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

11 June 2009 *

In Case T-300/02,

Azienda Mediterranea Gas e Acqua SpA (AMGA), established in Genoa (Italy), represented by L. Radicati di Brozolo and M. Merola, lawyers,

applicant,

supported by

ASM Brescia SpA, established in Brescia (Italy), represented by G. Caia, V. Salvadori, N. Pisani and F. Capelli, lawyers,

intervener,

* Language of the case: Italian.

Commission of the European Communities, represented by V. Di Bucci, acting as Agent,

defendant,

APPLICATION for annulment of Articles 2 and 3 of Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ 2003 L 77, p. 21),

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

composed of M.E. Martins Ribeiro, President, D. Šváby, S. Papasavvas, N. Wahl (Rapporteur) and A. Dittrich, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 April 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, Azienda Mediterranea Gas e Acqua SpA (AMGA), is a capital company 51.01% owned by the municipality of Genoa (Italy). It was established in 1995 following the restructuring of the municipal undertaking bearing the same name and operates in both the energy sector, in particular as a supplier of services for gas distribution, heating installation and the distribution of heat produced by combined heating and power plants, and in the water sector, in particular in so far as it provides services for the distribution, collection and treatment of waste water. It pursues those activities in the municipality of Genoa.

National legal context

2 Legge n. 142 ordinamento delle autonomie locali (Law No 142 on the organisation of local authorities of 8 June 1990, GURI No 135 of 12 June 1990) ('Law No 142/90') brought about a reform in Italy of the legal arrangements available to municipalities for the management of public services, in particular in the water, gas and electricity distribution sectors and in the transport sector. Under Article 22 of that law, as amended, municipalities can set up companies in a variety of legal forms to provide public services. Those include joint stock companies and limited liability companies with a majority public shareholding ('companies set up under Law No 142/90').

3 In that context, under Article 9a of legge n. 488 di conversione in legge, con modificazioni, del decreto legge 1° luglio 1986, n. 318, recante provvedimenti urgenti per la finanza locale (Law No 488 of 9 August 1986 converting and amending Decree-Law No 318 of 1 July 1986 and introducing urgent provisions for financing local authorities, GURI No 190 of 18 August 1986), loans were granted between 1994 and 1998 at a preferential rate of interest by the Cassa Depositi e Prestiti ('the CDDPP') to companies set up under Law No 142/90 providing public services ('the CDDPP loans').

4 Moreover, under Article 3(69) and (70) of legge n. 549 (su) misure di razionalizzazione della finanza pubblica (Law No 549 on measures to rationalise public finances of 28 December 1995, Ordinary Supplement to GURI No 302 of 29 December 1995) ('Law No 549/95'), in conjunction with decreto legge n. 331 (su) armonizzazione delle disposizioni in materia di imposte sugli oli minerali, sull'alcole, sulle bevande alcoliche, sui tabacchi lavorati e in materia di IVA con quelle recate da direttive CEE e modificazioni conseguenti a detta armonizzazione, nonché disposizioni concernenti la disciplina dei centri autorizzati di assistenza fiscale, le procedure dei rimborsi di imposta, l'esclusione dall'ILOR dei redditi di impresa fino all'ammontare corrispondente al contributo diretto lavorativo, l'istituzione per il 1993 di un'imposta erariale straordinaria su taluni beni ed altre disposizioni tributarie (Decree-Law No 331 harmonising tax provisions in various fields of 30 August 1993, GURI No 203 of 30 August 1993) ('Decree-Law No 331/93'), the following measures were introduced for the benefit of companies set up under Law No 142/90:

— exemption from all transfer taxes in connection with the conversion of special and municipal undertakings into companies set up under Law No 142/90 ('the transfer tax exemption');

— a three-year income tax exemption, namely in respect of the tax on the incomes of legal persons and local income tax, up to the tax year 1999 ('the three-year income tax exemption').

Administrative procedure

5 After receiving a complaint concerning those measures, the Commission asked the Italian authorities for information in that regard by letters of 12 May, 16 June and 21 November 1997.

6 By letter of 17 December 1997, the Italian authorities provided some of the information requested. A meeting was then held at the request of the Italian authorities on 19 January 1998.

7 By letter of 17 May 1999, the Commission informed the Italian authorities that it had decided to initiate the procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 1999 C 220, p. 14).

8 After receiving comments from interested parties and the Italian authorities, the Commission asked the latter for additional information on a number of occasions. Meetings were also held between the Commission and, respectively, the Italian authorities and the interested parties involved.

9 Certain companies set up under Law No 142/90, including the applicant and ACEA SpA and AEM SpA, which also instigated proceedings for the annulment of the decision at issue in this case (Cases T-297/02 and T-301/02 respectively), argued in particular that the three types of measure in question did not constitute State aid.

10 The Italian authorities and the Confederazione Nazionale dei Servizi (Confservizi), a confederation of, inter alia, companies set up under Law No 142/90 and special municipal undertakings in Italy, essentially supported that position.

11 On the other hand, the Bundesverband der deutschen Industrie eV (BDI), a German association for industry and suppliers of related services, was of the view that the measures in question could bring about distortions of competition not only in Italy but also in Germany.

12 Similarly, Gas-it, an Italian association of private operators in the gas distribution sector, stated that the measures in question, in particular the three-year income tax exemption, constituted State aid.

13 On 5 June 2002, the Commission adopted Decision 2003/193/EC on State aid granted by Italy in the form of tax exemptions and subsidised loans to companies set up under Law No 142/90 (OJ 2003 L 77, p. 21) ('the contested decision').

The contested decision

14 The Commission points out, first of all, that its analysis concerns only the aid schemes of general application introduced by the contested measures and not individual grants of aid to particular undertakings and its analysis in the contested decision is therefore general and abstract. It states that the Italian Republic 'did not grant the tax advantages on an individual basis or notify any individual cases to [it], together with all the information necessary for the Commission to assess it'. The Commission states that it therefore considered itself bound to carry out a general and abstract examination of the schemes in question in order to determine both whether they constituted State aid and whether such aid was compatible with the common market (recitals 42 to 45 in the preamble to the contested decision).

15 According to the Commission, the CDDPP loans and the three-year income tax exemption (together, 'the contested measures') are State aid. The effect of such advantages being conferred through State resources on companies set up under Law No 142/90 is to strengthen their competitive position by comparison with that of all other undertakings wishing to supply the same services (recitals 48 to 75 in the preamble to the contested decision). The contested measures are incompatible with the common market because they meet the requirements of neither Article 87(2) and (3) EC nor Article 86(2) EC and, furthermore, infringe Article 43 EC (recitals 94 to 122 in the preamble to the contested decision).

16 On the other hand, according to the Commission, the transfer tax exemption does not constitute State aid within the meaning of Article 87(1) EC, since such taxes are payable on the creation of a new economic entity or the transfer of assets between different economic entities. Municipal undertakings and the companies set up under Law No 142/90 are, substantially, the same economic entities. Exemption from those taxes for such companies is therefore justified by the nature or general scheme of the system (recitals 76 to 81 in the preamble to the contested decision).

17 The enacting terms of the contested decision are worded as follows:

'*Article 1*

The exemption from transfer tax … does not constitute aid within the meaning of Article 87(1) [EC].

Article 2

The three-year exemption from income tax … and the advantages resulting from [CDDPP] loans constitute State aid within the meaning of Article 87(1) [EC].

Such aid is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the [contested] decision.

The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

…'

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 30 September 2002, the applicant brought the present action.

19 By document lodged at the Registry of the Court of First Instance on 2 January 2003, ASM Brescia SpA applied for leave to intervene in the proceedings in support of the form of order sought by the applicant. By order of 12 May 2003, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance (former composition) granted that application. The intervener submitted its statement in intervention and the other parties their observations thereon within the prescribed time-limits.

20 By separate document lodged at the Registry of the Court of First Instance on 6 January 2003, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

21 On 14 March 2003, the applicant submitted its observations on the plea of inadmissibility.

22 On 8 August 2002, the Italian Republic also brought an action for annulment of the contested decision before the Court of Justice, which was registered as Case C-290/02. The Court of Justice considered that that action and those in Cases T-292/02, T-297/02,

T-300/02, T-301/02 and T-309/02 concerned the same subject-matter, namely the annulment of the contested decision, and were connected, since the pleas put forward in each of the cases overlapped to a very large extent. By order of 10 June 2003, the Court of Justice stayed the proceedings in Case C-290/02, in accordance with the third paragraph of Article 54 of its Statute, pending the final decision of the Court of First Instance in Cases T-292/02, T-297/02, T-300/02, T-301/02, T-309/02 and T-189/03.

23 By order of 8 June 2004, the Court of Justice decided to refer Case C-290/02 to the Court of First Instance, upon which jurisdiction has been conferred to adjudicate on actions brought by Member States against the Commission, in accordance with Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5). That case was registered at the Registry of the Court of First Instance under reference T-222/04.

24 By order of 5 August 2004, the Court of First Instance decided to reserve its decision on the plea of inadmissibility raised by the Commission until the judgment in the main proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the parties, to which they replied within the prescribed period.

26 By order of the President of the Eighth Chamber, Extended Composition, of the Court of First Instance of 13 March 2008, Cases T-292/02, T-297/02, T-300/02, T-301/02, T-309/02, T-189/03 and T-222/04 were joined for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

27 The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 16 April 2008.

28 The applicant, supported by the intervener, claims that the Court should:

— declare the action admissible;

— annul Articles 2 and 3 of the contested decision in so far as concerns the three-year income tax exemption;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant and the intervener to pay the costs.

Admissibility

Arguments of the parties

30 The Commission denies that the applicant has *locus standi* on the ground that the contested decision is not of individual concern to it within the meaning of the fourth paragraph of Article 230 EC.

31 The Commission submits, in essence, that the contested decision is to be regarded as a measure of general application since it concerns an aid scheme and, therefore, an indeterminate and indeterminable number of undertakings defined by reference to a general criterion, such as the fact that they belong to a particular category of undertakings. In its view, the general applicability, and thus the legislative nature, of a measure are not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose.

32 According to the Commission, in order for a person to be individually affected by a measure of general application, that measure must adversely affect that person's specific rights or the institution which adopted the measure must be under an obligation to take account of the effects of the measure on that person's situation. However, the Commission is of the view that that is not the case here. The contested decision has had an impact on the situation of all the undertakings which benefited from the measure in question. Consequently, the decision has not infringed rights which are specific to certain undertakings that can be distinguished from any other undertaking which benefited from the measure in question. Moreover, in adopting the contested decision, the Commission neither should nor could have taken account of the effects of its decision on the situation of a particular undertaking. Neither the declaration of incompatibility nor the order for recovery in the contested decision referred to the situation of individual beneficiaries.

33 According to the Commission, its analysis is confirmed by the existing case-law on State aid, which establishes that the fact that an undertaking has received State aid that has been declared incompatible with the common market is not sufficient to demonstrate that the undertaking is individually concerned for the purpose of the fourth paragraph of Article 230 EC.

34 A number of more recent cases do not call into question the established case-law. According to the Commission, the approach adopted in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855 ('the judgment in *Sardegna Lines*') cannot be applied to all actions brought by recipients of an aid scheme that has been declared unlawful and incompatible and in respect of which an order for recovery has been made. That is the inevitable conclusion in particular where, as in the present case, the aid scheme in question has been analysed in an abstract manner. Furthermore, in the case which gave rise to the judgment in *Sardegna Lines*, the applicant was an actual beneficiary of individual aid, since an advantage was conferred on it by virtue of a measure adopted on the basis of a regional law which allowed for a wide margin of discretion. Moreover, that situation was closely scrutinised in the course of the formal investigation procedure.

35 The facts of the case also differ from those which gave rise to the judgment in Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087 ('the judgment in *Alzetta*') in so far as, in the present case, the Commission was unaware of either the exact number or the identity of the beneficiaries of the aid in question, did not have available to it all the relevant information and was unaware of the amount of aid granted in each case. Moreover, in the present case, the three-year income tax exemption applied automatically, whereas the aid in question in the case which gave rise to the judgment in *Alzetta* was granted under a later measure.

36 Contrary to the applicant's submissions, what matters for the purpose of examining admissibility is not knowledge of the identity of an undertaking but the fact that the Commission's attention has been drawn to specific features of the case which justify individual scrutiny. The Commission stated in the contested decision that it had not been provided with any information to demonstrate that, as regards the applicant, the measure at issue did not constitute aid or constituted existing aid or aid compatible with the common market.

37 In any event, neither the fact that it participated in the formal investigation procedure laid down in Article 88(2) EC nor the order for recovery in the contested decision is sufficient, in the Commission's view, to distinguish the applicant individually. Given that actions brought by potential beneficiaries of a notified aid scheme are inadmissible for the purpose of Article 230 EC, the same should apply to actions brought by beneficiaries of an unnotified aid scheme.

38 Lastly, the Commission maintains that, if the action brought by the applicant in the present case were to be declared inadmissible, that would not infringe the principle of effective judicial protection, since the remedies provided for in Articles 241 EC and 234 EC would be sufficient (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677).

39 The applicant states that it is individually concerned for the purpose of the fourth paragraph of Article 230 EC in so far as it is a company set up under Law No 142/90 and is therefore an undertaking covered by the aid scheme that is the subject of the contested decision and in respect of which an order for recovery has been made.

40 The applicant does not accept that the contested decision is a measure of general application. It considers the Commission's assertion that the contested decision concerns an indeterminate and indeterminable number of undertakings to be incorrect. In its view, on the contrary, the undertakings in question form a closed group, namely a group of municipal undertakings transformed into companies set up under Law No 142/90 which commenced their activities before 31 December 1999. The number of such undertakings is even more limited if account is taken of the fact that, by definition, the advantage deriving from the three-year income tax exemption was enjoyed only by undertakings which were profitable during that period.

41 The applicant adds that, even if the contested decision were to be classified as a measure of general application, it should none the less be regarded as being individually concerned by the decision. The Commission should have taken account of the

applicant's specific situation, given that the contested measure affected each of the persons to which it was applied differently and the situation of each beneficiary varied considerably.

42 Moreover, it is apparent from the case-law, in particular the judgment in *Sardegna Lines*, paragraph 34 above, that those who are to be regarded as being individually concerned are actual recipients of individual aid granted under a general aid scheme that has been declared incompatible with the common market and recovery of which has been ordered by the Commission. Furthermore, the applicant was known to the Commission, particularly since it is expressly mentioned on a number of occasions in the contested decision.

43 The Commission's argument concerning the distinction to be made between notified aid and unnotified aid does not affect that conclusion. According to case-law, the only relevant distinction is that between aid that has been paid and aid that has not been paid.

44 In essence, the intervener supports the applicant's position and arguments as regards the question of whether the action is admissible.

Findings of the Court

45 According to the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him.

46 As regards the requirement under that provision that a person must be individually concerned, according to established case-law, natural or legal persons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 7 and 28).

47 Accordingly, the Court of Justice has held that an undertaking cannot, as a general rule, bring an action for the annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of the fact that it belongs to the sector in question and is a potential beneficiary of the scheme. Such a decision is, vis-à-vis the applicant undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15, and the judgment in *Alzetta*, paragraph 35 above, paragraph 37 and the case-law cited).

48 However, the Court of Justice also held, at paragraphs 34 and 35 of the judgment in *Sardegna Lines*, paragraph 34 above, that since the undertaking Sardegna Lines was concerned by the decision at issue in that case not only as an undertaking in the shipping sector in Sardinia and a potential beneficiary of the aid scheme for Sardinian shipowners but also as an actual recipient of individual aid granted under that scheme, recovery of which had been ordered by the Commission, it was individually concerned by the decision and the action which it brought against it was admissible (see also, to that effect, the judgment in *Alzetta*, paragraph 35 above, paragraph 39).

49 Accordingly, it is appropriate to determine whether the applicant is an actual recipient of individual aid granted under a sectoral aid scheme, recovery of which has been ordered by the Commission (see, to that effect, Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 70).

50 It is apparent from the answer of the Italian Republic and that of the applicant to the written questions put by the Court on this subject that, during the period in question, the applicant made only losses. Accordingly, since the applicant did not benefit from the three-year income tax exemption, it is not individually concerned by the contested decision.

51 It follows from all the foregoing considerations that the action is inadmissible.

Costs

52 In accordance with 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

53 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the intervener must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders Azienda Mediterranea Gas e Acqua SpA (AMGA) to bear its own costs as well as those incurred by the Commission;**

3. **Orders ASM Brescia SpA to bear its own costs.**

Martins Ribeiro Šváby Papasavvas

Wahl Dittrich

Delivered in open court in Luxembourg on 11 June 2009.

[Signatures]