakings provide the same cleaning and maintenance services at a purely local level.

162 Moreover, the contested decision is lacking a statement of reasons. It contains no analysis of the effect of the measures under consideration on trade between the Member States and on competition, and is based solely on presumptions.

163 Thirdly, the applicants allege infringement of Article 86(2) EC. They argue that Coopservice provides cleaning and maintenance services for public and private bodies in the City of Venice with a view to satisfying a general interest.

The Commission's arguments

164 The Commission points out that, when considering an aid scheme, it can merely study the general characteristics of the scheme. It can rely on the worst case scenario both for the purposes of categorising the scheme under consideration and, where appropriate, for assessing its compatibility with the common market.

165 In the present case, the fact that the Italian authorities supplied the Commission with data broken down by sector, indicating in particular the number of undertakings theoretically concerned by the scheme, does not alter the fact that the general approach is well founded. The Commission could not have based its assessment on the specific data gathered by the Italian authorities after the unlawful implementation of the aid scheme under consideration without granting the Member State concerned the advantage of a specific ex post analysis.

166 In the light of the information at its disposal, the Commission ascertained to the requisite legal standard in the contested decision (recital 49) that all the conditions for the application of Article 87(1) EC had been satisfied.

167 It is for the national authorities, when implementing the contested decision, to assess the individual situation of each beneficiary.

168 The Commission points out in that regard that the national authorities and the national courts must accept the assessment of incompatibility of the aid scheme made by it, without prejudice to the right of the national courts to refer the question of validity to the Court of Justice for a preliminary ruling under Article 234 EC. On the other hand, when the aid paid out is being recovered, the national authorities must ensure that, in

the individual case, the measure actually constitutes aid, that it is new aid and that it has not been declared compatible with the common market under a block exemption regulation or another Commission decision.

169 In any event, the Commission denies that the social security exemptions at issue which were granted to the applicants had no effect on trade between the Member States. The hotel industry in Venice could, in certain cases, form part of a flow involving trade between the Member States. The market for industrial cleaning services in which Coopservice operates could also be of interest to non-national undertakings, particularly if the tasks to be performed are of a significant economic value. Finally, there is no doubt that Italgas, which operates in the energy market, is in competition with operators in other Member States.

170 In addition, the Commission maintains that the measures under consideration are not of a compensatory nature such as to bring them outside the scope of Article 87(1) EC.

(b) Findings of the Court

171 The applicants claim that the conditions for the application of Article 87(1) EC relating to the grant of an economic advantage, the affecting of trade between the Member States and of competition are not satisfied in the present case. They argue that the aid scheme under consideration is compensatory in nature and, consequently, confers no advantage on its beneficiaries. In addition, the Commission has not proved that the scheme was likely to affect trade between the Member States or competition. Moreover,

the contested decision is vitiated by an inadequate statement of reasons, or by failure to state reasons, with regard to the abovementioned conditions for the application of Article 87(1) EC.

172 In addition, Italgas (Case T-270/00) and Coopservice and the Committee (Case T-277/00) claim that the contested decision is discriminatory and contradictory, inasmuch as the Commission examined the individual situation only of the municipal undertakings. The decision also infringes Article 86(2) EC.

173 All of the pleas concerning the infringement of Article 87(1) EC, of the duty to state reasons and of the principle of equal treatment should be taken together, so that they can be examined, first, with regard to the purported absence of any grant of advantage, owing to the purportedly compensatory nature of the measures under consideration, and then with regard to the purported absence of effect on trade between the Member States or on competition.

The purported absence of any grant of advantage, owing to the purportedly compensatory effect of the measures under consideration

174 In order to constitute State aid for the purposes of Article 87(1) EC, a measure must, in particular, be capable of conferring an advantage, to the exclusive benefit of certain undertakings or certain sectors of activity. That provision applies to aid which distorts or threatens to distort competition 'by favouring certain undertakings or the production of certain goods'.

175 In the present case, the measure at issue consists of exemptions from social security contributions for all undertakings located in Venice and Chioggia. The applicants do not dispute the selective nature of the exemptions, which in this case is the result of regional specificity (see, to that effect, Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115).

176 In addition, it cannot be denied that the social security exemptions at issue mitigate the costs which are normally included in the budget of an undertaking and thereby confer a financial advantage on the beneficiaries as compared with undertakings liable to pay the contributions (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 13 and 14).

177 However, the applicants maintain that the scheme for the social security exemptions at issue confers no advantage on the beneficiaries thereof, inasmuch as it is compensatory in nature.

178 In that regard, all the applicants claim that the social security exemptions at issue merely compensate in part for the structural disadvantages represented by the additional costs borne by the undertakings trading on the islands in the lagoon. In addition, Italgas (Case T-270/00) and Coopservice and the Committee (Case T-277/00) claim that the exemptions constitute partial compensation for the management of services of general economic interest, for which both undertakings were responsible.

The alleged compensation for structural disadvantages (Cases T-254/00, T-270/00 and T-277/00)

179 In the view of the applicants and of the Italian Republic — which is intervening in support of the forms of order sought by Italgas — the social security exemptions at issue do not confer any competitive advantage on the beneficiary undertakings but compensate in part for an unfavourable competitive situation. Undertakings located on the islands in the lagoon bear additional costs related, in particular, to the acquisition and maintenance of buildings because of the high rents and purchase prices, the constraints related to dampness and seasonal flooding ('acqua alta'), and the obligations imposed by the need to protect the historic heritage and landscape, plus additional costs for the transport and trans-shipment of stock and goods. In addition, by reason of the tourist nature of Venice, the cost of goods and services is also higher.

180 A similar argument had already been put forward by the Italian authorities, by the City of Venice and by the Committee during the administrative procedure on the basis of two studies carried out by COSES (see paragraph 9 above).

181 In the contested decision (recitals 52 to 54), the Commission disputes that argument on the ground that the fact that a measure is of a compensatory nature does not mean that it does not constitute State aid, but, in certain cases, it may be taken into consideration for the purposes of assessing the compatibility of the aid with the common market. The Commission states essentially that the Treaty is not intended to ensure perfect equality between undertakings. Undertakings operate in the real market and not in a perfect market where they are all subject to the same conditions. Furthermore, the alleged additional costs were not calculated in relation to the average costs borne by undertakings in the Community but to the costs which the undertakings concerned would have had to bear if they had relocated to the mainland.

182 The Commission's analysis is in accordance with case-law. In *Italy* v *Commission*, cited in paragraph 53 above, paragraph 61, the Court of Justice, confirming the judgment in *Alzetta and Others* v *Commission*, cited in paragraph 45 above, pointed out that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid. In that case, the alleged disadvantage was related to a geographical position exposing them, in particular, to competition from traders established in non-member countries who benefited from State aid and lower taxation (*Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraphs 64 and 101).

183 Contrary to the arguments put forward by Hotel Cipriani, that case-law does not refer only to measures intended to compensate for a competitive disadvantage related to macroeconomic factors such as costs related to credit, taxation or exchange rates.

184 In that regard, it should be borne in mind that, like all the rules of Community competition law, the Treaty rules on State aid are intended to ensure, not perfect competition, but effective or efficient competition, as the Commission points out in the contested decision (see paragraph 181 above).

185 Under those circumstances, compensation for structural disadvantages makes it possible to avoid categorisation as State aid only in certain specific situations. First of all, according to settled case-law, an advantage conferred on an undertaking with a view to correcting an unfavourable competitive situation is not State aid within the meaning of Article 87(1) EC if it is justified by economic criteria and if it does not discriminate between economic operators established in different Member States. In that sort of situation, the Community judicature in reality applies the criterion of a private operator in a market economy (*Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 99). That was the case, for example, of a preferential tariff for natural gas granted to undertakings engaged in hothouse horticulture by a company — Gasunie —

controlled by the Netherlands authorities, inasmuch as the tariff in question was objectively justified by the need to offer a competitive price as compared with other sources of energy in the context of the market concerned (*Kwekerij van der Kooy and Others* v *Commission*, cited in paragraph 50 above, paragraph 30).

186 Secondly, it also follows from the case-law that an advantage granted to an undertaking which mitigates the costs which are normally included in its budget does not constitute State aid within the meaning of Article 87(1) EC where the advantage is intended to remedy the fact that the beneficiary undertaking incurs additional costs resulting from special rules which are not incurred by competing undertakings subject to the ordinary law under normal market conditions. In Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 32, the Court of Justice ruled that an Italian law limiting the right of redemption where the members of Sotacarbo SpA exercised an exceptional right to withdrawal — and thereby relieving Sotacarbo's budget of a charge which it would normally have had to bear — merely neutralised the advantage granted to Enirisorse SpA as a member of Sotacarbo in the form of a right of withdrawal in derogation from the general law. The Court of Justice concluded that the effect of the law in question was not to create an economic advantage within the meaning of Article 87(1) EC to the benefit of Sotacarbo.

187 Similarly, in Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 57, the Court of First Instance held, in the context of the privatisation of a bus transport undertaking — Combus A/S — that the one-off payment by the Kingdom of Denmark of an amount of money to employees of a bus transport undertaking in order to compensate them for giving up their status as officials when they became contractual employees of Combus is not State aid. The Court accepted in that regard that the measure in question had been introduced to replace the privileged and costly status of the officials employed by Combus with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings and thereby to free Combus from a structural disadvantage it suffered in relation to its private sector competitors on account of the privileged status of the officials. On the other hand, in *France* v *Commission*, cited in paragraph 151 above, paragraphs 46 and 47, referred to by the Italian Republic, the Court of Justice held that the fact that the State measures at issue seek to offset additional costs which undertakings in certain sectors have assumed as a result of the conclusion and implementation of collective agreements cannot exclude them from being categorised as State aid on the ground that the agreements

between the two sides of industry are part of a whole which is the fruit of a compromise for which each party makes concessions in certain areas in exchange for advantages in other areas, with the result that, in the circumstances of that case, it was impossible to evaluate with the required accuracy the final cost of such agreements for the undertakings. Contrary to the Italian Republic's argument, the decisive factor in that judgment does not reside in the consensual nature of the agreements but in the balance of the respective final costs borne by the two sides of industry and the impossibility of evaluating precisely the cost of such agreements for undertakings.

188 In the present case, it is manifestly clear from their nature that the social security exemptions at issue, which are intended to offset in part the additional costs borne by undertakings by reason of their location on islands in the lagoon (see paragraph 179 above), are justified neither by objective economic considerations nor by requirements connected with the consistency of the applicable legal rules and the balance of rights and obligations — with regard to the ordinary law to which the competing undertakings are subject — such as those which are taken into account in the case-law considered in the preceding paragraphs.

189 Moreover, unlike the circumstances at issue in *Enirisorse*, cited in paragraph 186 above, or *Danske Busvognmænd* v *Commission*, cited in paragraph 187 above, there is no direct connection, in the present case, between the scheme for the social security exemptions at issue and the purported objectives, which are, in the present case, to offset additional costs connected with the specific structural problems resulting from the fact that Venice and Chioggia are situated in a lagoon. In particular, the social security exemptions at issue — granted to all undertakings located in Venice and Chioggia and intended to facilitate employment by mitigating the burden on employers — did not specifically aim to offset the structural disadvantages claimed, such as additional costs related to the acquisition and maintenance of buildings or to constraints related to dampness and seasonal flooding ('acqua alta', see paragraph 179 above). In that regard, it has not been established that the sectors most affected by the purported structural disadvantages are those which generate the most employment and therefore benefit most from the partial compensation for their additional costs. However, the applicants, on the basis of the COSES studies mentioned above, refer on that point to the instability of work on the islands. The COSES study dated February 1998 (point 1.2.4) in fact

confirms that, by reason of being located on an island, undertakings are often forced to pay travel and meal expenses for their employees, and are exposed to the late arrival or absence of staff on account of fog or seasonal flooding. However, even if that explanation is accepted, the fact remains that there must be a direct connection between the amount of the additional costs and the amount of the compensation, even if the latter is only partial, as the applicants claim.

190 However, in the present case, the factors put forward by the applicants do not enable it to be presumed that there is a direct connection between the additional costs actually incurred and the amount of the aid received by the various operators in the principal sectors of economic activity. In particular, the applicants put forward no evidence permitting it to be concluded that most sectors of activity are exposed to a comparable degree to the purported economic disadvantages linked to the island location. On the contrary, it is clear from the COSES study dated February 1998 (point 1.1.3) that, through Venice's attractive image ('il forte richiamo di immagine'), activities related to tourism and certain commercial sectors can counterbalance the disadvantages linked to the island location. The COSES study dated March 1998 (point 1.3) indicates, in particular, that, for hotels, the fact of being located in the historic centre of Venice or on islands in the lagoon can provide a lot of freedom in determining prices and is a significant competitive advantage. In the hotel sector, for example, the additional costs are therefore compensated for by higher prices, as indeed Hotel Cipriani pointed out.

191 Consequently, even supposing that, more generally, when a measure is intended to compensate for certain specific structural disadvantages, such compensation can, in certain cases, be taken into consideration in determining whether the measure confers an economic advantage on its beneficiaries, it must be stated that the conditions for the taking into account of that compensation are not satisfied in the present case.

192 In addition and in any event, it must be stated that, in the present case, the Italian authorities and the interested third parties referred to the costs borne by undertakings located on the mainland, as the Commission pointed out in the contested decision (see paragraph 181 above). However, contrary to the applicants' argument, only specific structural disadvantages giving rise to additional costs as compared with a 'typical' situation to which traders are normally likely to be exposed in a market characterised by effective competition (see paragraph 184 above) can be taken into consideration when assessing the existence of an advantage within the meaning of Article 87(1) EC, as the Commission pointed out in the contested decision. In the present case, the mere fact that undertakings located in Venice or Chioggia incur costs additional to those they would incur if they moved to the mainland does not allow the conclusion to be drawn that the scheme at issue does not confer any advantage on them and does not introduce any sort of discrimination against their competitors in Italy or in other Member States. On that point, the Commission therefore did not exceed the limits of its powers of assessment in considering that the purported additional costs had to be assessed in relation to the average costs borne by undertakings in the Community.

193 Moreover, it is for the national authorities or the interested third parties, during the administrative procedure, to provide evidence of the additional costs purportedly borne as compared with the average costs borne by undertakings in the Community, in order to prove the existence of specific structural disadvantages justifying the compensation measure at issue. Consequently, contrary to the applicants' arguments, it is not for the Commission to show that the costs borne by undertakings operating on the mainland — referred to by the Italian authorities for the purposes of the comparison — are indicative of a more favourable situation than that suggested by the average costs borne by undertakings in the Community, which were not communicated to it during the administrative procedure.

194 It follows from the foregoing that the applicants have not established that the Commission committed a manifest error of assessment in considering that, notwithstanding its purpose as partial compensation for structural disadvantages connected with insularity, the scheme for social security exemptions at issue conferred a competitive advantage on its beneficiaries.

195 In that context, the argument put forward by Coopservice and the Committee that the Commission should have taken account of Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam, and the rules of economic and social cohesion when assessing the existence of a competitive advantage (see paragraphs 153 and 155 above) must be rejected. It is sufficient to bear in mind in that regard that Article 87(1) EC does not distinguish between the reasons for or the objectives of a measure which reduces the burdens normally imposed on an undertaking, but defines that measure by reference to its effects (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671 ('*Maribel bis/ter*'), paragraph 25). A measure intended to compensate for a structural disadvantage cannot therefore, merely because of its purpose, escape the application of Article 87(1) EC if it confers a competitive advantage on its beneficiaries within the meaning of that provision. As it is, in the present case, it follows from the foregoing considerations that, even if the scheme under consideration was intended to compensate in part for the specific structural disadvantages connected with the island location of Venice and Chioggia, the applicants have not established that, by reason of its compensatory nature, that scheme confers no competitive advantage on its beneficiaries and therefore does not introduce discrimination between economic operators. Moreover, it must be noted that the objectives of economic and social cohesion referred to by the applicants may be taken into consideration for the purposes of a declaration that the aid scheme is compatible with the common market if the conditions for such a derogation, laid down in the Treaty and its implementing rules, are satisfied.

196 For all of those reasons, the Commission did not misapply Article 87(1) EC by considering, in the contested decision, that the compensation for structural disadvantages invoked by the Italian Republic and the interested third parties which took part in the procedure is not such as to prevent the measures in question from constituting State aid.

197 In addition, the contested decision contains a sufficient statement of reasons on that point (see paragraph 181 above). It is clear from the decision that the Commission considered that the compensation for the purported structural disadvantages by means of the measure at issue did not rule out the grant of an advantage within the meaning of Article 87(1) EC and that, in any event, the existence of additional costs as compared with a 'typical' situation, in circumstances of effective competition, had not been established in the present case.

198 It follows that the pleas in law alleging infringement of Article 87(1) EC and the lack of an adequate statement of reasons, raised in connection with the purported compensation for structural disadvantages, must be rejected as unfounded.

The purported compensation for the management of public services (Cases T-270/00 and T-277/00)

199 In Case T-270/00, Italgas claims that, when the aid under consideration was granted, Veneziana Gas — which was later taken over by Italgas — was responsible for a service of general economic interest, namely the distribution of gas in the City of Venice. Veneziana Gas should therefore have been accorded a derogation under Article 86(2) EC.

200 The applicant complains, essentially, that, in the contested decision, the Commission merely took account of the individual situation of the municipal undertakings, for which the Italian authorities had requested a derogation under Article 86(2) EC. By failing to carry out a similar individual examination with regard to the other undertakings in analogous situations, the Commission infringed the principle of non-discrimination and provided contradictory reasons for this in its decision. The applicant claims, in particular, that, in the same way as it acknowledged in recital 92 of the contested decision the compensatory nature of the social security exemptions at issue in favour of ASPIV — which was responsible for integrated water management, a service of general economic interest — the Commission should have taken account in the contested decision of the additional costs incurred by Veneziana Gas through the performance of its public service tasks in the lagoon area.

201 In Case T-277/00, Coopservice and the Committee similarly claim that Coopservice was responsible for providing a service of general economic interest.

202 The Commission objects that no information concerning the individual situation of the applicant undertakings was supplied to it during the administrative procedure.

203 In that regard, it should be pointed out at the outset that all the observations submitted to the Commission by the Italian authorities and the interested third parties which made their positions known — namely the Committee and the City of Venice — during the administrative procedure and produced by the Commission at the request of the Court, as well as the two COSES reports, confirm upon examination that the Commission's attention was not drawn to the additional costs incurred by Veneziana Gas or by the maintenance and cleaning companies, such as Coopservice. Although it is true that the Italian authorities, in their observations of 23 January 1999, referred, without providing any further details, to services of general economic interest among the sectors in which undertakings were not, in the view of the Italian authorities, likely to engage in trade, they did not name any of those undertakings or provide the slightest indication which would have made it possible to identify them or to determine the public service activities being referred to.

204 On the other hand, it is common ground that the Italian Republic and the City of Venice sought a derogation under Article 86(2) EC for the municipal undertakings. Contrary to the applicants' argument at the hearing, those municipal undertakings, which are few in number, were clearly identified by their very status in the observations submitted to the Commission. In particular, they were mentioned by name in the Italian Government's observations of 27 July 1999, which specified their respective sectors of activity and the conditions under which they exercised those activities.

205 Apart from matters concerning municipal undertakings, the only information communicated to the Commission during the administrative procedure for the purpose of establishing the compensatory nature of the aid scheme under consideration concerned the additional costs incurred generally by undertakings exercising their activities on islands in the lagoon. At no time was the specific situation of Veneziana Gas or of cleaning companies like Coopservice mentioned.

206 None the less, in the view of Italgas, the additional costs borne by Veneziana Gas, as compared with the costs borne by other gas distribution undertakings to which the same tariff structure, laid down at national level, applies, should have been taken into account in order to assess the compensatory nature of the social security exemptions at issue with regard to that undertaking.

207 Italgas argues in that regard that the application of the single tariff structure led the tariffs for the supply of gas to vary according to zone, on the basis of a standard cost and uniform parameters for the whole of Italy which did not take account of the real framework in which gas was distributed in the lagoon area and the additional costs actually incurred by Veneziana Gas.

208 In that regard, it should be borne in mind, first, that, when the Commission decides to initiate the formal investigation procedure, it is for the Member State concerned and the beneficiaries of the measure under consideration to put forward the arguments whereby they seek to show that the measure at issue either does not constitute aid or is aid compatible with the common market, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see, to that effect, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 93). In particular, in order to obtain approval of new or modified aid by way of derogation from the Treaty rules, the Member State concerned must, in order to fulfil its duty to cooperate with the Commission, provide all the information necessary to enable that institution to verify that the conditions for the derogation are satisfied (see, to that effect, Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 129; and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139, paragraph 48).

209 Moreover, in the case of an aid scheme, the Commission is not generally required to carry out an analysis of the aid granted in individual cases (see paragraph 73 above). It may confine itself to examining the general characteristics of the scheme in question

without being required to examine each particular case in which it applies (*Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, paragraph 51; Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24; Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraphs 91 and 92; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraphs 67 and 68).

210 However, according to case-law, the Commission is required, in the context of Article 88 EC, to conduct a diligent and impartial assessment of the aid measure under consideration in the interests of sound administration of the fundamental rules of the Treaty on State aid (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 167). In particular, in a formal investigation procedure, the principle of sound administration, which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, requires the Commission to comply with the principle of equal treatment as between the parties concerned (see, to that effect, the order of the President of the Court of First Instance in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 85).

211 In that legal framework, possible recognition of an obligation on the part of the Commission to assess individually the situation of certain beneficiaries when examining an aid scheme is connected, on the one hand, to compliance with the procedural obligations incumbent upon the Commission and the Member State concerned respectively and, on the other, to the content of the specific information concerning those beneficiaries communicated to the Commission by the national authorities or the interested third parties.

212 In particular, according to case-law, the Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation under Article 10 EC and refuses to provide information requested from it for the purpose of assessing the nature of the measure under Article 87(1) EC and, as the case may be, the compatibility of the aid

with the common market. Before taking such a decision, however, the Commission must order the Member State to provide it, within the time-limits it lays down, with all the documentation, information and data necessary to carry out its review. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the questions whether or not aid has been granted and, if it has, whether or not that aid is compatible with the common market (see, to that effect, Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 73, and Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, paragraph 36 and the case-law cited).

213 Those principles were confirmed in Article 5(2) and (3), Article 10(3) and Article 13(1) of Regulation No 659/1999. In particular, Article 13(1) of that regulation provides that if a Member State fails to comply with an information injunction, the Commission's decision to close the formal investigation procedure pursuant to Article 7 of that regulation is to be taken on the basis of the information available.

214 In the present case, the Commission completely fulfilled its procedural obligations both with regard to the Member State concerned and to the beneficiaries of the aid scheme under consideration in their capacity as interested third parties. The interested third parties were invited to submit their observations on the aid scheme under consideration by means of a notice published in the *Official Journal of the European Communities* of 18 February 1998 pursuant to Article 88(2) EC. That notice repeated the text of the letter by which the Commission informed the Italian Republic of its decision to initiate the formal procedure and in which it required the Italian Republic to provide it, in particular, with all such documentation, information and data as it considered useful for the assessment of the case. By letter of 17 March 1998, the Committee sent a report to the Commission, together with the COSES study dated March 1998. The City of Venice submitted its observations to the Commission by letter of 18 May 1998. It indicated in that letter that the municipal undertakings provided public services and asked to have Article 86(2) EC applied to them. The applicant undertakings did not submit observations. The abovementioned observations submitted by the Committee and by the City of Venice were sent to the Italian Government, which submitted its comments to the Commission by letter of 23 January 1999 and, by letter of 10 June 1999, supported the request for a derogation under Article 86(2) EC in favour of the municipal undertakings. By decision of 23 June 1999,

the Commission, on the view that the Italian Republic had not provided it with all the information necessary for assessing the measures in favour of the municipal undertakings, gave it notice to provide it with all the documentation, information and data necessary for assessing the compatibility of those measures with the common market pursuant to Article 86(1) EC. The Italian authorities replied by the abovementioned letter of 27 July 1999.

215 Under those circumstances, and in the absence of the slightest piece of information concerning the applicant undertakings in the observations and documents communicated to the Commission (see paragraphs 207 and 209 above), the Commission cannot be criticised for not examining their individual situation.

216 In particular, in the absence of any information on that point, it was not for the Commission to ascertain whether the social security exemptions at issue, granted to Veneziana Gas and Coopservice, represented financial compensation for public service obligations and did not, for that reason, confer on them any advantage within the meaning of Article 87(1) EC.

217 In that regard, it must be noted that the contested decision pre-dates the judgments of the Court of Justice in Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 27, and *Altmark*, cited in paragraph 107 above, which explains why, in recital 92 of the decision, the Commission considered the compensation for the management of a public service by the municipal undertaking ASPIV from the point of view of the derogation provided for in Article 86(2) EC and not in the framework of the assessment of the conditions for the application of Article 87(1) EC.

218 However, the criteria laid down in *Altmark*, cited in paragraph 107 above, resulting from an interpretation of Article 87(1) EC, are fully applicable to the factual and legal situation of the present case as it was presented to the Commission when it adopted the contested decision (see, to that effect, Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 158). However, inasmuch as that decision was adopted a number of years before the judgment in question, it is appropriate to determine whether the Commission's overall approach in the contested decision is compatible with the substance of the criteria laid down in *Altmark* rather than to make a literal application of those criteria (see, to that effect, the Opinion of Advocate General Sharpston in Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, point 94).

219 In the present case, Italgas also relies on the judgment in Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 31 to 40, which repeats the conditions laid down in *Altmark*, cited in paragraph 107 above.

220 None the less, since the Commission was not required, in the light of the available information, to examine the individual situation of Veneziana Gas and Coopservice (see paragraph 215 above), it must be held that the contested decision does not misapply Article 87(1) EC in that regard and is vitiated neither by an infringement of the principle of non-discrimination nor by a contradiction in the statement of reasons, in that it limits itself to examining the individual situation of the municipal undertakings.

221 For all of those reasons, the entire body of pleas and arguments put forward by the applicants and the Italian Republic regarding the purportedly compensatory nature of the measure under consideration must be rejected as unfounded.

The purported absence of effect on trade between the Member States and on competition

222 According to the applicants and the Italian Republic — which is intervening in support of Italgas — it was the Commission's duty to determine whether the aid scheme in question was likely to affect trade between the Member States and competition in the principal sectors of activity considered. They complain, in particular, that the Commission failed to take account of the local nature of the markets concerned. The contested decision does not therefore contain a sufficient statement of reasons and infringes Article 87(1) EC. In addition, by taking account only of the local nature of the activities of the municipal undertakings, the Commission infringed the principle of non-discrimination and provided contradictory reasons for the contested decision.

223 The contested decision states in recital 49:

'[C]ompetition and trade between Member States is affected, in that all companies benefit from reductions in social security contributions, including those operating in areas where there is trade between Member States. In particular, according to the information notified by the Italian authorities, some of the recipient companies operate in sectors of intense trading activity, such as the manufacturing and service sectors.'

224 In the light of that succinct statement of reasons, it must be concluded — as the applicants have pointed out — that, on the strength of the data concerning certain sectors transmitted to it by the national authorities, the Commission relied in the present case on a general presumption, inasmuch as the aid scheme under consideration covered all sectors of activity in a given geographical area.

225 It must be ascertained whether such an approach may be regarded as in accordance with Article 87(1) EC and the duty to state reasons.

226 In order to show that the Commission was required to carry out an analysis of the markets concerned, the applicants rely, inter alia, on the judgments in Case 248/84 *Germany* v *Commission* [1987] ECR 4013, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151 ('*Bremer Vulkan*'); *Maribel bis/ter*, cited in paragraph 195 above; *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above; *Italy* v *Commission*, cited in paragraph 104 above; *Alzetta and Others* v *Commission*, cited in paragraph 45 above; and the judgment of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and Wam* v *Commission* [2006] (not published in the ECR) under appeal.

227 It is clear from the case-law that the requirements concerning statements of reasons and the analysis by the Commission of the effect of an aid measure on trade between the Member States and on competition vary, very logically, according to the individual or general nature of the measure.

228 With regard to individual aid, the Community judicature will ascertain whether the statement of reasons for the contested decision is based on specific elements in order to establish that the measure under consideration is likely to affect trade between the Member States and competition, such as the size of the recipient undertaking, its exports and the amount of the aid (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraphs 10 and 11). It requires a specific economic analysis of the market by the Commission (*Bremer Vulkan*, cited in paragraph 226 above, paragraph 53; Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraphs 123 and 124; and *Italy and Wam* v *Commission*, cited in paragraph 226 above, paragraph 73).

229 Nor may the Commission limit itself to an abstract analysis when considering sectoral aid schemes. The Community judicature will also ascertain whether the Commission relied on specific factors, relating, for example, to the characteristics of the aid scheme or the market concerned, in order to assess the effect of the aid (see, for example, *Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 87, and *Italy and Sardegna Lines* v *Commission*, cited in paragraph 52 above, paragraph 69, in which the Court of Justice annulled the decision at issue for lack of a sufficient statement of reasons on the ground that the Commission had failed to take account of the absence of liberalisation in the sector concerned — cabotage with the Mediterranean islands — during the period concerned).

230 On the other hand, with regard to multisectoral aid schemes, it is clear from the case-law that the Commission may merely study the characteristics of the programme at issue in order to assess whether, by reason of the large amounts or high percentage of the aid, the characteristics of the investments being supported or other arrangements provided for under the programme, the latter gave an appreciable advantage to recipients in relation to their competitors and was likely to benefit in particular undertakings engaged in trade between Member States (see, to that effect, *Germany* v *Commission*, cited in paragraph 226 above, paragraph 18; *Maribel bis/ter*, cited in paragraph 195 above, paragraph 48; and *Italy* v *Commission*, cited in paragraph 104 above, paragraphs 89 and 91).

231 It follows that, in the case of an aid scheme applicable, as in the present case, to all undertakings located in a particular territory, the Commission cannot be required to show, on the basis of even a summary examination of the situation in the markets, that the scheme will have a foreseeable effect on trade between the Member States and on competition in all the sectors of activity concerned.

232 In that regard, it should be pointed out that the apportionment of the burden of proof in State aid cases is subject to compliance with the procedural obligations incumbent upon the Commission and the Member State in the course of the exercise by that institution of its powers to cause the Member State to provide it with all the necessary information (*Olympiaki Aeroporia Ypiresies* v *Commission*, cited in paragraph 212 above, paragraph 35).

233 In particular, it is for the Member State concerned, by virtue of its duty to cooperate with the Commission, and for interested parties properly invited to submit their comments pursuant to Article 88(2) EC, to put forward their arguments and provide the Commission with all the information likely to provide clarification concerning all the circumstances of the case (see paragraph 208 above).

234 It is precisely on the basis of the arguments and data submitted to it that the Commission is required — while respecting its procedural obligations (see paragraph 212 above) — to ascertain with diligence and impartiality, in particular, whether the measure under consideration is likely to affect trade between the Member States and competition. The Commission is under no obligation to consider of its own motion and on the basis of prediction what elements of fact or of law might have been submitted to it during the administrative procedure (see, to that effect, *Commission* v *Sytraval and Brink's France*, cited in paragraph 210 above, paragraph 60, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 49).

235 Consequently, in the case of a multisectoral aid scheme, the Commission is merely required to ascertain, on the basis of specific factors, whether, in given sectors, the measure under consideration fulfils the two conditions, mentioned above, for the application of Article 87(1) EC, where sufficient relevant information for that purpose has been communicated to it during the administrative procedure. In the absence of sufficient information, the Commission may, in accordance with the case-law, rely on a presumption based on the analysis of the characteristics of the aid scheme under consideration (see paragraph 230 above).

236 Moreover, according to settled case-law, the question whether the statement of the grounds for a decision meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question. While the Commission, in the statement of reasons for a decision, is not required to discuss all the issues of fact and law raised by interested parties during

the administrative procedure, it must none the less take account of all the circumstances and all the relevant factors of the case so as to enable the Community judicature to review its lawfulness and make clear both to the Member States and to the persons concerned the circumstances in which the Commission has applied the Treaty (see, to that effect, Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 94 and the case-law cited).

237 It follows that the scope of the Commission's duty to state reasons in the case of a multisectoral aid scheme depends — particularly as regards the effect of the scheme on trade between the Member States and on competition — on the data and information communicated to the Commission within the framework of the administrative procedure.

238 Finally, the lawfulness of the Commission's decision must be assessed solely on the basis of the information available to it at the time when the decision was adopted and not on the basis of factual arguments which were unknown to the Commission and which were not notified to it during the administrative procedure (*Olympiaki Aeroporia Ypiresies* v *Commission*, cited in paragraph 212 above, paragraphs 72 and 73).

239 In the present case, therefore, the question whether the Commission has established to the requisite legal standard that the social security exemptions at issue were likely to affect trade between the Member States and competition and whether the contested decision contains a sufficient statement of reasons on that point are matters which must be assessed in the light of the available data which had been communicated to the Commission by the Italian authorities, the Committee and the City of Venice during the administrative procedure and which were produced by the Commission at the Court's request.

240 In the present case, as the applicants pointed out at the hearing, the Italian authorities argued in their letter of 23 January 1999 that undertakings in the building industry, commerce, the hotel sector and performing services of general economic interest were unlikely to engage in such trade. That claim is not supported by any argument of law or fact. In particular, the INPS tables annexed to that letter and referred to in the contested decision (recital 6) merely contain information regarding the implementation of the measure at issue, broken down by sector of activity and by year, concerning the number and size of the recipient undertakings and the number of workers concerned. Moreover, they do not contain any information which makes it possible to establish the strictly local nature of the markets, in particular, in the sectors referred to by the Italian authorities in the abovementioned letter.

241 The local nature of the sectors of activity in which the applicant undertakings operate is also not clear from the Committee's observations of 17 March 1998 or the COSES studies, especially the study dated March 1998, which contained an analysis of the competitive situation, in particular, in the commercial sectors connected to tourism, the hotel industry, the catering industry, services and traditional handicrafts, such as the Murano glass industry. In fact, only competition with operators located on the mainland was considered in that study with regard to all the sectors studied. On the other hand, the effect of the measure in question on trade between the Member States and the competitive position of the beneficiaries as compared with operators located in other Member States or other parts of Italy was not raised. Moreover, the maintenance and cleaning services sector, in which Coopservice operates, and the distribution of gas, where Veneziana Gas operated, were not analysed. In the case of services, in particular, the abovementioned study refers to the 'tertiary sector' only in a general way (point 1.4).

242 It follows that the observations and documents communicated to the Commission during the administrative procedure contained no specific fact or datum of such a nature as to draw the Commission's attention to the special situation of certain sectors and permit it in particular to establish that, in those sectors, the social security exemptions at issue were not likely to affect trade between the Member States or competition.

243 Accordingly, it is not for the Commission, which completely fulfilled its procedural obligations (see paragraph 214 above), to obtain additional information from the national authorities in order to ascertain whether the conditions for the application of Article 87(1) EC relating to the affecting of trade between the Member States and of competition have been satisfied in the various sectors of activity concerned and, in particular, in the hotel industry, gas distribution and maintenance and cleaning services, in which the applicant undertakings operate.

244 In that regard, contrary to the applicant undertakings' argument at the hearing, their situation and that of the other beneficiaries of the aid scheme under consideration differs from the situation of the municipal undertakings, which had been identified and with regard to which precise information was supplied to the Commission during the administrative procedure (see paragraph 202 above). The pleas alleging infringement of the principle of non-discrimination and the contradictory nature of the statement of reasons must therefore be rejected.

245 In addition, inasmuch as it is clear from the documents sent to the Commission that the latter did not have any specific information concerning the special nature of their sectors of activity, the applicants are not entitled to rely on that special nature in order to show that they operate on a strictly local market or — with regard to Italgas — that the gas distribution sector was not open to competition during the period under consideration.

246 Moreover, the applicants' arguments concerning the small amount of the aid under consideration and the fact that most of the beneficiary undertakings exercised their activities at an exclusively local level cannot be accepted.

247 The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. In particular, a relatively small amount of aid may affect such trade where there is strong competition in the sector in which the beneficiary undertakings operate. Thus, where a sector has a large number of small companies, aid potentially available to all or a very large number of undertakings in that sector can, even if individual amounts are small, have an effect on trade between Member States (see *Xunta de Galicia*, cited in paragraph 107 above, paragraphs 41 to 43 and the case-law cited). In addition, in the present case, the Commission expressly excluded, in the contested decision, measures complying with the *de minimis* rule from the scope of Article 87(1) EC (see paragraph 103 above).

248 Even supposing that most of the beneficiary undertakings exercised their activities solely at local level — which has not been established — that fact would not, in any event, be relevant. According to settled case-law, aid may be of such a nature as to affect trade between the Member States and distort competition even if the beneficiary undertakings which are in competition with producers in other Member States exercise their activities exclusively at local level. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State (see, to that effect, *Italy* v *Commission*, cited in paragraph 104 above, paragraph 84; *Xunta de Galicia*, cited in paragraph 107 above, paragraph 40; *Italy* v *Commission*, cited in paragraph 209 above, paragraph 117; and *Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 91).

249 For all of those reasons, having regard, first, to the characteristics of the aid scheme under consideration, which provides for exemptions from social security contributions for all undertakings located in Venice or Chioggia and, secondly, to the facts and data communicated to the Commission during the administrative procedure, that institution did not misapply Article 87(1) EC by presuming that such a scheme was of benefit to undertakings operating in sectors of intense trading activity, such as the

manufacturing and services sectors, without referring, even summarily, to precise markets and without relying on the specific characteristics of some of those markets.

250 In addition, the Commission, in stating the reasons for the contested decision in that way (see paragraph 223 above), indicated in a succinct but clear fashion the reasons why the social security exemptions at issue were likely to affect trade between the Member States and competition.

251 Contrary to the applicants' argument, that statement of reasons was sufficient to permit the Italian authorities to determine, when implementing that decision, which undertakings were required to repay the aid received. As has already been held (see paragraphs 100 to 111 above), it was not for those authorities, when implementing the contested decision, to ascertain in each individual case whether the conditions for the application of Article 87(1) EC were satisfied.

252 It follows that the contested decision is sufficient in itself and neither needs to be nor has been supplemented by an additional statement of reasons. In that regard, the Commission's replies of 29 August and 29 October 2001 — referred to by the applicants — to requests addressed to it by the national authorities for explanations concerning the detailed arrangements for the implementation of the decision merely came within the framework of the duty of the Commission and the national authorities to cooperate with each other in good faith.

253 On all of those grounds, the pleas in law alleging infringement of Article 87(1) EC and the lack of an adequate statement of reasons must be rejected as unfounded.

2. *The alleged infringement of Article 87(3)(c) EC and the alleged lack of an adequate statement of reasons*

(a) Arguments of the parties

The applicants' arguments

— Case T-254/00

254 The applicant — Hotel Cipriani — points out that Article 87(3)(c) EC must be interpreted in accordance with the objectives of economic and social cohesion laid down in Article 2 EC and implemented in particular by Article 158 EC et seq. The realisation of a single market and the protection of competition do not constitute an end in themselves but are intended to realise the essential objectives of the Treaty. Regional aid constitutes an essential instrument in the pursuit of those objectives, which is not the 'prerogative' of the Structural Funds. It is for the Commission, in the framework of its discretion, to apply the provisions concerning regional aid in a flexible manner, adopting different approaches in certain cases in order to take account of the objectively special nature of the situations under consideration, so as to ensure the useful effect of those provisions and the realisation of their purposes.

255 In the present case, the conditions for a derogation under Article 87(3)(c) EC are satisfied. In particular, the contested decision is vitiated by a manifest error of assessment and lacks an adequate statement of reasons inasmuch as it excludes the entire territory of Venice from the benefit of that derogation.

256 First, the applicant argues that the measures at issue, which are intended to preserve the socioeconomic fabric of the city of Venice, are in full accord with the objectives of the Community regional aid scheme. Part of the territory of Venice, in particular, the islands in the lagoon — one of which is the island of Giudecca, on which the Hotel Cipriani is located — is specified as one of the areas of Italy which are entitled to benefit from assistance under Objective 2 of the Structural Funds and is on the map of the areas of Italy entitled to the derogation provided for in Article 87(3)(c) EC.

257 In addition, the entire territory of Venice falls within the scope of the Community Guidelines on State aid for undertakings in deprived urban areas (see paragraph 127 above), because it is covered by the Community initiative for urban areas, known as 'the Urban initiative' (point 7 of the guidelines). Moreover, it fulfils the other alternative criteria for eligibility. Contrary to the Commission's contention (recital 72 of the contested decision), the guidelines were conceived of as an instrument intended to supplement the other Community schemes for the protection of economic and social cohesion, which the Commission admitted were partial and inappropriate in nature (point 1 of the guidelines). They also met the need to take account of other socioeconomic indicators, specific to intra-urban realities (point 7 of the guidelines). In the present case, the application, in the case of Venice, of special criteria such as those laid down in the abovementioned guidelines is objectively justified by the additional costs connected with the island status of Venice and the danger of making the city a 'museum city' with no authentic economic and social fabric. Moreover, in its notice of 22 May 2002 on the expiry of the abovementioned Community guidelines, the Commission pointed out that State aid for deprived urban areas may be found compatible 'as the case may be and depending on the specific circumstances of the proposed aid in question, directly on the basis of Article 87(3)(c) EC'.

258 Consequently, because of Venice's island status, its situation is absolutely special, which justifies a more flexible approach on the part of the Commission with regard to the application of Article 87(3)(c) EC, which the European Parliament expressly asked it to adopt in its resolution of 16 April 1999 on the crisis in Venice (OJ 1999 C 219, p. 511).

259 Secondly, the applicant claims that the measures at issue offset only a small part of the additional costs, whose existence the Commission does not deny in the contested decision (recital 78). They are therefore proportionate to the objective of regional development being pursued and, accordingly, do not alter trading conditions to an extent contrary to the common interest. That applies, a fortiori, to the hotel and catering sector.

— Case T-270/00

260 The applicant — Italgas — points out that, in order to avoid treating similar situations in a discriminatory manner, the Commission is required to apply Article 87(3)(c) EC in accordance with objective criteria, which it generally lays down itself in its interpretative communications, which give Commission practice the continuity and predictability required by the principle of legal certainty. However, those communications do not make it possible to draw up an exhaustive list of the assistance likely to be eligible for the regional derogation provided for in that provision. They thus do not dispense the Commission from ascertaining whether other assistance, intended to remedy specific local problems, deserves to be authorised under that provision. The Court has held in that regard that measures not covered by Community Guidelines on the application of Article 87(3)(c) EC may none the less be granted benefit of the derogation provided for in that provision if trading conditions are not affected to an extent contrary to the common interest (Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 72).

261 That interpretation is also clear from the Community Guidelines on State aid for undertakings in deprived urban areas, mentioned above, in which the Commission accepted that certain specific local circumstances — albeit not fulfilling the structural criteria laid down in the 1998 Guidelines on regional aid (OJ 1998 C 74, p. 9; 'the 1998 Guidelines') — none the less justify the authorisation of State aid pursuant to Article 87(3)(c) EC. In those guidelines (points I and III), the Commission stressed the

inadequacy of the first-mentioned guidelines for dealing with difficulties related to the additional costs incurred by undertakings in deprived urban areas.

262 In the present case, the Commission failed to take account of the same criteria of assessment and thereby accept the existence of a specific, exceptional situation in Venice, which, although not envisaged by the abovementioned Guidelines on State aid for undertakings in deprived urban areas, justified the authorisation of State assistance pursuant to Article 87(3)(c) EC. However, the Italian authorities and the City of Venice referred, during the administrative procedure, to the possibility of such an authorisation, in view of the unique situation of the lagoon area, for which they had sought an ad hoc solution independently of the data provided by the usual structural indicators and of the regional aid rules, of which they had sought neither the application nor the amendment.

263 None the less, in the contested decision (recital 74), the Commission merely referred to the fact that the situation in Venice had not 'changed' in such a way as to justify the derogation sought, without, however, stating the reasons why it considered that the factors put forward by the Italian authorities were not sufficient to justify such a derogation.

264 In addition, the applicant points out that the aid at issue was granted before the reform introduced by the 1998 Guidelines. In that context, the Commission did not indicate the grounds of law and fact on which its decision to refuse the derogation sought was

based. It did not explain why the criteria laid down in the guidelines then in force prevented the special situation of Venice being taken into account under Article 87(3)(c) EC.

265 As it is, according to the case-law, the Commission is required to take account of all relevant circumstances for the purposes of assessing the compatibility of aid with the common market pursuant to Article 87(3)(c) EC (*Philip Morris Holland* v *Commission*, cited in paragraph 228 above, paragraph 17; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 56; and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 48). Its decision must contain a statement of reasons which the persons to which it is addressed can understand (Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 21).

266 In the present case, the contested decision is therefore vitiated by a serious defect in the statement of reasons inasmuch as the observations of the Italian Government and the interested third parties were not taken into account. That defect in the statement of reasons is all the more manifest in the light of Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam, which states that Community legislation must take account of the handicaps connected with island status and that 'specific measures' may be taken in favour of these regions. However, in the contested decision (footnote 30 to recital 78), the Commission merely stated that the alleged structural burdens referred to were not linked to the island status of the lagoon territories and therefore did not constitute structural handicaps as referred to in Declaration No 30.

267 Moreover, the applicant points out that the social security exemptions at issue constitute aid for job creation, extending to Venice and Chioggia the principles underlying employment policy in the Mezzogiorno. The fact that Venice does not meet the criteria laid down in point 22 of the 1995 Guidelines on aid to employment does not preclude a regional derogation under Article 87(3)(c) EC. The Commission remains free to let its practice evolve, subject to compliance with the abovementioned criteria in

the cases expressly envisaged by the guidelines which set out those criteria. In particular, it could apply, by analogy with other cases, the principles underlying the guidelines, independently of the adoption of a communication intended to regulate, specifically, the particular case.

268 Finally, the contested decision is in any event vitiated by an error of law inasmuch as the second paragraph of Article 1 thereof provides that aid provided for under Article 2 of the Ministerial Decree of 5 August 1994 is incompatible with the common market where it is granted to firms which are not SMEs and are located outside areas eligible for derogation under Article 87(3)(c) EC. Since the purpose of the aid is the creation of new jobs, it should, pursuant to point 20 of the Guidelines on aid to employment, be regarded as coming within the derogation provided for in Article 87(3)(c) EC, if the aid is intended to 'facilitate the development of certain activities'. In that context, the aid for the creation of new jobs must be declared compatible with the common market even if it is granted to undertakings located outside areas entitled to the benefit of the regional derogation referred to in the abovementioned provision.

269 The Italian Republic, intervening in support of the forms of order sought by Italgas, points out that the Commission itself admitted in its defence (point 191) that the instrument for the regional derogation provided for in Article 87(3)(c) EC could satisfy, in an appropriate way, requirements such as those submitted by Italgas with regard to Venice, without it being necessary to create ad hoc rules. That position was contended for by the Italian authorities during the administrative procedure. The Commission, however, without disputing the Italian authorities' arguments concerning the irreversible degradation of the economic fabric in the lagoon area, did not take account of their request for a derogation under Article 87(3)(c) EC for that part of Venice located on islands in the lagoon. The contested decision (recital 74) is thus vitiated by failure to state adequate reasons. In addition, the Commission's fear of provoking a large number of similar applications for derogations is unfounded, in view, in particular, of the special nature of the island and lagoon area of Venice.

— Case T-277/00

270 The applicants — Coopservice and the Committee — claim that the contested decision is vitiated by error and by failure to state adequate reasons, inasmuch as the Commission does not — when considering whether the scheme in question is eligible for a regional derogation under Article 87(3)(c) EC — take account of the island nature of Venice and Chioggia, which justifies the grant of the measures at issue. In particular, the Commission disregarded, erroneously and without justification, Declaration No 30 of the Treaty of Amsterdam. However, it is clear from that declaration that island status justifies authorisation of aid by virtue of a presumption concerning the structural handicaps which affect island areas purely by virtue of their island status.

The Commission's arguments

271 The Commission contends that, since Article 87(3)(c) EC creates an exception, it must be narrowly construed. The exceptional nature of the regional derogations is clear from the 1998 Guidelines (point 1, fourth paragraph) which replaced the Commission Communication of 12 August 1988 on the method for the application of Article [87](3)(a) and (c) [EC] to regional aid (OJ 1988 C 212, p. 2; 'the Communication of 12 August 1988'). The Commission is bound by the rules laid down in those guidelines.

272 The Commission points out in that regard that the areas in each Member State which are entitled to the regional derogation appear on the regional aid map approved by the Commission on the basis of common criteria and of a project notified by the Member State in accordance with the procedure laid down in the 1998 Guidelines (in particular, point 3.10).

273 In the present case, the aid scheme under consideration is also intended for undertakings located in areas which are not eligible for the derogation provided for in Article 87(3)(c) EC. As the Commission pointed out in the contested decision (recital 68), that fact was sufficient to justify refusal of a regional derogation for that scheme. When it is examining an aid scheme, the Commission is not required to analyse the individual situation of each recipient undertaking. Consequently, contrary to the argument of Hotel Cipriani, the contested decision is not vitiated by failure to state adequate reasons in that the Commission did not take account of the fact that the applicant is located in an area entitled to the regional derogation.

274 In addition, for the same reasons, the Commission was entitled to refuse the request of the Italian authorities for authorisation of the aid scheme under Article 87(3)(c) EC by reason of the special local situation of Venice, marked by the need to avert population decline in the city and the erosion of its industrial base, and to prevent it from becoming a museum city, and by the purportedly compensatory nature of the measures under consideration (recital 67 of the contested decision).

275 Moreover, the Commission denies that Venice comes within the scope of the Guidelines on State aid for undertakings in deprived urban areas.

276 In addition, it points out that ad hoc rules for Venice are not necessary in any event in order to deal with the needs referred to by Italgas. In the present case, it was the Italian Republic that decided not to include the entire territory of Venice in its proposal concerning the list of areas to be eligible for regional derogations under Article 87(3)(c) EC.

277 Furthermore, the Commission points out that it set out in the contested decision (recitals 73 and 74) the reasons why it did not intend to amend the method for the application of that provision — as it did when Sweden and Finland joined the Community — in order to adapt it to the case of Venice.

278 Finally, the Commission disputes the argument of Italgas that the aid scheme under consideration provides for job creation measures similar to those adopted in the rules concerning the Mezzogiorno, which were extended to Venice and Chioggia.

279 The argument concerning the compliance of the measures under consideration with the principle of proportionality, put forward by Hotel Cipriani, refers to an individual situation and a given sector of activity, which do not undergo examination by the Commission when it is assessing an aid scheme.

(b) Findings of the Court

280 It should be pointed out at the outset that, in the contested decision (recitals 60 to 63 and the first paragraph of Article 1), the Commission, on the basis of points 20, 21 and 23 of the Guidelines on aid to employment, which refer solely to employment aid which is not linked to investment (see point 10 of the guidelines), declared compatible with the common market under Article 87(3)(c) EC the social security exemptions at issue, designed to promote job creation, where such exemptions are granted to undertakings which are either SMEs or undertakings located in an area eligible for a derogation under

Article 87(3)(c) EC, or undertakings which have taken on certain groups of workers experiencing particular difficulties entering or re-entering the labour market.

281 On the other hand, the Commission considered — in the second paragraph of Article 1 and in Article 2 of the contested decision — that those of the social security exemptions at issue, designed to promote job creation, which fail to meet one of the three alternative conditions mentioned above, as well as the social security reductions at issue, which are intended to maintain jobs (recitals 64 and 65 of the contested decision), do not satisfy the conditions set out in the abovementioned Guidelines on aid to employment (point 22) for authorisation under Article 87(3)(c) EC as sectoral aid to facilitate the development of certain activities without adversely affecting trading conditions to an extent contrary to the common interest.

282 In recitals 67 to 78 of the contested decision, the Commission ascertained whether the exemptions referred to in the preceding paragraph — albeit ineligible for a sectoral derogation under Article 87(3)(c) EC as aid to employment — could be eligible for a regional derogation under Article 87(3)(a) or (c) EC as regional aid. It relied expressly in that regard on the Communication of 12 August 1988, which was applicable during the period under consideration between 1995 and 1 December 1997, from which date the aid scheme under consideration was suspended (recital 69 of the contested decision).

283 That method was later replaced, before the adoption of the contested decision, on 25 November 1999, by the 1998 Guidelines, which were adopted on 16 December 1997 as 'appropriate measures' as referred to in Article 88(1) EC (Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603, paragraph 30), and published in the *Official Journal of the European Communities* on 10 March 1998.

284 It must therefore be ascertained whether the 1998 Guidelines were applicable in the present case. It should be noted in that regard that the 1998 Guidelines (point 6.1) state that the Commission is to assess the compatibility of regional aid with the common market on the basis of those guidelines as soon as they are applicable. They provide, however, that aid proposals which were notified before the guidelines were communicated to the Member States were to be assessed on the basis of the criteria in force at the time of notification. However, in the present case, the aid scheme under consideration had been implemented unlawfully since 1995. In addition, the provisions of Law No 30/1997 extending the Mezzogiorno scheme for 1997 and widening it to cover undertakings established in Venice and Chioggia were communicated to the Commission by letter of 10 June 1997 pursuant to Decision 95/455 authorising, subject to certain conditions, the social security relief scheme for the Mezzogiorno, and not in the form of a formal notification of an aid project for the benefit of undertakings in Venice and Chioggia pursuant to Article 88(3) EC inasmuch as the aid scheme under consideration had already been implemented. Such a communication cannot therefore be regarded as notification permitting the application of the criteria in force at the time of notification pursuant to point 6.1 of the 1998 Guidelines. None the less, by virtue of the transitional provisions provided for in points 6.2 and 6.3 of the 1998 Guidelines, the Commission may, under certain conditions, derogate from the provisions of the guidelines with regard to the examination of the eligibility of the lists of assisted regions and continue to rely on the method laid down in the Communication of 12 August 1988. The Commission may also derogate, under certain conditions, from the provisions of the 1998 Guidelines with regard to the examination of the compatibility of the aid intensities and the ceilings on combination.

285 It follows that the Commission was entitled to rely in the contested decision on the map of the areas eligible for a regional derogation and on the aid intensities and ceilings on combination, established in accordance with the method for the application of Article 87(3)(a) and (c) EC laid down in the Communication of 12 August 1988. The 1998 Guidelines were applicable to the other elements.

286 Moreover, as the Court pointed out in *HAMSA* v *Commission*, cited in paragraph 265 above, paragraphs 201 and 202, it is clear from the Communication of 12 August 1988

(point 6, first paragraph), and is confirmed and made more precise in the 1998 Guidelines (points 1, 4.1 and 4.11), that the object of regional aid likely to be eligible for a derogation as provided for in Article 87(3)(a) and (c) EC is to secure either productive investment or job creation which is linked to investment. On the other hand, operating aid may be authorised only exceptionally under Article 87(3)(a) or (c) EC (point 6, second paragraph, of the Communication of 12 August 1988 and points 4.15 to 4.17 of the 1998 Guidelines). Even if it must be considered that the provisions concerning aid for job creation linked to investment and those relating to operating aid contained in the 1998 Guidelines are not applicable *ratione temporis* — which is not contradicted by point 6.1, which states that, except for the transitional provisions set out in points 6.2 and 6.3, the guidelines are applicable as soon as they have been adopted — the fact remains that the importance of a connection to investment and the exceptional nature of operating aid are clear from the Communication of 12 August 1988. Moreover, such an interpretation of that communication is essential inasmuch as it is fully in accordance with the objective underlying the regional derogations provided for in Article 87(3)(c) EC, which is to facilitate the development of certain economic areas, without adversely affecting trading conditions to an extent contrary to the common interest.

287 In the contested decision (recitals 68 and 69), the Commission is therefore right to point out that the criteria for determining the eligibility of an area for a regional derogation under Article 87(3)(c) EC, the type of aid that could be granted and the intensity of such aid were laid down in the Communication of 12 August 1988. In that context, the Commission considered that the measures in question were not eligible for such a derogation on two grounds. It pointed out, first of all, that only part of the territory of the city of Venice was included in the list of Italian regions eligible for the regional derogation provided for in Article 87(3)(c) EC. Secondly, it pointed out that, in accordance with the Communication of 12 August 1988, regional aid is intended to support productive investment or job creation linked to such investment. Since the social security exemptions at issue for job creation constituted operating aid, they could be granted, pursuant to points 4.15 to 4.17 of the 1998 Guidelines, only under very strict conditions to undertakings operating in areas eligible for the derogation provided for in Article 87(3)(a) EC, which was not the case of Venice and Chioggia. The Commission therefore considered that they could not be regarded as regional measures (recitals 68 to 70 of the contested decision). Finally, as far as the purported regional development objective of the aid is concerned, the Commission noted that, given the characteristics

of the aid scheme under consideration, the measures were not related to the structural difficulties referred to (recital 78).

288 In the contested decision (recitals 71 to 77), the Commission then rejected the arguments put forward by the Italian authorities, the Committee and the City of Venice in support of the application of more flexible criteria than those set out in the Communication of 12 August 1988. In particular, it denied that it had applied rules which were an exception to the criteria set out in that communication, in particular, in the Guidelines on State aid for undertakings in deprived urban areas, dated 14 May 1997, in its Communication of 20 December 1994 concerning an amendment of the method for the application of Article [87](3)(c) [EC] to regional aid as the Nordic countries were about to join the Community (OJ 1994 C 364, p. 8), and in Decision 95/455 (see paragraph 2 above).

289 Concurring with the argument put forward before the Commission during the administrative procedure, the applicants and the Italian Republic — which is intervening in support of Italgas — argue that the contested decision infringes Article 87(3)(c) EC and does not contain a sufficient statement of reasons inasmuch as the Commission did not take due account of the special difficulties connected, in particular, with the island status of Venice for the purposes of granting a regional derogation in respect of the social security exemptions at issue which were declared incompatible with the common market in the contested decision.

290 It should be borne in mind that, according to case-law, the Commission has a wide discretion when applying Article 87(3)(c) EC, the exercise of which involves complex economic and social assessments which must be made in a Community context. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and

ascertaining that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 93, and Case T-137/02 *Pollmeier Malchow* v *Commission* [2004] ECR II-3541, paragraph 52).

291 Moreover, it is clear from the very wording of Article 87(3)(c) EC and Article 88 EC that the Commission 'may' consider aid covered by the first of those two provisions to be compatible with the common market. Accordingly, whilst the Commission must always determine whether State aid subject to review by it is compatible with the common market, even if that aid has not been notified to it, it is not bound to declare such aid compatible with the common market (*Spain* v *Commission*, cited in paragraph 290 above, paragraph 94, and *Pollmeier Malchow* v *Commission*, cited in paragraph 290 above, paragraph 53).

292 The Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as frameworks, communications or guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty. Where the Commission adopts such measures which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it itself limits that discretion in that it must comply with the indicative rules which it has imposed upon itself. In that context, it is for the Court to verify whether those rules have been observed by the Commission (see Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177, paragraph 79 and the case-law cited; see also *Spain* v *Commission*, cited in paragraph 290 above, paragraph 95, and *Pollmeier Malchow* v *Commission*, cited in paragraph 290 above, paragraph 54.

293 In the context of its discretion in the application of Article 87(3) EC, the Commission retains the power to repeal or amend its frameworks, communications or guidelines if

the circumstances so require. In addition, those measures concern a defined sector and are based on the desire to follow a policy which the Commission has established (Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 89).

294 In particular, it is clear from the case-law that the Commission cannot be regarded as having deprived itself of the power to recognise aid as compatible with the common market directly on the basis of Article 87(3) EC if it has not explicitly adopted a position on the question at issue in the relevant communication, guidelines or framework. That is particularly the case where the framework does not expressly prohibit, or is not intended to prohibit, the type of aid granted in the case (see, to that effect, the judgment of 20 September 2007 in Case T-375/03 *Fachvereinigung Mineralfaserindustrie* v *Commission* [2007] (not published in the ECR), paragraphs 143 and 144).

295 It is also clear from the case-law that such frameworks, communications or guidelines cannot be understood on the basis of their wording alone. They must be interpreted in the light of Article 87 EC and the objective sought by that provision, namely undistorted competition in the common market. In *Kronofrance* v *Commission*, cited in paragraph 292 above, paragraph 89, the Court pointed out that the multisectoral framework of regional aid for major investment projects may be understood in the way contended for by the Commission, namely, that for the purposes of assessing the competition factor, examination of the declining market criterion is allowed only as a subsidiary exercise, if the data relating to the capacity utilisation rate for the sector in question are insufficient. However, the Court considered that that framework must be understood as meaning that, where the data on capacity utilisation in the sector concerned do not lead to the conclusion that there is structural overcapacity, the Commission must consider whether the market in question is a declining market, because that interpretation is the only one consistent with the objective of undistorted competition.

296 Similarly, the Court held in *Pollmeier Malchow* v *Commission*, cited in paragraph 290 above, that the provisions of the Commission recommendation of 3 April 1996 concerning the definition of SMEs is to be interpreted in the light of the purpose of the criterion of economic independence. Although those provisions laid down, essentially,

that undertakings which are 25% or more owned by one or more other undertakings which do not correspond to the definition of SMEs were to be regarded as independent, the Court considered that the provisions in question had not altered the Commission's discretion in determining whether companies which are members of a group are to be regarded as an economic unit for the purposes of applying the rules on State aid (see, in particular, paragraphs 58 to 63 of the judgment).

297 Moreover, it should be borne in mind that, under Article 253 EC, the Commission must give reasons for its decisions, including decisions refusing to declare aid compatible with the common market under Article 87(3)(c) EC. However, the statement of reasons required by Article 253 EC must explain clearly and unambiguously the reasoning followed by the Community authority which has adopted the contested act, so as to enable interested parties to take cognisance of the justifications for the measure for the purposes of defending their rights and to enable the courts to exercise their powers of review (*Spain* v *Commission*, cited in paragraph 290 above, paragraphs 95 and 98).

298 In the present case, it must therefore be ascertained whether the statement of reasons in the contested decision (see paragraphs 287 and 288 above) may be regarded as sufficient and whether, in the light of the arguments of the parties, the Commission has exceeded the limits of its discretion with regard to communications, guidelines and frameworks, having regard to the case-law that has just been set out.

299 With regard, first of all, to Hotel Cipriani's argument that the provisions concerning national regional aid must be interpreted in a flexible manner in the light of the objectives of economic and social cohesion, the Commission rightly points out that the setting-up of a system ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC and Articles 81 EC to 89 EC) and the strengthening of economic and social cohesion (Article 3(1)(k) EC and Articles 158 EC to 162 EC) constitute two distinct and autonomous Community policies. The Structural Funds constitute the

principal instrument of the second of those policies, whereas the regional derogations provided for in Article 87(3)(a) and (c) EC come under Community competition policy and are limited to the need to avoid any undue distortion which would be contrary to the common interest. The complementarity of those two policies with regard to regional aid, which was already clear from the Communication of 12 August 1988 (fourth paragraph in the preamble), does not, however, imply a hierarchy between the objectives pursued by the two policies. The fact, pointed out in recital 3 to the block exemption regulation — Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 [EC] and 88 [EC] to national regional investment aid (OJ 2006 L 302, p. 29) — and referred to by Hotel Cipriani, that regional State aid promotes the economic, social and territorial cohesion of Member States and the Community as a whole cannot therefore have any bearing on the interpretation of the rules governing regional State aid. In particular, the Commission is not required, in the exercise of its discretion, to apply those rules in a more flexible way so as to favour the objectives of the policy of economic and social cohesion over those of competition policy. Moreover, in practice, the 1998 Guidelines contain a specific provision (point 3.10.5) intended to promote the consistency of national regional aid with the Structural Funds while ensuring compliance with certain conditions set out in those guidelines.

300 Next, the Court must consider the applicants' arguments concerning frameworks, communications and guidelines, put forward to show that the Commission was required in the present case to declare the social security exemptions at issue compatible with the common market under Article 87(3)(c) EC.

301 First of all, as the Commission points out in the contested decision (recital 72), the Guidelines on State aid for undertakings in deprived urban areas do not concern the grant of regional derogations but the grant of sectoral derogations under Article 87(3)(c) EC. Although it is true that, as regards the degree of difficulty which justifies a derogation under Article 87(3)(c) EC, point 13 of those guidelines states that, from the

point of view of both their socioeconomic situation and the handicaps and additional costs which have to be borne by enterprises situated within them, deprived urban areas pose problems of a degree comparable to those of regions assisted under the abovementioned provision, it is nevertheless pointed out in point 10 that the problems encountered by firms in such deprived urban areas are problems of an essentially local nature which do not justify regional aid of the kind available to large undertakings. In addition, according to point 5, the fact that the rules governing regional aid are inappropriate is a result, in particular, of the eligibility criteria for the areas which may be accepted and the impossibility of granting regional aid to undertakings outside the scope of an investment project.

302 Moreover, one of the alternative criteria — laid down in point 7 of the abovementioned guidelines — for the eligibility of areas for State aid for undertakings in deprived urban areas is that the areas have been selected under the Urban initiative, set up under the Structural Funds pursuant to Article 11 of Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 24) and Article 3(2) of Council Regulation (EEC) No 2083/93 of 20 July 1993 amending Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund (OJ 1993 L 193, p. 34). Point 14 of the Note to the Member States laying down guidelines for operational programmes which the Member States are invited to establish in the framework of [the Urban initiative] (OJ 1994 C 180, p. 6) provides that Community assistance in the form of loans or grants in aid may be made available within the framework of the Urban initiative, in favour of integrated development programmes for a geographically defined and limited part of an urban area in difficulty. In that regard, it is clear from the Community Guidelines on State aid for undertakings in deprived urban areas (point 2.1) that it refers, in particular, to State aid intended to complement the efforts of the Structural Funds.

303 It should be pointed out that, according to point 4 of those guidelines, the economic handicaps which cause undertakings to shun deprived areas may be explained in practice by the 'additional direct or indirect costs involved in setting up in such areas (theft, level of insurance premiums, vandalism, etc.) and the structural handicaps that are a feature of such areas (difficulty in finding skilled labour that is prepared to work, overall reduction in economic activity, lack and decay of public infrastructure, insecurity, financial problems faced by local authorities, problem of "public image", etc.)'. Those guidelines refer only to aid to small undertakings carrying on a local activity (point 11) and mention the eligible activities in Annex 1 thereto, which include hotel and catering activities. Among the 'activities not involved' mentioned in the annex is the supply of gas.

304 On the other hand, it should be pointed out that, in the present case, the aid under consideration has been granted to all undertakings located in Venice and Chioggia. It provides for no limitation of its scope *ratione materiae*.

305 In addition, although Hotel Cipriani claims that the territory of Venice, particularly under the Urban initiative (see paragraph 299 above), falls within the scope of the abovementioned guidelines, it cannot legitimately be argued — and none of the applicants claim the contrary — that the specific criteria laid down in the guidelines have been satisfied by the aid scheme under consideration. Those guidelines are thus totally irrelevant in the present case. The Commission rightly contends in that regard that the abovementioned guidelines are not an example of assistance which derogates from the criteria for the application of Article 87(3)(c) EC, justified by unique and exceptional conditions. On the contrary, they lay down general criteria applicable to all deprived urban areas for the purposes of granting a sectoral derogation. Under those circumstances, and contrary to the applicants' position, the fact that the Commission took account, in those guidelines, of the specific economic difficulties in deprived urban areas does not mean that, as claimed by the applicants, it should have taken account, for the purposes of granting a derogation under Article 87(3)(c) EC, of the specific problems in Venice, which are unrelated to the difficulties of deprived urban areas.

306 Secondly, there is no basis for the complaint put forward by the applicants and the Italian Republic that the Commission did not take account of the specific nature of the structural problems linked to island status — referred to by the Italian authorities and the interested parties during the administrative procedure — in order to grant a regional derogation under Article 87(3)(c) EC, on the ground that the aid scheme under consideration was in harmony with the regional development objectives being pursued by the regional scheme and is proportionate.

307 Admittedly, it follows from the case-law (see paragraphs 294 to 296 above) that — as the applicants and the Italian Republic claim — the Commission is entitled, in the exercise of its discretion, to take account of specific situations under Article 87(3)(c) EC without it being necessary to amend for that purpose the rules governing regional aid flowing from the applicable communications and guidelines or to lay down ad hoc rules. In such a case, it is for the Commission to weigh the beneficial effects of aid against its adverse effects on trading conditions and the maintenance of undistorted competition (*Philip Morris Holland* v *Commission*, cited in paragraph 228 above, paragraphs 24 and 26, and *Alzetta and Others* v *Commission*, cited in paragraph 45 above, paragraph 129).

308 However, in the present case, the arguments put forward by the applicants and the Italian Republic do not enable it to be established that the Commission exceeded the limits of its discretion by ruling, in recitals 68 and 69 of the contested decision (see paragraph 287 above), on the assessment criteria laid down in the Communication of 12 August 1988 and the 1998 Guidelines.

309 In particular, the applicants have not shown that the Commission committed a manifest error of assessment in considering that Venice's situation did not contain any new factors and by relying, therefore, on the fact that the aid under consideration was not

connected with an investment in order to refuse to authorise it as a regional derogation (see paragraph 288 above). In addition, the applicants and the Italian Republic do not deny that only certain parts of Venice's territory were included in the list of regions eligible for the regional derogation provided for in Article 87(3)(c) EC. On the latter point, however, it should be noted that, contrary to the Commission's contentions, that fact does not in itself exclude the entire territory of Venice from the benefit of a regional derogation. However, in the areas that are eligible, the fact that the aid under consideration constitutes operating aid is sufficient justification for the Commission's refusal to authorise it as regional aid.

310 Moreover, it is necessary to reject the complaint raised by Italgas and the Italian Republic that the Commission, by referring in the contested decision (recital 74) merely to the absence of new factors capable of justifying the ad hoc derogation being sought, did not provide sufficient reasons for its rejection of the arguments based on the unique situation of the lagoon area of Venice, raised by the Italian authorities and the interested third parties during the administrative procedure.

311 In recital 74 of the contested decision, the Commission set out the reasons why it did not intend to amend, in the present case, the method of 12 August 1988 for the application of Article 87(3)(c) EC in order to adapt it to the case in point, as it did in preparation for Sweden and Finland joining the Community. On that occasion, the Commission, by decision of 1 June 1994, amended the abovementioned method by laying down, in essence, a supplementary criterion for the eligibility of areas for a regional derogation and the possibility of authorising aid intended to compensate in part for additional transport costs, in order to take account of specific geographical factors which were new to the European Community (remote northern location, harsh weather conditions, very long distances within the territory of the Member State, low population density in some parts), which were not taken into account as fundamental problems when the method was devised (see the Communication of 20 December 1994,

mentioned above, addressed to Member States and other interested parties, concerning an amendment to Part II of the Communication of 12 August 1988. By explaining that Venice's situation had not changed and that the aid scheme under consideration was likely to disturb the system of aid in force — because it was operating aid granted in an area with no grave problems of economic and social cohesion — the Commission thereby provided a sufficient statement of reasons for its refusal to depart, in the present case, from the criteria laid down in the applicable method.

312 Thirdly, the argument put forward by Italgas that the Commission was entitled to depart, inter alia, from the criteria set out in point 22 of the Guidelines on aid to employment with regard to general exemptions from social security contributions intended to maintain employment, as referred to in Article 1 of the Ministerial Decree of 5 August 1994, must also be rejected. Whereas the guidelines relate to sectoral derogations under Article 87(3)(c) EC, the applicant merely refers to Decision 95/455, by which the Commission granted a regional derogation for relief from social security contributions in the Mezzogiorno under circumstances which are totally different from those at issue in the present case, as it pointed out in the contested decision (recitals 75 and 76). In that 1995 decision (recital 14), the Commission found that the operating aid provided for in Article 1 of the Ministerial Decree of 5 August 1994 met, in regions other than Abruzzi and Molise, all the conditions for regional derogation under Article 87(3)(a) EC. With regard, on the other hand, to Abruzzi and Molise, which no longer met the conditions, the Commission had taken into account the fact that the two regions had qualified for the derogation under Article 87(3)(a) EC until 31 December 1993. Accordingly, although Article 87(3)(c) EC does not cover operating aid, the Commission deemed it to be appropriate and compatible with the common market — and without affecting trading conditions to an extent contrary to the common interest — to authorise such aid, together with a gradual dismantling plan by way of temporary accompanying measures, with a view to helping firms in the region to adapt to the less favourable rules laid down in Article 87(3)(c) EC. In Decision 95/455 (recital 15), the Commission justified that derogation from the criteria set out in the Communication of 12 August 1988 by reference to 'a general principle which takes

account of any objective peculiarities of situations which are not comparable to those of the other regions which may qualify for derogation pursuant to Article [87](3)(c) [EC]'.

313 Fourthly, contrary to the argument of Italgas, the Commission fully complied with the criteria which it laid down in the abovementioned Guidelines on aid to employment by declaring the social security exemptions at issue incompatible with the common market where such exemptions are granted to undertakings which are neither SMEs, nor undertakings located in an area eligible for regional aid, nor undertakings which had taken on workers entering or re-entering the labour market. The Commission clearly indicated, in point 21 of the guidelines, the criteria according to which it would assess whether aid for employment creation would be eligible for a sectoral derogation under Article 87(3)(c) EC. Among those criteria are the three alternative conditions mentioned above, including, in particular, the criterion relating to the location of the undertaking in an area eligible for regional aid. Inasmuch as Italgas puts forward nothing to cast doubt on the consistency of the three alternative criteria with the objectives of the sectoral derogations under Article 87(3)(c) EC — namely, to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the interest of the Community — it must be held that, in accordance with settled case-law (see paragraph 292 above), the Commission was required to comply with the indicative criteria which it had imposed upon itself. In any event, the fact that the Commission applied those criteria does not give grounds for complaint since it has neither been established nor alleged in a substantiated way that those criteria are incompatible with the objective pursued by the sectoral derogations (see, *a contrario*, *Pollmeier Malchow* v *Commission*, cited in paragraph 290 above).

314 In the light of all the foregoing considerations, the pleas in law alleging infringement of Article 87(3)(c) EC and the lack of an adequate statement of reasons must be rejected as unfounded.

3. *The alleged infringement of Article 87(3)(d) EC and the principle of equal treatment, and the alleged defects in the statement of reasons and contradictions therein*

(a) Arguments of the parties

The applicants' arguments

— Case T-254/00

315 The applicant — Hotel Cipriani — challenges the grounds on which the Commission refused to grant a cultural derogation. It claims that the COSES study of March 1998, produced by the Committee, confirmed the general nature of the constraints resulting in Venice from the Italian rules concerning the protection of cultural goods and the environment. That study showed precisely the additional costs occasioned in Venice by those constraints, as compared with the costs occasioned by similar constraints in different environments. The applicant refers in particular to the constraints imposed by Italian Law No 1089/39, which had introduced rules for the protection of goods of historical and artistic interest and, with particular regard to Venice, Decree No 791/1973 of the President of the Republic laying down special provisions concerning the restoration and renovation of buildings of architectural, historical and artistic interest. It adds that the Committee had also proposed to provide the additional information which the Commission considered necessary. Under those circumstances, if it became clear that certain undertakings were not subject to the additional constraints mentioned above, the Commission would merely have been required to exclude from the cultural derogation those undertakings not subject to the constraints, on the basis of all the necessary information.

316 The applicant then claims that, when compared with the scale of the additional costs, the limited amount of the relief from the social security contributions at issue — which, moreover, was graduated until it was totally withdrawn — was therefore proportional. In the present case, it is the contested decision which infringes the principle of proportionality.

317 Also, the Commission had decided to grant a cultural derogation to the Consorzio Venezia Nuova, without checking the connection between the cultural purpose of that body and the amount of the aid granted. From that point of view, the contested decision is thus contradictory and contrary to the principle of equal treatment.

318 The hotel business in which the applicant is engaged, whose buildings are subject to the extremely restrictive rules applicable in the historic centre, is closely linked to the identity of the buildings it operates and whose original purpose must be maintained pursuant to Decree No 791/1973, mentioned above. The employment for that purpose of a sufficient number of staff thus meets the need to preserve the appearance and historic role of those buildings in the city.

— Case T-277/00

319 The applicants — Coopservice and the Committee — complain that the Commission failed to take account of the general constraints concerning, specifically, the area of the lagoon, which are intended to preserve, in particular, the architectural heritage and the environment. In particular, the Commission did not take account of the restraints imposed, inter alia, by Decree No 962/1973 of the President of the Republic for the purposes of 'protecting the landscape, and the historical, architectural and artistic setting of the city of Venice and its lagoon', in accordance with the objectives laid down in Italian Law No 171/1973 and Italian Law No 431/1985 intended to pursue primary objectives of environmental protection. Thus, the Commission merely considered the direct constraints related to the protection of architectural treasures and buildings, covered by Law No 1089/39. On the other hand, it took no account of the 'indirect'

constraints which are intended to protect conditions concerning the environment, the setting, the view and the lighting of buildings subject to direct constraints.

320 The social security exemptions at issue are intended to promote culture and heritage conservation. In addition, they are proportionate to the additional costs flowing from the abovementioned constraints and do not modify the conditions of trade between the Member States or competition. From those two points of view, the statement of reasons in the contested decision is erroneous and insufficient.

The Commission's arguments

321 The Commission objects that it applied only Article 87(3)(d) EC. It thereby concluded that there was no real connection between the advantage granted and the additional costs relating to heritage conservation for which the advantage was intended to compensate.

(b) Findings of the Court

322 First of all, the Court notes that it has not been established that the additional costs connected with heritage conservation are borne by all the undertakings enjoying the social security reductions at issue. In particular, the fact, referred to by Hotel Cipriani, that the architectural, historical and artistic interest may be determined 'for groups of buildings defined according to parameters linked to the layout of streets, squares and

canals' — as the Committee had indicated — does not prove that all the buildings operated by the undertakings benefiting from the reductions at issue incur such additional costs.

323 It must be noted in that regard that the Commission did not have the information necessary to draw a distinction in the contested decision between undertakings operating buildings subject to the constraints connected with heritage conservation and those which did not operate buildings of that type.

324 More generally, it is clear from the observations and documents sent to the Commission during the administrative procedure that the Commission possessed no relevant information to enable it to assess the scope of the possible architectural and cultural constraints referred to by Hotel Cipriani, Coopservice and the Committee, and to consider the possibility of granting a derogation under Article 87(3)(d) EC. In particular, it is clear from the contested decision (recital 79), and is not denied by the applicants, that the Italian Government never sought a cultural derogation but merely defended the regional nature of the exemptions at issue. Moreover, the COSES study of February 1998 (point 3.3), mentioned above, communicated to the Commission by the City of Venice, merely draws up a list of the laws and regulations applicable to Venice with regard to the environment, building and urban planning. Although it cannot be denied that some of those laws or regulations impose constraints 'of a historic and artistic character', as the applicants claim, the significance and scope of such constraints are not specified. In addition, the major part of the rules referred to relate more generally to constraints regarding urban planning, the environment or landscaping, which, in principle, are not taken into account with regard to the promotion of culture or heritage conservation, referred to in Article 87(3)(d) EC. The COSES study of March 1998 (points 1.2 and 1.5), communicated to the Commission by the Committee, contains no indication concerning the costs borne by undertakings located in Venice or Chioggia in direct relation to heritage conservation.

325 Secondly, it should be noted — as the Commission pointed out in the contested decision (recital 81) — that the method of implementing the social security exemptions at issue does not make it possible to ensure that they are proportional to the objective of the cultural derogation. The applicants do not deny that, having regard to the method by which the aid was granted, there is, as a general rule, no connection between, on the one hand, the amount of the tax exemptions granted to an undertaking on the basis of the number of persons it employs and, on the other, the type or size of the buildings operated by that undertaking and, consequently, the additional costs borne in connection with heritage conservation.

326 With regard to the situation of Hotel Cipriani, raised in the present case, it must be held that arguments of fact on the applicant's part concerning its particular situation are inadmissible inasmuch they were not put before the Commission during the administrative procedure.

327 On the other hand, it must be noted that the individual examination, in the contested decision, of the aid granted to Consorzio Venezia Nuova is explained by the fact that the latter is one of the municipal undertakings with regard to which the Italian authorities had provided detailed information. It was on the basis of that information that the Commission considered that the aid granted to that undertaking, whose duty under its statutes is to carry out measures decided on by the State for the purpose of safeguarding the historic, artistic and architectural heritage of Venice, had a cultural objective.

328 For all of those reasons, it cannot be considered that the Commission infringed, in the present cases, the principle of non-discrimination and exceeded the limits of its discretion by failing to take account of the individual situation of Hotel Cipriani, in particular, and by considering, in general, that the alleged constraints did not justify the grant of a cultural derogation.

329 It follows that the pleas in law alleging infringement of Article 87(3)(d) EC and the duty to state reasons must be rejected as unfounded.

4. *The alleged infringement of Article 87(3)(e) EC*

(a) Arguments of the parties

330 In Case T-277/00, the applicants — Coopservice and the Committee — are of the opinion that the contested decision (recital 84) infringes Article 87(3)(e) EC and that the statement of the reasons for the decision is insufficient and contradictory inasmuch as the Commission considered that it could not even envisage applying the derogation provided for in that provision. They claim that the purposes of general interest concerning the conservation of Venice's cultural heritage justify such a derogation.

331 The Commission challenges those arguments.

(b) Findings of the Court

332 Article 87(3)(e) EC refers to 'such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission'. It is

therefore sufficient to note, as the Commission pointed out, that there is no specific Council decision, adopted on the basis of that provision, permitting the aid under consideration to be authorised.

333 The present plea in law must therefore be rejected as unfounded.

5. *The alleged infringement of Article 87(3)(b) EC, Article 87(2)(b) EC and Article 253 EC, and the allegedly insufficient and contradictory nature of the statement of reasons*

(a) Arguments of the parties

334 In Case T-277/00, the applicants — Coopservice and the Committee — complain, first, that the Commission refused, erroneously and without giving reasons, to accept the fact that the conservation of the city of Venice constitutes an important project of common European interest, within the meaning of Article 87(3)(b) EC. The contested decision is contradictory on that point inasmuch as the Commission has recognised elsewhere the extreme importance of conserving Venice and, consequently, has accepted that aid granted to Consorzio Venezia Nuova is compatible with the common market (recital 96).

335 Secondly, the Commission also refused, erroneously and without giving reasons, the derogation provided for in Article 87(2)(b) EC with regard to natural disasters.

However, 'acqua alta' (seasonal flooding) constitutes a natural disaster by reason, on the one hand, of the extreme seriousness of its effects on the economic and social fabric of the city and their repetitive nature and, on the other, of the devastating consequences when the phenomenon occurs on an exceptional scale.

336 The Commission challenges those arguments.

(b) Findings of the Court

337 First of all, it should be held that the Commission is right to contend that the aid scheme at issue cannot be regarded as closely linked to an important project of European interest. It was not set up for the purposes of conserving Venice but is intended to reduce the social security burden normally borne by the budgets of undertakings located in the territory of Venice or Chioggia. Essentially, therefore, the scheme seeks to improve the competitiveness of those undertakings. However, according to case-law, an aid measure can benefit from the derogation provided for in Article 87(3)(b) EC only if it does not benefit mostly the economic operators of one Member State rather than the Community as a whole (*Unicredito Italiano*, cited in paragraph 209 above, paragraphs 72 to 78, and *Italy* v *Commission*, cited in paragraph 209 above, paragraphs 139 and 140).

338 By rejecting, in the contested decision (recital 97), the categorisation of the aid as a 'project of common interest' within the meaning of Article 87(3)(b) EC, the

Commission did not therefore exceed its discretion. Moreover, contrary to the applicants' argument, the statement of reasons in that regard in the contested decision is not contradictory inasmuch as the aid paid to Consorzio Venezia Nuova was not authorised under Article 87(3)(b) (see paragraph 327 above).

339 In addition, the Commission provided a statement of reasons for the contested decision to the requisite legal standard by indicating that the aid scheme at issue is not connected with an important project of common interest and that, also, it is not intended to remedy a serious disturbance in the economy of a Member State.

340 Secondly, it should be pointed out that the social security reductions at issue are proportional to the total payroll and do not seek to remedy damage caused by natural disasters or other exceptional occurrences, as is required by Article 87(2)(b) EC. Moreover, the Commission points out that, in the agricultural sector, according to established practice, damage linked to bad weather conditions can be assimilated to damage caused by natural disasters within the meaning of Article 87(2)(b) EC only if it exceeds thresholds determined by reference to normal production. Such criteria cannot be transposed to the 'acqua alta' phenomenon in Venice.

341 Under those circumstances, it must be concluded that the Commission did not exceed its discretion by considering, in the contested decision (recital 99), that the 'acqua alta' phenomenon in Venice could not be regarded as a natural disaster or an exceptional

occurrence within the meaning of Article 87(2)(b) EC. In addition, the statement of reasons for the contested decision is sufficient with regard to that point.

342 It follows that the present pleas in law must be rejected as unfounded.

B — *The alleged irregularity of the obligation, imposed in Article 5 of the contested decision, to recover the aid*

343 The applicants put forward two series of pleas in support of their application for the annulment of the recovery obligation imposed in Article 5 of the contested decision. First of all, they allege infringement of Article 15 of Regulation No 659/1999 and breach of the principles of legal certainty, the protection of legitimate expectations and equal treatment, in conjunction with the allegedly erroneous categorisation of the measures at issue as new aid. Secondly, the contested decision, inasmuch as it imposes an obligation to recover the aid at issue, infringes Article 14(1) of Regulation No 659/1999 and the principles of proportionality, legal certainty, equal treatment and the protection of legitimate expectations, and also the principles of transitional law and the duty to state reasons.

1. *The alleged infringement of Article 15 of Regulation No 659/1999 and the alleged breach of the principles of legal certainty, protection of legitimate expectations and equal treatment, in conjunction with the allegedly erroneous categorisation of the measures at issue as new aid*

(a) Arguments of the parties

The applicants' arguments

— Case T-254/00

344 The applicant — Hotel Cipriani — points out that the Commission began its inquiry in 1997 concerning the social security reductions at issue in the present case. In that context, Article 15 of Regulation No 659/1999, intended to ensure legal certainty, limited the Commission's power of inquiry and decision to aid introduced since 1987, which is the only aid which may be recovered after the end of the limitation period laid down in that provision.

345 However, Hotel Cipriani has benefited, in particular, at least since 1972, from social security relief provided for in respect of the entire national territory by laws other than Laws Nos 206/1995 and 30/1997, which the Commission takes as its basis. The applicant refers in that regard to the social security relief for craft and industrial undertakings employing fewer than 300 people instituted by Law No 590/1971 and extended to the hotel industry by Law No 463/1972. It adds that it also enjoys, under Law No 102/1977, relief from certain social security contributions, which applies to

craft and industrial undertakings throughout the national territory pursuant to Law No 102/1977 and which was extended to the hotel industry by Law No 573/1977.

346 The social security reductions at issue in the present case therefore constitute existing aid within the meaning of Article 15(3) of Regulation No 659/1999 and not new aid instituted by Laws Nos 206/1995 and 30/1997, considered by the Commission in the contested decision.

347 Even if it were accepted that the applicant enjoyed the social security reductions at issue pursuant to Laws Nos 206/1995 and 30/1997, which it denies, those measures must be regarded as existing aid, going back at least to 1972 and 1978. On the one hand, those laws provided for a mere extension in time and territory of existing aid, instituted by Law No 1089/1968, which provided for social security relief for undertakings in the Mezzogiorno, which was extended to Venice by Law No 171/1973 and to the hotel sector by Law No 502/1978 and the abovementioned Law No 463/1972. On the other hand, the applicant has benefited, since 1978, from the relief provided for under the rules concerning depressed areas ('aree depresse').

348 Contrary to the Commission's contention, there is legal continuity between the aid scheme under consideration and the existing aid referred to above, inasmuch as the latter has not been substantially amended. Although that aid was instituted by different laws, it none the less concerns the same relief from social security contributions, whose application to the territories of Venice and Chioggia was provided for under Law No 171/1973, as interpreted by Law No 502/1978. That analysis is confirmed by Article 5a of Law No 206/1995, which states that the provisions referred to in Article 23 of Law No 171/1973 and Article 3 of Law No 502/1978 are to be interpreted as meaning that the social security relief for which it provides is to continue to be granted in accordance with the criteria laid down in the Ministerial Decree of 5 August 1994. It follows that Laws Nos 206/1995 and 30/1997 merely confirm the application to the

territories of Venice and Chioggia of the relief already provided for, without amending the essential elements of the scheme, namely the beneficiaries, the form of the assistance and its degree.

349 In that legal context and having regard to the provisions of Article 15(1) and (2) of Regulation No 659/1999, the beneficiaries of the social security exemptions at issue could have formed a legitimate expectation that the exemptions were lawful and compatible with the common market. The limitation period began in 1973, if not earlier. The applicant argues that Article 15(2) of Regulation No 659/1999, which states that the limitation period is to begin on the day on which the unlawful aid is awarded to the beneficiary, must be interpreted as meaning that, with regard to an aid scheme, the act granting the aid coincides with the adoption of the law instituting the scheme. The monthly deadlines for the payment of the social security contributions under consideration are not relevant because they are simply part of the implementation of that law (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 130).

350 In addition, the Commission, in error, impliedly regarded the measures at issue as new aid which was subject as such to an obligation to notify under Article 88(3) EC.

351 Finally, the contested decision gives rise to breach of the principle of equal treatment with regard to the applicant as compared with hotels located elsewhere in Italian territory, which continue to enjoy relief from social security contributions.

352 The applicants — Coopservice and the Committee — also claim that the measures at issue, provided for in Laws Nos 206/1995 and 30/1997, constitute existing aid within the meaning of Articles 1 and 15 of Regulation No 659/1999, which is not subject to the obligation to notify under Article 88(3) EC. Pursuant to Article 15 of Regulation No 659/1999, such aid is not liable to be recovered. The applicants claim that the legislation concerning relief from social security contributions in favour of undertakings in the Mezzogiorno originates with Law No 1089/1968 setting up a simple exemption scheme whose expiry date was fixed initially at 31 December 1972. The scope of that scheme was extended to Venice and Chioggia by Law No 171/1973. The aid scheme instituted by Law No 1089/1968 remained in effect until 30 June 1994. It was partly replaced by the Ministerial Decree of 5 August 1994 instituting a 'one-off' exemption scheme which absorbed the various exemptions provided for by Law No 1089/1968, and a total annual exemption for new jobs. However, the legislature's wish — put into effect in Law No 171/1973 — to grant undertakings operating in the historic centres of Venice and Chioggia some of the advantages granted to undertakings operating in the centre and south of Italy did not change. The essential elements of the scheme were not amended. The scheme is still intended for the same undertakings; it is justified for the same reasons, related to the specific conditions of the historic centres of Venice and Chioggia; and it is based on the same mechanism for determining the aid, namely the reference to the legislation in force in the centre and south of Italy.

353 There was thus continuity in the conditions and the arrangements for implementation of the measures provided for, in particular, by Law No 171/1973 and by Laws Nos 206/1995 and 30/1997. In the absence of substantial amendment, by the latter two laws, of the measures provided for in Law No 171/1973, the social security reductions at issue in the present case do not constitute new aid. The only amendments made by Laws Nos 206/1995 and 30/1997 reduced the advantage previously granted to the beneficiaries of the measures at issue and cannot therefore be regarded as substantial.

354 Moreover, the applicants challenge the Commission's argument that the date on which the aid scheme was instituted is irrelevant for the purposes of determining the starting point of the limitation period laid down in Article 15(2) of Regulation No 659/1999. They claim that the aid granted under an aid scheme becomes vested at the date on which the undertaking concerned is accepted under the scheme and not upon the implementation, each month, of the obligation to pay out the aid already granted.

355 In the present case, the Commission failed to assess the connection between the aid scheme under consideration, applicable since July 1994, and the scheme instituted by Law No 171/1973. The contested decision is therefore vitiated by infringement of Article 15 of Regulation No 659/1999 and failure to state adequate reasons, inasmuch as it impliedly categorises the aid scheme under consideration as new aid.

The Commission's arguments

356 The Commission challenges those arguments.

(b) Findings of the Court

357 In so far as the provisions of Article 15 of Regulation No 659/1999, laying down a limitation period, are regarded as being procedural in nature, they were immediately applicable to all procedures pending before the Commission on 16 April 1999, the date on which the regulation entered into force (Case T-366/00 *Scott* v *Commission* [2003] ECR II-1763, paragraph 51). Since the contested decision was adopted on 25 November 1999, it must be determined whether, in the present case, the limitation

period had expired, with the consequence that the aid scheme under consideration would be deemed to be existing aid pursuant to Article 15(3) of the regulation.

358 It should first be pointed out that measures to grant or alter aid must be regarded as new aid (Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraphs 17 and 18, and Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 13). In particular, where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme. On the other hand, if the alteration is not substantive, only the alteration as such is liable to be classified as new aid (*Government of Gibraltar* v *Commission*, cited in paragraph 349 above, paragraphs 109 and 111).

359 In the present case, it must be stated that Law No 206/1995, by extending to undertakings located in the territories of Venice and Chioggia the Mezzogiorno scheme introduced by the Ministerial Decree of 5 August 1994, and Law No 30/1997, by extending the scheme in 1997, introduced a specific new scheme applicable, precisely, to the territories of Venice and Chioggia.

360 In that regard, the arguments put forward by the applicants to show that the aid scheme under consideration is a mere extension in time and territory of existing aid do not stand up to examination. First of all, it should be pointed out that the Commission maintains, without being contradicted by the applicants, that Law No 463/1972, referred to by Hotel Cipriani, extended to 30 June 1973 the social security relief provided for under Law No 590/1971 in favour of craft undertakings, industrial SMEs and hotels. That relief has not been granted since 1 July 1973 and cannot therefore have any bearing on the aid examined in the contested decision, which was paid out between

1995 and 1997. The same is true of the relief provided for in Laws Nos 502/1978, 102/1977 and 573/1977, which were applicable until 31 December 1981.

361 Secondly, the subject-matter of the Ministerial Decree of 5 August 1994, to which Laws Nos 30/1997 and 206/1995 refer, was 'a new scheme for relief from social security contributions in the Mezzogiorno'. It thus introduced a new aid scheme for the Mezzogiorno. Law No 206/1995 extended the new scheme to undertakings in Venice and Chioggia and Law No 30/1997 amended the conditions for granting aid under the new scheme.

362 Under those circumstances, even supposing that the aid scheme under consideration, initially provided for by Law No 206/1995, merely extended an existing aid scheme to new beneficiaries, without making a substantive alteration to the existing scheme, such an extension, which is severable from the initial scheme, constitutes new aid which is subject to the obligation to notify (see, to that effect, *Government of Gibraltar* v *Commission*, cited in paragraph 349 above, paragraphs 109 and 110).

363 It follows that the contested decision requiring recovery of aid incompatible with the common market, paid out under Laws Nos 206/1995 and 30/1997 was, in any event, adopted before the expiry of the limitation period laid down in Article 15 of Regulation No 659/1999.

364 In addition, and in any event, contrary to the applicants' claim, the limitation period laid down in Article 15 of Regulation No 659/1999 did not begin until the date on which the unlawful aid was paid out. In the case of an aid scheme introduced more than 10 years

before the first interruption of the limitation period, the unlawful aid incompatible with the common market granted under that scheme during the last 10 years is therefore subject to recovery (*Government of Gibraltar* v *Commission*, cited in paragraph 349 above, paragraph 130).

365 Consequently, in the present case, even supposing that there is continuity between the aid scheme under consideration and earlier schemes, which examination of the facts belies, the 10-year limitation period had in no way expired before the adoption of the contested decision in 1999 with regard to the aid considered in that decision, which was paid out between 1995 and 1997.

366 Finally, it is common ground that, during the administrative procedure, the Italian Government never claimed that the scheme under consideration constituted existing aid, nor challenged the Commission's categorisation of it as new aid in its decision to initiate the investigation procedure. Nor did the interested parties put forward relevant arguments on that point. The Commission cannot therefore be criticised for failing to ascertain whether the scheme under consideration was to be categorised as existing aid or new aid (Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 51).

367 On all of those grounds, the present pleas in law must be rejected as unfounded.

2. *The alleged infringement of Article 14(1) of Regulation No 659/1999 and the alleged breach of the principles of proportionality, legal certainty, equal treatment and the protection of legitimate expectations, and of the principles of transitional law and the duty to state reasons*

(a) Arguments of the parties

The applicants' arguments

— Case T-254/00

368 The applicant — Hotel Cipriani — claims, in the alternative, that even supposing the limitation period laid down in Article 15 of Regulation No 659/1999 had not expired, which it denies, the obligation imposed by the contested decision to recover the aid at issue infringes the principles of proportionality and equal treatment and is therefore also contrary to Article 14(1) of Regulation No 659/1999, which provides that the Commission is not to require recovery of the aid if this would be contrary to a general principle of Community law. An obligation to recover aid does not therefore flow automatically from the declaration that it is incompatible with the common market. It is for the Commission to consider the exceptional circumstances which characterise the present case in order to ascertain whether the imposition of such an obligation is in accordance with the principle of proportionality.

369 In the present case, the Commission rejected the arguments put forward by the Italian authorities against recovery of the aid at issue, without providing a sufficient statement of its reasons for doing so.

370 The situation being considered in the present case is characterised by a high degree of legal uncertainty. It is probable that the relief from social security contributions granted to undertakings exercising an economic activity on a purely local market is not of such a nature as to affect trade between the Member States or competition. In addition, the withdrawal of the aid scheme under consideration on 30 November 1997 and the fact that no interested third party took part in the procedure corroborate the scheme's lack of effect on the functioning of the market. The obligation to recover the aid is thus disproportionate.

371 In its reply, the applicant points out that, in the abovementioned context, it could legitimately expect that its situation would be assessed, in accordance with the general principle of equal treatment, in a way similar to that in which the municipal undertakings were assessed. That legitimate expectation precludes recovery of the social security contributions under consideration in the present case.

372 Finally, the reference rate adopted in the contested decision for calculating the interest on the amounts to be recovered is unlawful inasmuch as it exceeds the rate of interest paid by the undertaking concerned on its own debts during the period under consideration. It is contrary to the purpose of recovering aid, which is to restore the situation in which the undertaking would have found itself if it had not received the aid under consideration.

— Case T-270/00

373 The applicant — Italgas — claims first that the assessment of the circumstances referred to by the Italian authorities in support of their request that the aid under consideration should not be recovered falls within the jurisdiction of the national courts.

374 Italgas then complains that the Commission infringed the principle of non-retroactivity of substantive rules by relying, in the contested decision, on Article 14(1) of Regulation No 659/1999. That regulation came into force on 16 April 1999, whereas the aid under consideration was paid out only until 1997. However, the abovementioned Article 14(1) contains a substantive rule amending the criteria on which the Commission may base a decision not to require the Member State to recover the aid under consideration. Under the earlier rules, the Commission had a discretion (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 82). It could have taken account of the economic and social consequences of a recovery order. On the other hand, under Article 14(1) of Regulation No 659/1999, the Commission can abstain from requiring recovery of aid only if such recovery would be contrary to a general principle of Community law.

375 Consequently, Article 5 of the contested decision is vitiated by an error of law.

376 In addition, in the absence, *ratione temporis*, of an obligation on the part of the Commission to require recovery of the aid under Article 14(1) of Regulation No 659/1999, the contested decision is erroneous and the statement of reasons is insufficient inasmuch as that decision orders, in a general manner and without distinction, the recovery of the aid paid out, without having ascertained, with a sufficient degree of certainty and on the basis of a thorough analysis of all the relevant circumstances, that the measure under consideration was capable of affecting trade between the Member States and competition.

377 The Italian Republic, which is intervening in support of Italgas, concurs with its observations. It adds that the specific nature of the facts in the present case, the consequent legal uncertainty and the lack of observations from interested third parties should have led the Commission to verify in specific terms whether recovery of the aid under consideration was necessary to restore the earlier competitive situation. That

question, which was discussed at some length during the administrative procedure, was not considered in the contested decision.

— Case T-277/00

378 The applicants — Coopservice and the Committee — claim that the obligation imposed in the contested decision to recover the aid is contrary to the principles of the protection of legitimate expectations and legal certainty and also the principle of proportionality.

379 With regard, first, to the principles of the protection of legitimate expectations and legal certainty, the fact that the Commission considered, with regard to the municipal undertakings ACTV, Panfido and AMAV, that the conditions for the application of Article 87(1) EC were not satisfied shows that, in the Commission's view, the measures at issue did not in themselves constitute unlawful aid. Moreover, the Commission laid down compatibility criteria to be applied by the Member State concerned. The reference to national procedure in order to establish, on the basis of a thorough and complex individual examination, whether aid is irregular implies, in the applicants' view, that a finding that the aid is irregular produces effects only *ex nunc*. Consequently, the beneficiaries of such measures are denied protection of their legitimate expectations.

380 In addition, the social security reductions at issue were provided for in national rules going back to 1973. In that context, it is excessive to require the beneficiaries of those measures to inform themselves concerning Community procedure, all the more so as they constitute a numerous and undetermined category. After 30 years in existence, the present aid scheme must be presumed to be known at Community level, even it was not formally notified.

381 Secondly, the obligation to recover the aid at issue is contrary to the principle of proportionality because the measures had a derisory effect on trade, whereas repayment of the aid would be a very heavy burden for the beneficiaries.

382 For all of those reasons, the Commission infringed Article 14(1) of Regulation No 659/1999 and the duty to state reasons by failing to ascertain whether recovery of the aid under consideration was contrary to a general principle of Community law.

383 Finally, the applicants consider that the contested decision is also contrary to the principle of the protection of legitimate expectations inasmuch as it provides that the amount of the aid to be repaid is to bear interest calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid. In addition, no reasons have been given for the choice of the method of payment of interest.

The Commission's arguments

384 The Commission challenges those arguments.

(b) Findings of the Court

385 It should be pointed out at the outset that Article 14(1) of Regulation No 659/1999 imposes an obligation on the Commission to recover, as a general rule, aid declared incompatible with the common market. According to that provision, it is only if recovery of the aid would be contrary to a general principle of Community law that the Commission is not to require such recovery. Moreover, it should be borne in mind that, contrary to the argument of Italgas (see paragraph 373 above), Article 87 EC et seq., Article 14 of Regulation No 659/1999 and the principles of the protection of legitimate expectations, legal certainty and proportionality cannot preclude a national measure ordering repayment of aid in compliance with a Commission decision which found that aid to be incompatible with the common market and examination of which in the light of those provisions and general principles has not disclosed any factor capable of affecting its validity (*Unicredito Italiano*, cited in paragraph 209 above, paragraph 125).

386 In that context, the complaint made by Italgas that the contested decision infringes the principle of non-retroactivity inasmuch as it imposes an obligation to recover the aid on the basis of Article 14(1) of Regulation No 659/1999, which lays down a new substantive rule, cannot be accepted. It should be pointed out in that regard that, in the contested decision (recitals 100 to 103), the Commission did not refer only to the obligation laid down in Article 14(1) of that regulation. It also relied expressly on earlier case-law which was formally enshrined in the abovementioned Article 14(1), which introduced no new rule in that regard.

387 Even before the entry into force of Regulation No 659/1999, the cancelling-out of unlawful aid by way of recovery was, according to settled case-law, the logical consequence of the finding that it was unlawful (*Tubemeuse*, cited in paragraph 265 above, paragraph 66, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47). In particular, the Court of Justice has held that, save in exceptional circumstances, the Commission will not exceed the bounds of its discretion if it asks the

Member State to recover the unlawful aid, since it is only restoring the previous situation (*Maribel bis/ter*, cited in paragraph 195 above, paragraph 66).

388 Consequently, it must be accepted that although, in principle, Article 14(1) of Regulation No 659/1999 is not formally applicable to the present case inasmuch as it contains a substantive rule, that fact cannot vitiate the obligation imposed in the contested decision to recover the aid inasmuch as, in accordance with the case-law referred to in the preceding paragraph, the Commission considered that recovery was necessary to restore the previous situation by cancelling out the advantages granted to the undertakings concerned by the aid scheme at issue.

389 In particular, contrary to the applicants' argument, the obligation to recover the aid under consideration cannot be regarded as disproportionate to the objectives of the provisions of the Treaty concerning State aid inasmuch as it is the logical consequence of the unlawfulness of the aid and seeks to restore the previous situation.

390 In that regard, as has already been held (paragraphs 246 to 248 above), the fact that most of the beneficiary undertakings exercised their activities at local level — which has not been established — would not, in any event, have eliminated all effects of the social security exemptions at issue on trade and competition. Similarly, the fact that the interested third parties did not take part in the administrative procedure does not show that the beneficiaries of those exemptions did not obtain a significant competitive advantage, which must be cancelled out in order to restore the previous situation.

391 In that context, contrary to Hotel Cipriani's argument, the Commission took appropriate account in the contested decision (recital 103) of the observations submitted by the Italian authorities in support of their request that the aid found to be incompatible with the common market should not be recovered.

392 With regard to the plea alleging infringement of the principle of the protection of legitimate expectations — put forward by Hotel Cipriani and by Coopservice and the Committee — it should be pointed out that, according to case-law, the beneficiary of unlawful aid may not entertain a legitimate expectation that the aid is lawful (*Unicredito Italiano*, cited in paragraph 209 above, paragraphs 104 and 108 to 111, and Case C-408/04 P *Commission* v *Salzgitter* [2008] ECR I-2767, paragraph 104). In the present case, the aid scheme under consideration had not been notified and recovery of the aid was therefore a foreseeable risk. In that regard, the fact, referred to by Coopservice and the Committee, that recovery is to be carried out in the framework of national implementation of the Commission decision is irrelevant.

393 Moreover, the applicants raise no other objectively exceptional circumstance, as required under the case-law, which establishes that the obligation to recover the aid at issue is contrary to the principle of legal certainty (*Commission* v *Salzgitter*, cited in paragraph 392 above, paragraph 107). In particular, the arguments concerning the continuity in time of the rules granting the social security exemptions at issue have already been rejected by the Court as unfounded (see paragraph 362 above). In addition and in any event, such continuity would not in itself have constituted an exceptional circumstance of such a nature as to render unlawful a Commission decision requiring recovery of the aid at issue within the limitation period laid down in Article 15 of Regulation No 659/1999.

394 With regard to the plea alleging breach of the principle of equal treatment — put forward by Hotel Cipriani — it should be borne in mind that the contested decision contains no finding of an individual nature, with the exception of the assessment of the situation of the municipal undertakings, carried out on the basis of data sent to the

Commission by the national authorities and the City of Venice. Since no information concerning the individual situation of Hotel Cipriani was communicated to the Commission during the administrative procedure, the contested decision cannot be discriminatory with regard to that applicant as compared with the municipal undertakings.

395 The respective arguments of Hotel Cipriani and of Coopservice and the Committee, intended to show that the method of calculating the interest levied on the amounts to be recovered was irregular, must also be rejected. It should first be noted that, although it is true that the provision made in Article 14(2) of Regulation No 659/1999 to the effect that the Commission is to fix interest at an appropriate rate constitutes a substantive rule and, for that reason, was not formally applicable in the present cases, that provision nevertheless introduces no new rule.

396 In the present cases, it is sufficient to note that the rate of interest fixed in the contested decision (second paragraph of Article 5), which refers to the reference rate used to calculate the grant equivalent of regional aid, is in conformity with the purpose of recovery and cannot therefore be regarded as unforeseeable.

397 In addition, it was not for the Commission to provide a more detailed statement of the reasons for its choice of that reference rate in the contested decision. In particular, the mere fact that the rate in question is allegedly higher than that paid by Hotel Cipriani on its own debts does not mean that it is not representative of the interest rates charged on the market (see, to that effect, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 159). Moreover and in any event, as has already been held, arguments on the part of that applicant with regard to its individual situation are not admissible, since that situation was not made known to the Commission during the administrative procedure (see, in particular, paragraphs 211 and 215 above).

398 It follows that the applicants have not established that the rate fixed in the contested decision was inappropriate in that it exceeded what was necessary to cancel out the advantages accruing to the beneficiaries from the social security exemptions at issue.

399 For all of those reasons, the pleas in law alleging infringement of Article 14(1) of Regulation No 659/1999 and breach of the principles of proportionality, legal certainty, equal treatment and the protection of legitimate expectations, and of the principles of transitional law and the duty to state reasons must be rejected as unfounded.

Costs

400 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the forms of order sought by the Commission, including, with regard to the applicants in Case T-277/00, the costs of the interlocutory proceedings.

401 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Italian Republic must accordingly bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the applications;**

2. **Orders Hotel Cipriani SpA, Società italiana per il gas SpA (Italgas), Coopservice — Servizi di fiducia Soc. coop. rl and the Comitato 'Venezia vuole vivere' to bear their own costs and to pay those of the Commission, and orders Coopservice and the Comitato 'Venezia vuole vivere' also to bear the costs of the interlocutory proceedings.**

Meij Vadapalas Wahl

Prek Ciucă

Delivered in open court in Luxembourg on 28 November 2008.

[Signatures]

Table of contents