JUDGMENT OF THE COURT (Second Chamber)

15 December 2005 *

In Case C-148/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Commissione tributaria provinciale di Genova (Italy), made by decision of 11 February 2004, received at the Court on 23 March 2004, in the proceedings

Unicredito Italiano SpA

v

Agenzia delle Entrate, Ufficio Genova 1,

THE COURT (Second Chamber),

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

* Language of the case: Italian.

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 February 2005,

after considering the observations submitted on behalf of:

— Unicredito Italiano SpA, by A. Santa Maria, C. Biscaretti di Ruffia and G. Pizzonia, avvocati,

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

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

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the validity of Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (OJ 2002 L 184, p. 27; 'the contested decision'), and the interpretation of Article 87 et seq. EC, Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) and the general principles of Community law.

2 The reference was made in the course of proceedings between Unicredito Italiano SpA ('Unicredito'), established in Genoa (Italy), and the Agenzia delle Entrate, Ufficio Genova 1 (Revenue Agency, Genoa 1 Office), concerning a tax advantage enjoyed by Unicredito in 1998, 1999 and 2000.

I — National legal framework

3 A reform of the banking system was undertaken in Italy by Law No 218 of 30 July 1990 containing provisions on the capital restructuring and consolidation of credit institutions governed by public law (GURI No 182 of 6 August 1990, p. 8; 'Law No 218/90').

4 That law made it possible to convert credit institutions governed by public law into public limited companies. To that end, a public bank was authorised to hand over the banking institution to a public limited company, so as to separate the transferring legal entity, known in practice as 'the banking foundation' (hereinafter 'the banking foundation'), which owned the shareholdings, from the assignee public limited company, which was the sole proprietor of the banking business. The banking foundation administered the shareholding in the assignee bank and employed the income for social purposes.

5 Article 2 of Law No 489 of 26 November 1993, which, inter alia, extended the time-limit laid down in Article 7(6) of Law No 218/90 (GURI No 284 of 3 December 1993, p. 4), made mandatory by 30 June 1994 at the latest the conversion of banking institutions governed by public law into public limited companies.

6 Law No 461 of 23 December 1998 delegating powers to the government to revise the civil and tax provisions applicable to the entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990, as well as the tax provisions applicable to restructuring operations in the banking sector (GURI No 4 of 7 January 1999, p. 4; 'Law No 461/98'), empowered the Italian Government to carry out a new reform of the provisions applicable to the banking sector, in particular in the context of restructuring.

7 Legislative Decree No 153 of 17 May 1999 concerning the civil and tax provisions applicable to the entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990 and the tax provisions applicable to restructuring operations in the banking sector implemented, in accordance with Article 1 of Law No 461 of 23 December 1998 (GURI No 125 of 31 May 1999, p. 4; 'Decree No 153/99'), the delegation made by Law No 461/98.

8 It introduced, in particular, in Articles 22(1) and 23(1), a tax advantage in the form of a reduction to 12.5% of the rate of income tax (IRPEG) ('the tax reduction') for banks which merge or engage in similar restructuring, for five consecutive tax years, provided that the profits are placed in a special reserve which may not be distributed for a period of three years. It stipulates that the profits placed in the special reserve may not exceed 1.2% of the difference between the sum of credits and debits of the post-merger bank and the sum of the credits and debits of the largest pre-merger bank.

II — Background to the dispute in the main proceedings

9 Following a Parliamentary question, the Commission of the European Communities requested the Italian authorities, by letter of 24 March 1999 sent in the context of its competences in the field of State aid, to supply information to enable it to assess the scope and effects of Law No 461/98.

10 By letters of 24 June and 2 July 1999, the Italian authorities supplied the Commission with information on that law and on Decree No 153/99.

11 By letter of 23 March 2000, the Commission informed the Italian authorities that in its opinion Law No 461/98 and Decree No 153/99 were likely to contain aid elements and requested them to halt any measures implementing them. On 12 April 2000, the Italian authorities replied that they had suspended implementation of those measures, and on 14 June 2000 they supplied further information.

12 The maximum theoretical amount of tax advantages obtained by way of the tax reduction was put by the Italian authorities at ITL 5 358 billion, or EUR 2 767 million, for 76 operations carried out in 1998, 1999 and 2000.

13 By letter of 25 October 2000, the Commission informed the Italian Government that it had decided to initiate the procedure provided for in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 2001 C 44, p. 2).

14 Following that procedure the Commission found that the Italian Republic had unlawfully implemented Law No 461/98 and Decree No 153/99, in breach of Article 88(3) EC. It considered that, without prejudice to a measure laid down in Article 27 (2) of Decree No 153/99, the tax measures implemented, including the tax reduction, amounted to State aid incompatible with the common market. Such measures conferred an advantage on banks by enabling them to grow in size and benefit from economies of scale at lower cost.

15 Consequently, the Commission adopted the contested decision, stating that Law No 461/98 and Decree No 153/99 also introduced tax advantages for banking foundations but that those advantages were not dealt with in that decision.

16 The contested decision is worded as follows:

'*Article 1*

... the State aid to banks which Italy has granted under [Law No 461/98] and [Decree No 153/99], and in particular on the basis of ... Articles 22(1), 23(1), ... [of Decree No 153/99], is incompatible with the common market.

...

Article 3

Italy shall withdraw the scheme referred to in Article 1.

Article 4

1. Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the scheme referred to in Article 1 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective implementation of the 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.

...'

17 Pursuant to that decision, Article 5 of Decree-Law No 63 of 15 April 2002 concerning urgent financial and tax provisions in the context of revenues, rationalisation of the system for calculating the cost of pharmaceutical goods, compliance with Community obligations, securitisation, development of national heritage and the financing of infrastructures (GURI No 90 of 17 April 2002, p. 5), which was ratified by Law No 112 of 15 June 2002 (GURI No 139 of 15 June 2002, p. 3), suspended the tax advantages granted to banks pursuant to Law No 461/98 and, in particular, the tax reduction.

18 Decree-Law No 282 of 24 December 2002 concerning urgent provisions in the context of Community and tax measures, revenues and accounting procedures (GURI No 301 of 24 December 2002; 'Decree No 282/02'), which was ratified by Law No 27 of 21 February 2003 (Suppl. Ord. to GURI No 44 of 22 February 2003), ordered the banks which benefited from that aid to pay by 31 December 2002 at the latest an amount equal to the tax not paid as a result of the aid scheme, with interest at 5.5% per annum.

III — The main proceedings and the questions referred

19 In accordance with Decree No 282/02, Unicredito transferred the sum of EUR 244 712 646.05, corresponding to the tax and interest due as a result of the tax advantage from which it benefited in 1998, 1999 and 2000 in the form of the tax reduction.

20 On 4 February 2003, it went on to submit three requests for reimbursement of the charges levied in respect of those years. Those requests were rejected by implied decisions of the Agenzia delle Entrate, Ufficio Genova 1.

21 Unicredito brought an action to challenge those decisions before the Commissione tributaria provinciale di Genova (Provincial Tax Commission, Genoa; 'the national tribunal'), alleging inter alia that the contested decision was unlawful.

22 The national tribunal considers that a preliminary reference is justified in particular from the point of view of the conformity of Decree No 282/02 with the Community principles of legal certainty, proportionality and the protection of legitimate expectations.

23 As regards the principles of legal certainty and the protection of legitimate expectations, it considers that the income tax reduction amounts to a continuation and extension of a rule previously introduced by Law No 218/90 in connection with the privatisation of the Italian banking system.

24 It observes that Law No 218/90 contained, in Article 7(3), a measure drawn up in terms substantially similar to those of Articles 22(1) and 23(1) of Decree No 153/99.

25 It points out that that earlier measure was more advantageous than the tax reduction at issue in the contested decision, inasmuch as the amounts placed in a special reserve were simply deductible and exempt, and not merely subject to a reduced tax rate. It also points out that transfers into the special reserve could be made over a five-year period, up to a maximum amount for the whole of that period equal to 1.2% of the difference between, on the one hand, the sum of the investments and deposits of the credit institutions that participated in the merger or in the capital transfers, and, on the other hand, the similar amount given on the last balance sheet of the largest of the credit institutions that participated in the merger and in the capital transfers.

26 Moreover, the Commission had already proceeded to carry out an express assessment of Law No 218/90 in the context of Decision 1999/288/EC of 29 July 1998 giving conditional approval to the aid granted by Italy to Banco di Napoli (OJ 1999 L 116, p. 36) and Decision 2000/600/EC of 10 November 1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa (OJ 2000 L 256, p. 21). In those decisions it gave a clear indication that it considered Law No 218/90 generally to be compatible with Article 87 EC.

27 In addition, the possibility of enjoying the tax advantages granted by Law No 461/98 and Decree No 153/99 was one of the assumptions on which various banks based their assessment of the economic feasibility of their amalgamations. The retroactive abolition of those advantages would, given the amount of the payment requested, threaten their financial stability and lead to an unfair change in ex post criteria for evaluating business decisions which have already been implemented. The principle of the protection of legitimate expectations would thus preclude retroactive application of the contested decision.

28 As regards the principle of proportionality, the national tribunal notes that banks could have made use of the ordinary tax provisions in the context of operations structured in other ways in order to win tax economies. For the purposes of compulsory recovery of the aid, the principle of proportionality therefore requires that a comparison be made between the ordinary advantageous scheme and that under Law No 461/98 and Decree No 153/99.

29 In that context, the Commissione tributaria provinciale di Genova decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [the contested decision] invalid and incompatible with Community law, in that the provisions of Law [No 461/98 and Decree No 153/99] regarding banks

are compatible with the common market, contrary to the opinion of the European Commission, or do they in any case fall within the scope of the derogations provided for by Article 87(3)(b) and (c) EC?

(2) In particular, is Article 4 of the [contested decision] invalid and incompatible with Community law, in that the Commission:

(a) failed in its duty to provide adequate reasons in accordance with Article 253 EC; and/or

(b) infringed the principle of legitimate expectations; and/or

(c) infringed the principle of proportionality?

(3) In any event, does a correct interpretation of Article 87 et seq. EC, Article 14 of [Regulation No 659/1999] and the general principles of Community law, in particular the principles of legal certainty, proportionality and the protection of legitimate expectations, preclude the application of Article 1 of [Decree No 282/02]?'

IV — Other proceedings pending before the Court

30 By application lodged at the Registry of the Court of Justice on 21 February 2002 (Case C-66/02), the Italian Republic brought an action against the Commission for annulment of the contested decision, a separate judgment for which is to be delivered by this Court today.

31 By applications lodged at the Registry of the Court of First Instance on 21 February 2002 and 11 April 2002, the Associazione bancaria italiana (ABI) (Case T-36/02), the Banca Sanpaolo IMI SpA (Case T-37/02), the Banca Intesa Banca Commerciale italiana SpA (Case T-39/02), the Banca di Roma SpA (Case T-40/02), the Mediocredito Centrale SpA (Case T-41/02), the Banca Monte dei Paschi di Siena SpA (Case T-42/02), and the Compagnia di San Paolo Srl (Case T-121/02) also brought actions against the Commission for annulment of that decision. The Commission raised an objection of inadmissibility of the actions before the Court of First Instance, based on lack of individual concern on the part of the applicants since, in its opinion, the aid in question is not individual aid, but part of an aid scheme. By orders of 9 July 2003, the Court of First Instance stayed the seven sets of proceedings pending the Court of Justice's judgment in Case C-66/02. Appeals were brought by the applicants against the orders staying the proceedings in Cases T-36/02, T-37/02, T-39/02, T-40/02, T-41/02 and T-42/02. By order of the Court of Justice of 26 November 2003 in Cases C-366/03 P to C-368/03 P, C-390/03 P, C-391/03 P and C-394/03 P *ABI and Others* v *Commission* (not published in the ECR), those appeals were dismissed as manifestly inadmissible.

V — The questions referred

32 It must be observed at the outset that although the Commission raises in its written observations the question of the admissibility of a preliminary reference made at the request of Unicredito, which is a beneficiary of one of the measures examined in the

contested decision and is represented before the Court of First Instance by ABI in the context of the proceedings in Case T-36/02, it admits that the preliminary reference is admissible in the light of the situation of the bank concerned. However, it pleads that the first question referred is inadmissible (see paragraph 42 of this judgment).

33 Next, the action in the main proceedings is directed against three implied decisions of rejection of requests for reimbursement of sums in relation to the tax advantage enjoyed by Unicredito in 1998, 1999 and 2000 in the form of the tax reduction.

34 As pointed out by the Commission, the action does not concern the other measures laid down in Decree No 153/99 which were also assessed in the contested decision and found to be incompatible with the common market.

35 The first two questions referred must therefore be understood as seeking a review of the validity of Articles 1 and 4 of the contested decision respectively in so far as they refer only to the tax reduction. As regards the third question, it must be understood as seeking to determine whether Article 87 et seq. EC, Article 14 of Regulation No 659/1999 and the general principles of legal certainty, proportionality and the protection of legitimate expectations must be interpreted as precluding a national measure such as Decree No 282/02.

A — The first question

36 By the first question, which, unlike the second question, does not concern Article 253 EC, the national tribunal is asking in substance whether Article 1 of the contested decision is invalid in the light of Article 87 EC, inasmuch as the Commission considers the tax reduction to be incompatible with the common market.

1. Observations submitted to the Court

37 Unicredito maintains that Law No 461/98 and Decree No 153/99 represent the continuation and completion of the previous restructuring and privatisation of the banking system initiated in 1990 by Law No 218/90.

38 It submits that the contested decision infringes Article 87(1) and (3)(b) and (c) EC inasmuch as the tax reduction:

— is not a selective measure but a measure of general character, and, in any case, inasmuch as the differentiation it makes is justified by the nature and general scheme of the tax system;

— does not affect trade between Member States and does not distort or threaten to distort competition;

— should have been the subject of a specific examination for each of the operations carried out;

— should have been examined from the point of view of '*de minimis* aid', a possibility dismissed by the Commission from the outset with no consideration at all;

— is compatible with the common market in so far as it may be regarded as aid to promote an important project of common European interest as it is part of the privatisation of the Italian banking system, or as aid aimed at facilitating the development of certain activities.

39 The Italian Government considers likewise that the contested decision is invalid. In its opinion, the tax advantage granted does not amount to unlawful State aid.

40 It is a continuation and extension of the previous legislation in the form of Law No 218/90 which provided for more significant benefits in substantially similar terms. Its objective was to complete the privatisation of public banks by putting an end to the excessive segmentation of the Italian banking system which was the direct consequence of the status of the original banks as public institutions and which was only partially eliminated by Law No 218/90.

41 The Italian Government points out that the tax reduction also applies to operations involving Italian branches of Community banks.

42 The Commission considers that the first question is inadmissible because the national tribunal is requesting the Court of Justice to substitute its own judgment for that of the Commission, whereas according to the settled case-law of the Court the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Court. Consequently, a national tribunal may not, in a reference for a preliminary ruling under Article 234 EC, ask the Court for guidance as to the compatibility with the common market of a given State aid or State aid scheme (order in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraph 47).

2. Findings of the Court

43 Contrary to what the Commission submits, the national tribunal is not asking the Court of Justice to assess in place of the Commission the compatibility of the tax reduction with the common market. The question referred merely seeks a review of the validity of a decision actually taken by the Commission as to that compatibility. It is therefore admissible.

(a) The selectivity of the tax reduction

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

45 Aid may be selective in the light of that provision even where it concerns a whole economic sector (see, in particular, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33).

46 In the present case, the tax reduction applies to the banking sector. It does not benefit undertakings in any other economic sectors.

47 In addition, within the banking sector it benefits only undertakings which carry out the operations referred to.

48 Without it being necessary to determine in addition whether, as stated by the Commission in point 33 of the grounds of the contested decision, the tax reduction is more advantageous to large undertakings, it is therefore clear that that measure is selective in relation to other economic sectors and within the banking sector itself.

49 Since it does not apply to all economic operators, it cannot be considered to be a general measure of tax or economic policy.

50 It is in fact a departure from the ordinary tax scheme. The undertakings concerned enjoy tax relief to which they would not be entitled under the normal application of that scheme and to which undertakings in other sectors which carry out similar operations, or undertakings in the banking sector which do not carry out operations such as those referred to, are not entitled.

51 The tax reduction is not justified by the nature and overall structure of the tax system in question (see, by way of analogy, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33). It is not an adaptation of the general scheme to the particular characteristics of banking undertakings. It is apparent from the documents before the Court that it was put forward expressly by the national authorities as a means of improving the competitiveness of certain undertakings at a certain stage in the development of the sector.

52 The complaint that the tax reduction is not selective is therefore unfounded.

(b) The effect on trade between Member States and distortion of competition

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

54 In its assessment of those two conditions, the Commission is required, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44).

55 The result is that aid must be found to be incompatible with the common market if it has or is liable to have an effect on intra-Community trade and to distort competition within such trade.

56 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see, in particular, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11; Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and Case C-372/97 *Italy* v *Commission*, cited above, paragraph 52).

57 In that regard, the fact that an economic sector has been liberalised at Community level is an element which may serve to determine that the aid has a real or potential effect on competition and on trade between Member States (see Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 75).

58 In addition, it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned (see, to that effect, in particular, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 84). Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State.

59 In the present case, the tax reduction strengthens the position of the beneficiary undertakings in relation to other undertakings active in intra-Community trade.

60 Furthermore, the financial services sector has been involved in an important liberalisation process at Community level, enhancing the competition that may already have resulted from the free movement of capital provided for in the EC Treaty.

61 It is apparent from the documents before the Court that, at the time of its adoption, the tax reduction was presented in the explanatory statement on the draft law at the origin of Law No 461/98 as a means of ensuring that the achievement of monetary union did not in fact result in the erosion of the Italian banking system to the benefit of the most solid European banks owing to the fact that the Italian banking system was significantly behind in relation to its European competitors.

62 The advantage in terms of competitiveness brought about by the tax reduction for operators established in Italy may make it more difficult for operators in other Member States to penetrate the Italian market, and may even facilitate the penetration of other markets by operators established in Italy.

63 The fact raised by the Italian Government that the tax reduction is also available, in Italy, to branches of banks from other Member States is not capable of preventing such effects.

64 It must therefore be concluded that the complaints alleging that trade between Member States is not affected and that competition is not distorted are unfounded.

(c) The failure of the Commission to examine specifically each of the operations

65 It is common ground that the Italian Republic did not notify the Commission of:

— individual aid concerning certain banks;

— Law No 461/98 and Decree No 153/99 as aid schemes.

66 The Commission initiated of its own motion the procedure laid down in Article 88 (2) EC in relation to Law No 461/98 and Decree No 153/99, which it regarded as aid schemes.

67 In the case of an aid scheme, the Commission 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 (see, in particular, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 51, and Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24), in order to determine whether that scheme comprises aid elements.

68 The complaint based on the failure to examine each of the operations involving the tax reduction is therefore unfounded.

(d) The examination of the tax reduction from the point of view of '*de minimis* aid'

69 Since the Commission was examining an aid scheme and not individual aid, it was not required to examine each particular case of application of the scheme which would not have resulted in exceeding the maximum amount of *de minimis* State aid laid down in Notice 96/C 68/06 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9).

70 The complaint based on the failure to examine the tax reduction from the point of view of '*de minimis* aid' is therefore unfounded.

(e) The application of Article 87(3)(b) and (c) EC

71 The Court makes the preliminary observation that for the purposes of applying Article 87(3) EC the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment in the matter for that of the competent authority but must confine itself to examining whether the authority's assessment is vitiated by a manifest error or by misuse of powers (see Case C-456/00 *France* v *Commission* [2002] ECR I-11949, paragraph 41, and the case-law cited).

(i) The meaning of 'aid to promote the execution of an important project of common European interest'

72 Article 87(3)(b) EC enables the Commission to declare compatible with the common market aid to promote the execution of an important project of common European interest.

73 In point 45 of the grounds of the contested decision, the Commission notes that the measures at issue aim to strengthen the Italian banking system, benefiting mostly the economic operators of one Member State rather than the Community as a whole.

74 In that regard, it is sufficient to note that it is evident from the explanatory statement on the draft law at the origin of Law No 461/98 that, inter alia, the tax reduction is essentially designed to improve the competitiveness of operators established in Italy in order to strengthen only their competitive position solely in the internal market.

75 Therefore the Commission did not make a manifest error of assessment in not classing it as 'a project of common European interest'.

76 Unicredito and the Italian Government cannot reasonably claim that the contested measures are part of the framework for completing a process of privatisation which could amount to a project of common European interest.

77 Privatisation undertaken by a Member State cannot be regarded, in itself, as amounting to a project of common European interest.

78 Consequently, the complaint alleging infringement of Article 87(3)(b) EC is unfounded.

(ii) The meaning of 'aid to facilitate the development of certain activities'

79 Article 87(3)(c) EC empowers the Commission to declare compatible with the common market aid to facilitate the development of certain activities.

80 In point 47 of the grounds of the contested decision the Commission observes that no feature of the aid scheme examined allows it to be considered to be compatible with the common market under Article 87(3)(c) EC.

81 It points out that, in its opinion, the criterion established by that provision, according to which the aid at issue must not adversely affect trading conditions to an extent that is contrary to the common interest, is not met.

82 The Commission's finding, as regards the latter point, inter alia that the tax reduction essentially improves the competitiveness of the beneficiaries in a sector characterised by intensive international competition, after having pointed out that its purpose is in fact to strengthen the position of the beneficiaries of the aid in relation to those competitors which do not benefit from it, implies that the tax reduction is not aimed at 'developing' the banking business in general.

83 For the reasons given when the previous complaints were examined, as regards the characteristics of the tax reduction it must be acknowledged that the Commission's analysis is not the result of a manifest error of assessment.

84 Consequently, the complaint alleging infringement of Article 87(3)(c) is unfounded.

B — The second question

85 By its second question, read in the light of the grounds of the decision to refer, the national tribunal is effectively seeking to determine whether Article 4 of the contested decision is invalid in so far as no reasons were given, in accordance with Article 253 EC, for the direction to recover the aid which it contains and inasmuch as it infringes the principles of legal certainty, proportionality and the protection of legitimate expectations.

1. Observations submitted to the Court

86 Unicredito submits that the Commission did not give sufficient reasoning for its decision not to make use of its discretion under Article 14(1) of Regulation No 659/1999 not to require recovery of the aid where such recovery would be contrary to the Community law general principle of the protection of legitimate expectations.

87 It claims that Law No 218/90 was considered by the Commission to be lawful and that the content of Law No 461/98 is entirely consistent with that law. The Italian Republic should therefore have benefited from a presumption of legality as regards Law No 461/98.

88 The applicant in the main proceedings pleads that too much time has lapsed since the adoption of Law No 218/90.

89 It maintains that the Commission's conduct in respect of that law gave rise to an 'exceptional' case of legitimate expectation exonerating private beneficiaries from the requirement to repay the aid.

90 It argues that the existence of a legitimate expectation can be derived from the measure laid down in Article 7(3) of Law No 218/90 which contains an implementation mechanism that is essentially identical to that of the tax reduction.

91 Support for the existence of a legitimate expectation might also be found in the fact that, as far as banks are concerned, all operations carried out which benefited from the tax measures at issue in the contested decision were covered by authorisations from the Banca d'Italia, which is the authority specifically responsible for ensuring compliance with the competition rules in the banking sector.

92 In the circumstances of the present case, the Commission also disregarded the principle of legal certainty by not taking account of the concrete risk of significant legal dispute at national level.

93 Unicredito claims that, in the light of Article 14(1) of Regulation No 659/1999, the Commission should have ensured that the principle of proportionality was observed when the order to recover the aid was given.

94 By ordering that the aid be recovered not gradually but all at once, obligatorily and immediately, the Commission did not ensure that the situation was remedied in a manner consistent with that principle.

95 The Commission should have compared the tax reduction with the benefits that the banks could have gained from the ordinary tax scheme by carrying out operations structured in other ways.

96 The Italian Government submits that prior to the tax reduction the legality in terms of Article 87 EC of the similar provisions contained in Law No 218/90, namely Article 7(3), were not challenged.

97 The Commission considers that it gave thorough consideration in the contested decision to the question of the recovery of the aid. It adds that according to settled case-law it is not in any event required to provide specific reasons in order to justify the exercise of its power to require the national authorities to recover the aid.

98 As for the rest, the Commission considers that the complaints alleging infringement of the principles of legal certainty, proportionality and the protection of legitimate expectations are unfounded.

2. Findings of the Court

(a) The statement of reasons for the order to recover the aid

99 The requirements to be satisfied by the statement of reasons laid down in Article 253 EC depend, in principle, on the circumstances of each case, in particular on the content of the measure in question, the nature of the reasons given and the interest which its addressee may have in obtaining explanations. However, in the matter of State aid, where, contrary to the provisions of Article 88(3) EC, the aid has already been granted, the Commission, which has the power to require the national authorities to order repayment, is not obliged to provide specific reasons in order to justify the exercise of that power (case-law cited above: *Belgium* v *Commission*, paragraphs 81 and 82; Case C-310/99 *Italy* v *Commission*, paragraph 106; and Case C-372/97 *Italy* v *Commission*, paragraph 129).

100 It is common ground that the Italian Republic did not notify the Commission of the scheme laying down the tax reduction before its implementation.

101 The Commission was therefore not obliged to provide specific reasons in support of its order to recover the aid.

102 In any event, it appears that, contrary to the assertion of the applicant in the main proceedings, the contested decision contains, in points 49 to 57 and 62 of the grounds thereto, thorough reasoning, in respect of Article 14 of Regulation No 659/1999 and the principle of the protection of legitimate expectations, for the Commission's decision to require recovery of the aid at issue.

103 Accordingly, the complaint alleging insufficient reasoning for the order to recover the aid cannot be upheld.

(b) The complaint alleging infringement of the principles of legal certainty and the protection of legitimate expectations

104 In view of the mandatory nature of the review of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article and, second, a diligent businessman should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 88(3) EC, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraphs 44 and 45, and the case-law cited). Neither the Member State in question nor the operator involved can plead the principle of legal certainty either, in order to prevent recovery of the aid, since the risk of national proceedings, as claimed by Unicredito, was foreseeable from the moment that the aid was implemented.

105 It is common ground that the measures contained in Law No 218/90 were never notified to the Commission. Therefore, as regards the allegation that the measure provided for in Article 7(3) of that law was very similar to the tax reduction, it is sufficient to note that that measure was not examined by the Commission. In that context, the time which has elapsed since the adoption of that law, as pleaded by Unicredito, is irrelevant. In addition, even supposing that the two successive measures are, as suggested by the national tribunal, related, the one being a continuation and extension of the other, the fact that the Commission took no action regarding the first is immaterial, since the system at issue in the current proceedings, viewed independently of its predecessor, favours certain undertakings (see, to that effect, Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 10).

106 As regards Decisions 1999/288 and 2000/600, referred to by the national tribunal (see paragraph 26 of this judgment), it should be noted that they concern aid granted to specified beneficiary banks and relate to measures which differ from those at issue in the present case, namely increases in share capital, advances granted by the Banca d'Italia, a transfer to a bank of a holding of the Treasury and tax relief for operations primarily concerning transfers of an undertaking, branches of an undertaking and assets. If the Commission did not consider certain measures contained in Law No 218/90 to be incompatible with the common market, that does not imply a positive decision on its part in respect of all the measures laid down in that law.

107 As for the authorisations which, according to the applicant in the main proceedings, were granted by the Banca d'Italia for each operation involving the tax reduction for banks, it is sufficient to remember that only the Commission is entitled to examine the compatibility of aid with the common market, so that a diligent economic operator cannot have a legitimate expectation with regard to a decision which was not made by that institution.

108 Finally, it cannot usefully be argued that, since the banks concerned took account of the aid granted by means of the tax reduction when assessing the feasibility of their operations, recovery of that aid infringes the principle of the protection of legitimate expectations.

109 The recovery of aid granted contrary to the procedure laid down in Article 88(3) EC constitutes a foreseeable risk for the operator benefiting from it.

110 In addition, and as pointed out by the Commission, the undertakings in receipt of unlawful aid generally take account of that aid when making economic decisions and the subsequent recovery of that aid does, generally speaking, have an adverse effect on their finances. If such a situation were to prevent recovery, in virtually all cases the aid would remain ultimately in the possession of the beneficiaries and the control of State aid at Community level would be ineffective.

111 In the light of the above considerations, Unicredito cannot therefore claim that the recipient of unlawful aid may rely on exceptional circumstances on the basis of which it might legitimately have expected the aid to be lawful (see *Demesa and Territorio Histórico de Álava* v *Commission*, cited above, paragraph 51).

112 As a result, it must be held that the complaint alleging infringement of the principles of legal certainty and the protection of legitimate expectations is unfounded.

(c) The complaint alleging infringement of the principle of proportionality

113 The withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful. That recovery for the purpose of re-establishing the previously existing situation cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid. By repaying, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-372/97 *Italy* v *Commission*, cited above, paragraphs 103 and 104, and the case-law cited).

114 It would not be right to determine the amounts to be repaid in the light of various operations which could have been implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid.

115 That choice was made in the knowledge of the risk of recovery of aid granted contrary to the procedure laid down in Article 88(3) EC.

116 Those undertakings could have avoided that risk by opting immediately for operations structured in other ways.

117 In addition, in circumstances such as those in the case in the main proceedings, re-establishing the status quo ante means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the tax reduction.

118 That does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible.

119 Re-establishing the status quo ante merely enables account to be taken, at the stage of recovery of the aid by the national authorities, of tax treatment which may be more favourable than the ordinary treatment which, in the absence of unlawful aid and in accordance with domestic rules which are compatible with Community law, would have been granted on the basis of the operation actually carried out.

120 The complaint alleging infringement of the principle of proportionality is therefore unfounded.

121 It is evident from all the above that examination of the first two questions referred has disclosed nothing capable of affecting the validity of the contested decision.

C — The third question

122 By its third question, the national tribunal is effectively asking whether Article 87 et seq. EC, Article 14 of Regulation No 659/1999 and the principles of legal certainty, proportionality and the protection of legitimate expectations 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.

123 In that regard, it is sufficient to note that a national measure providing for repayment of aid in compliance with a Commission decision is unlawful where that decision is contrary to a rule of Community law.

124 It follows that, conversely, if examination of a negative decision of the Commission in the light of rules of Community law does not reveal any factor capable of affecting its validity, those rules cannot preclude a national measure adopted in compliance with the Commission decision in question.

125 The answer to the third question must therefore be that Article 87 et seq. EC, Article 14 of Regulation No 659/1999 and the principles of legal certainty, proportionality and the protection of legitimate expectations 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.

Costs

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

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

1. **Examination of the questions referred has disclosed nothing capable of affecting the validity of Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy.**

2. **Article 87 et seq. EC, Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, and the principles of legal certainty, proportionality and the protection of legitimate expectations 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.**

[Signatures]