Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 11 April 2018[1]

Joined Cases C-622/16 P to C-624/16 P

Scuola Elementare Maria Montessori Srl
v
European Commission (C-622/16 P)
and
European Commission
v
Scuola Elementare Maria Montessori Srl (C-623/16 P)
and
European Commission
v

Pietro Ferracci (C-624/16 P)

(Appeal — Fourth paragraph of Article 263 TFEU — Admissibility — Regulatory act not entailing implementing measures — Whether of direct concern — State aid — Scheme of aid granted by the Italian authorities to non-commercial entities carrying on specific activities in certain fields — Exemption from the municipal tax on real property — Decision declaring that the recovery of State aid incompatible with the internal market is impossible — Decision declaring that the system of exemption from the municipal property tax for premises where non-commercial activities are carried out by non-commercial entities does not constitute State aid — Actions for annulment brought by potential competitors)

I. Introduction

1. By their appeals in Cases C-622/16 P and C-623/16 P respectively, Scuola Elementare Maria Montessori Srl and the European Commission seek to have set aside the judgment of the General Court of the European Union of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), by which the General Court dismissed as unfounded the action brought by Scuola Elementare Maria Montessori seeking annulment of Commission Decision 2013/284/EU of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy[2] ('the decision at issue'). By its appeal in Case C-624/16 P, the Commission also seeks to have set aside the judgment of the General Court of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), by which the General Court dismissed as unfounded Mr Pietro Ferracci's action for annulment of that decision.

1 Original language: French.

2 OJ 2013 L 166, p. 24.

2. Article 230 EC was amended by the Treaty of Lisbon. The Treaty of Lisbon added to the fourth paragraph of Article 263 TFEU a third limb 'which relaxed the conditions of admissibility of actions for annulment brought by natural and legal persons'. [3] In any event, that was the declared objective.

3. Although the Court recognised that 'the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of Article 230 EC, was to enable those persons to bring, *under less stringent conditions*, actions for annulment of acts of general application', [4] it nonetheless interpreted each of the conditions imposed in the final limb of the fourth paragraph of Article 263 TFEU very restrictively.

4. Thus, regulatory acts have been defined as acts of general application other than legislative acts, [5] the condition that such an act should not entail implementing measures has been distinguished from that of direct concern, [6] and the 'mechanical nature' of any national measure adopted following an act of the European Union is irrelevant when identifying implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU. [7]

5. Following the judgments of 13 March 2018, *Industrias Químicas del Vallés* v *Commission* (C-244/16 P, EU:C:2018:177) and *European Union Copper Task Force* v *Commission* (C-384/16 P, EU:C:2018:176), these appeals therefore offer the Court a final opportunity to confer a modicum of effectiveness on the final limb of the fourth paragraph of Article 263 TFEU. If the Court were to find the that actions giving rise to the present appeals are inadmissible, it would confirm the Lilliputian scope of the amendment made to Article 263 TFEU (formerly Article 230 EC) by the Treaty of Lisbon. [8]

II. Legal framework

6. According to Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU]: [9]

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

3 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 57).

4 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 60). Emphasis added.

5 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 60 and 61).

6 See, to that effect, order of 14 July 2015, *Forgital Italy* v *Council* (C-84/14 P, not published, EU:C:2015:517, paragraph 43).

7 See, to that effect, judgments of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraph 41); of 10 December 2015, *Canon Europa* v *Commission* (C-552/14 P, not published, EU:C:2015:804, paragraph 47) and *Kyocera Mita Europe* v *Commission* (C-553/14 P, not published, EU:C:2015:805, paragraph 46).

8 Subject to the General Court's interpretation that, in order for a regulatory act to 'entail' implementing measures, those measures must be adopted in the 'normal course of events' (judgment of 14 January 2016, *Tilly-Sabco* v *Commission*, T-397/13, EU:T:2016:8, paragraph 43; see also judgment of 14 January 2016, *Doux* v *Commission*, T-434/13, not published, EU:T:2016:7, paragraph 44). Although it was adopted in a judgment against which an appeal was brought, that broader interpretation of the fourth paragraph of Article 263 TFEU was not criticised by the Commission or censured by the Court (see judgment of 20 September 2017, *Tilly-Sabco* v *Commission*, C-183/16 P, EU:C:2017:704). However, 'the criterion which makes the admissibility of an action brought by a natural or legal person against a decision addressed to another person subject to the conditions governing admissibility laid down in the fourth subparagraph of Article 263 TFEU raises an absolute bar to proceeding which the European Union Courts may consider at any time, even of their own motion' (judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 45).

9 OJ 1999 L 83, p. 1.

III. Background to the dispute

7. The background to the dispute, as set out in paragraphs 1 to 20 of the judgments of the General Court of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484) and *Ferracci* v *Commission* (T-219/13, EU:T:2016:485, ('the judgments under appeal') may be summarised as follows.

8. Mr Ferracci is the owner of a bed and breakfast establishment consisting of two bedrooms; Scuola Elementare Maria Montessori is a private educational establishment. In 2006 and 2007 they lodged complaints with the Commission, claiming that, first, the amendment to the scope of the national rules relating to the Imposta comunale sugli immobili (municipal tax on real property, 'ICI') adopted by the Italian Republic and, secondly, Article 149(4) of the Testo unico delle imposte sui redditi (Codified law on income tax, 'the TUIR') constituted State aid incompatible with the common market.

9. In essence, the purpose of the amendment to ICI was to establish that the exemption from that tax, enjoyed since 1992 by non-commercial entities carrying on in real property owned by them only social assistance, welfare, health, educational, accommodation, cultural, recreational, sports and religious activities, should be understood as also applicable to those activities 'even if they were of a commercial nature'. Article 149(4) of the TUIR stated in essence that, unlike all other entities, ecclesiastical entities recognised as legal persons governed by civil law and amateur sports clubs were not subject to the criteria laid down in that provision for the purposes of determining whether they would lose their non-commercial-entity status.

10. Following amendments and clarifications to ICI by the Italian authorities, the Commission, in a letter of 15 February 2010, informed Mr Ferracci and Scuola Elementare Maria Montessori that, on the basis of a preliminary analysis, it considered that the contested measures did not appear to constitute State aid and that accordingly there was no need to pursue the investigation. On 26 April 2010 Mr Ferracci and Scuola Elementare Maria Montessori brought two actions before the General Court, registered under Cases Nos T-192/10 and T-193/10, seeking annulment of the letter of 15 February 2010.

11. On 12 October 2010 the Commission decided to initiate the formal investigation procedure within the meaning of Article 108(2) TFEU, concerning the ICI exemption for non-commercial entities for specific purposes and also Article 149(4) of the TUIR. By two orders of 18 November 2010, the General Court, on application by Mr Ferracci and Scuola Elementare Maria Montessori, ordered that Cases T-192/10 and T-193/10 be removed from the register.[10]

12. On 15 February 2012 the Italian authorities informed the Commission that they intended to adopt new rules on the municipal tax on real property and announced that the ICI exemption would be replaced as from 1 January 2012 by the exemption provided for in the new regime on the Imposta municipale unica (single municipal tax, 'IMU'). Those new rules were adopted on 19 November 2012.

13. On 19 December 2012 the Commission adopted the decision at issue. The Commission found therein, first of all, that the exemption granted to non-commercial entities carrying on, on real property owned by them, activities specified in the ICI regime constituted State aid incompatible with the internal market and unlawfully put into effect by the Italian Republic, in breach of Article 108(3) TFEU. Next, the Commission considered that, given the specific nature of the present case, it would be absolutely impossible for the Italian Republic to recover the unlawful aid, and therefore did not order recovery of the aid in the contested decision. Lastly, the Commission found that neither Article 149(4) of the TUIR nor the exemption provided for in the new IMU regime constituted State aid within the meaning of Article 107(1) TFEU.

10 Orders of the General Court of 18 November 2010, *Ferracci* v *Commission* (T-192/10, not published, EU:T:2010:474) and *Scuola Elementare Maria Montessori* v *Commission* (T-193/10, not published, EU:T:2010:475).

IV. The proceedings before the General Court and the judgments under appeal

14. By applications lodged at the Registry of the General Court on 16 April 2013, Mr Ferracci and Scuola Elementare Maria Montessori each brought an action seeking annulment of the decision at issue in that the Commission found that it was impossible for the Italian authorities to recover the aid considered unlawful and incompatible with the internal market (first part of the contested decision) and also that neither Article 149(4) of the TUIR nor the exemption provided for in the new IMU regime constituted State aid (second and third parts of the contested decision).

15. By documents lodged at the Registry of the General Court on 17 July 2013, the Commission raised pleas of inadmissibility, which were joined to the substance by orders of the General Court of 29 October 2014.

16. In the judgments under appeal, the General Court ruled that the two actions were admissible under the final limb of the fourth paragraph of Article 263 TFEU, holding that the decision at issue was a regulatory act which is of direct concern to Mr Ferracci and Scuola Elementare Maria Montessori and does not entail implementing measures. On the merits, the General Court dismissed the two actions, rejecting in turn the four pleas raised by Mr Ferracci and Scuola Elementare Maria Montessori respectively, alleging infringement of Article 14(1) of Regulation No 659/1999, infringement of Article 107(1) TFEU and infringement of the obligation to state reasons.

V. Forms of order sought and procedure before the Court

17. By its appeal in Case C-622/16 P, Scuola Elementare Maria Montessori claims that the Court should:

– set aside the judgment of the General Court of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), and, consequently, annul the decision at issue in so far as the Commission decided that recovery of the aid in the form of the ICI exemption should not be ordered and considered that the measures relating to the IMU exemption did not fall within the scope of Article 107(1) TFEU;

– in any event, set aside those parts of the judgment relating to such grounds of the present appeal as the Court may rule well founded and uphold, and

– order the Commission to pay the costs of the proceedings at first instance and on appeal.

18. The Commission, supported by the Italian Republic, contends that the Court should:

– dismiss the appeal in its entirety, and

– order the appellant to pay the costs of both the present proceedings and the proceedings at first instance.

19. By its appeals in Cases C-623/16 P and C-624/16 P, the Commission, supported by the Italian Republic, claims that the Court should:

– set aside the judgments under appeal in so far as they declare the actions at first instance admissible under the final limb of the fourth paragraph of Article 263 TFEU;

– declare the actions at first instance inadmissible under the second and the final limbs of the fourth paragraph of Article 263 TFEU and consequently dismiss them in their entirety;

– order Mr Ferracci and Scuola Elementare Maria Montessori respectively to pay the costs incurred by the Commission both in the proceedings before the General Court and in the present proceedings.

20. Scuola Elementare Maria Montessori contends that the Court should:

– dismiss the appeal brought by the Commission in Case C-623/16 P and uphold the judgment of the General Court in that it declared admissible the action brought by Scuola Elementare Maria Montessori;

– order the Commission to pay the costs of the present proceedings.

21. By decision of the President of the Court of 11 April 2017, Cases C-622/16 P to C-624/16 P were joined for the purposes of any oral procedure and the judgment. The parties submitted written pleadings and presented oral argument at the hearing on 6 February 2018.

VI. The appeals

22. Since the Commission's appeals relate to the General Court's assessment of the admissibility of the actions at first instance, I shall first examine that issue. Secondly, I shall consider the grounds of appeal put forward by Scuola Elementare Maria Montessori in support of its appeal.

A. Admissibility of the actions brought by Mr Ferracci and Scuola Elementare Maria Montessori before the General Court

23. In order to have standing to bring an action for annulment on the basis of the final limb of the fourth paragraph of Article 263 TFEU, the action must be brought against a regulatory act which is of direct concern to the applicant and does not entail implementing measures. The Commission puts forward in support of its appeals a single ground of appeal alleging that the General Court wrongly interpreted and applied each of those three conditions.

1. Regulatory nature of the decision at issue

24. The decision at issue comprises three parts. In the first part, the Commission found that the exemption granted to non-commercial entities carrying on, on real property owned by them, activities specified in the ICI regime constituted State aid incompatible with the internal market and unlawfully put into effect by the Italian Republic, in breach of Article 108(3) TFEU. The Commission considered, however, that it was impossible for the Italian Republic to recover that unlawful aid. In the second and third parts, the Commission found respectively that neither Article 149(4) of the TUIR nor the exemption provided for in the new IMU regime constituted State aid within the meaning of Article 107(1) TFEU.

25. According to the Commission, in classifying the decision at issue as a regulatory act, the General Court made three errors of law in the judgments under appeal.[11] First, the General Court wrongly held that any non-legislative act of general application is necessarily a regulatory act. Secondly, the General Court erred in law in inferring that the decision at issue was regulatory in nature from the

11 See judgments of the General Court of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraphs 50 to 52) and *Ferracci* v *Commission* (T-219/13, EU:T:2016:485, paragraphs 53 to 55).

fact that the national measures which are the subject of that decision are of general application. Thirdly, the General Court should not, in any event, have ruled that each of the three parts of the decision at issue was of general application. In so far as the part relating to the ICI exemption concerns the recovery of aid granted under that exemption, that part concerns a closed class of persons.

(a) The classification of regulatory acts within the meaning of the fourth paragraph of Article 263 TFEU as non-legislative acts of general application

26. The Commission's suggestion that not all non-legislative acts of general application are necessarily covered by the final limb of the fourth paragraph of Article 263 TFEU cannot be accepted.

27. It is common ground that the Treaty of Lisbon added to the fourth paragraph of Article 263 TFEU a third limb which '*relaxed* the conditions of admissibility of actions for annulment brought by natural and legal persons'. [12]

28. Nevertheless, the Court has found that the concept of 'regulatory act' used in that provision had a scope more restricted than the concept of 'acts' used in the first two limbs of the fourth paragraph of Article 263 TFEU. [13]

29. On the basis of the considerations set out in the two preceding points, the Court held that 'the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of Article 230 EC, was to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts'. [14] The Court inferred from this that 'the General Court was therefore correct to conclude that the concept of "regulatory act" provided for in the fourth paragraph of Article 263 TFEU [did] not encompass legislative acts'. [15]

30. In order to justify that restrictive interpretation, the Court relied on the *travaux préparatoires* relating to Article III-365(4) of the draft Treaty establishing a Constitution for Europe. [16] However, those *travaux préparatoires* do not establish that other acts of general application should be excluded from the concept of 'regulatory acts'. The possibility of maintaining a restrictive approach in relation to actions by individuals is expressly limited therein to legislative acts. [17] Contrary to what the Commission again maintained at the hearing on 6 February 2018, there is nothing in the *travaux préparatoires* relating to Article III-365(4) of the draft Treaty establishing a Constitution for Europe to support the argument that State aid decisions constitute, 'by their nature', a third category of acts of general application alongside, first, legislative acts and, secondly, regulatory acts as provided for in the final limb of the fourth paragraph of Article 263 TFEU.

12 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 57). Emphasis added.

13 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 58).

14 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 60).

15 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 61).

16 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 59).

17 See Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003 (CONV 636/03, paragraph 22), and Cover note from the Praesidium to the Convention of 12 May 2003 (CONV 734/03, p. 20).

31. Moreover, in contrast to the distinction between legislative acts and non-legislative acts, the exclusion of certain non-legislative acts of general application from the scope of the final limb of the fourth paragraph of Article 263 TFEU cannot be based on a procedural criterion.[18] Furthermore, a case-by-case approach would be contrary to the requirement of legal certainty which must prevail when legal proceedings are brought.

32. In the same way that the Court has recognised that the principle of effective judicial protection requires that an individual must have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in his applying to the courts,[19] an individual must be in a position to determine whether the act at issue may be directly challenged before the Courts of the European Union on the basis of the fourth paragraph of Article 263 TFEU. To that end, the categories of acts open to challenge must necessarily be defined and identifiable with clarity and certainty.

33. Consequently, I consider that the General Court did not err in law in finding in the judgments under appeal that any non-legislative act of general application is necessarily a regulatory act.

(b) The general application of the decision at issue

34. In the judgments under appeal, the General Court considers that 'the contested decision is of general application as regards the three [parts]'.[20] I agree with that analysis: any contrary interpretation would call into question the established classification of Commission decisions concerning the compatibility of an aid *scheme* in the context of the fourth paragraph of Article 263 TFEU, as opposed to Commission decisions concerning the compatibility of *individual* aid.

35. It is probably not unreasonable to assert that an act of general application has always been defined as an act which applies to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract.[21]

36. Admittedly, the decisions which the Commission adopts on the basis of Article 108(2) TFEU are addressed to a particular Member State. However, I have already had the opportunity to state that I shared the view of Advocate General Kokott that decisions addressed to a Member State have the particular feature of being able to 'shape a national legal system and in that way be measures of general application'.[22]

37. Moreover, it is significant that the Council of the European Union defined 'aid scheme' in Regulation No 659/1999 as 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings *defined within the act in a general and abstract manner* and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.[23]

18 Since the Treaty of Lisbon, the classification of a legislative act has depended solely on the procedure laid down in the Treaty article authorising its adoption. 'A legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure' (see judgment of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 62).

19 See, to that effect, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15).

20 Judgments of the General Court of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485, paragraph 54) and *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraph 51).

21 See, implicitly (for the purpose of differentiating an individual decision from a regulation), judgment of 14 December 1962, *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* (16/62 and 17/62, not published, EU:C:1962:47, paragraphs 2 and 3) and, expressly this time, judgment of 15 January 2002, *Libéros* v *Commission* (C-171/00 P, EU:C:2002:17, paragraph 28).

22 Opinion of Advocate General Kokott in *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:204, point 25) and, to that effect, my Opinion in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2013:335, point 85).

23 Article 1(d); emphasis added. That definition was incorporated into Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

38. Above all, that definition of 'aid scheme', which refers to the general and abstract nature of the definition of the undertakings concerned, is also central to the settled case-law of the Court according to which Commission decisions authorising or prohibiting an aid scheme are of general application.

39. As regards decisions authorising an aid scheme, the Court has held that '*the general scope of the contested decision* … result[ed] from the fact that it [was] designed to authorise a tax scheme which applies to a category of operators defined in a general and abstract manner'.[24] As regards decisions prohibiting an aid scheme, the Court has consistently held that that they are, vis-à-vis the undertakings which belong to the sector concerned and are, potentially, beneficiaries of the aid scheme at issue, '*measure[s] of general application* covering situations which are determined objectively and entail … legal effects for a class of persons envisaged in a general and abstract manner'.[25]

40. That case-law, developed in the context of the condition of individual concern already present in Article 230 EC, was not called into question after the entry into force of the Treaty of Lisbon.

41. Thus, for example, in the judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852), the Court saw in Article 1(1) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain[26] a provision which 'applies to objectively determined situations and produces legal effects with respect to categories of persons viewed generally and in the abstract'.[27]

42. I also note that the Court did not accede to the Commission's request to substitute the grounds in the case which gave rise to the order of 10 October 2017, *Greenpeace Energy* v *Commission* (C-640/16 P, not published, EU:C:2017:752) on the ground that the General Court had erred in law 'since, in order to find that the decision at issue was not an act of general application, the General Court [had] not confined itself to its nature as a "decision", but [had] also referred to the fact that that decision related to individual aid'.[28]

43. By not making the requested substitution of the grounds and not criticising the reasoning of the General Court, the Court implicitly but clearly confirms that the General Court was fully entitled not to confine itself to the fact that the contested measure was a decision addressed to a Member State in order to rule that it does not have general application.

44. In support of its position, the Commission relied on paragraph 92 of the judgment of 17 September 2015 (*Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609). In that paragraph, the Court had held that 'as the decision at issue, which was addressed to the French Republic, does not constitute a regulatory act under the fourth paragraph of Article 263 TFEU, since it is not an act of general application …, it [was] necessary to determine whether the appellants [were] directly and individually concerned by that decision, within the meaning of that provision'.

45. Contrary to what the Commission suggested, that analysis could not be generalised. Indeed, the decision at issue was of a particular nature in that it constituted a Commission response to a specific question from the French Republic concerning the obligation to recover individual State aid previously found to be unlawful and incompatible with the internal market. Moreover, if that decision

24 Judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 31). Emphasis added.

25 Judgment of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 37). Emphasis added.

26 OJ 2011 L 7, p. 48.

27 Judgment of 19 December 2013, *Telefónica* v *Commission* (C-272/12 P, EU:C:2013:852, paragraph 48). Article 1(1) of Decision 2011/5 stated that the scheme at issue had been put into effect in breach of Article 88(3) EC and declared it incompatible with the common market.

28 Paragraph 22 of that order.

were to be equated with a Commission decision concerning the lawfulness of State aid, it would in any event have been regarded as of individual application since it was 'related and complementary' [29] to the Commission's initial decision, which was concerned with the granting of aid to one specific undertaking.

46. In conclusion, since Commission decisions declaring an aid scheme either compatible or incompatible with the common market on the basis of Article 108(2) TFEU are regarded as measures of general application, they constitute, on that basis, regulatory acts for the purposes of the final limb of the fourth paragraph of Article 263 TFEU. [30]

47. Moreover, contrary to what the Commission argued at the hearing on 6 February 2018, the fact that the first part of the decision at issue relates to State aid which is no longer in force and whose beneficiaries, therefore, constitute a closed class has no bearing on its general application. Indeed, the classification of a provision as being general and abstract in nature depends not on the possibility of identifying, in the context of its application, a fixed number of beneficiaries but on the way in which those beneficiaries are contemplated by the drafters of the provision. [31] The decisive test is the *purpose* of the act: a provision will be of either individual or general application depending on whether it has been adopted to deal with individual cases or objective situations. [32] However, in the case of a decision relating to an aid scheme, even if that scheme was repealed or replaced at the time of the adoption of the Commission decision, the purpose of the act is actually to govern objective situations defined in abstract terms and not individual cases identified *a priori*.

48. It is therefore by reference to the national measure to which the Commission decision relates that the general application of that decision may and must be determined. A contrary interpretation would lead to a fundamental inconsistency in the application of the various limbs of the fourth paragraph of Article 263 TFEU. Indeed, if the case-law relating to the classification of Commission decisions on State aid developed in the context of examining individual concern is not to be abandoned, [33] the issue of whether Commission decisions on State aid are of individual or general application would be likely to vary — vis-à-vis one and the same applicant! — depending on whether the admissibility of an action for annulment is assessed on the basis of the second or third limb of the fourth paragraph of Article 263 TFEU. In the latter case, the Commission decision would be an act of individual application whereas, in the context of the second limb — which could always be relied on in the alternative by an applicant — the same decision would have general application.

49. Moreover, such a distinction concerning the application of the act would be paradoxical to say the least. Although the objective pursued by the third limb of the fourth paragraph of Article 263 TFEU was to allow an action for annulment to be brought under less stringent conditions of admissibility, the new provision would not apply to Commission decisions on State aid on account of the Court's refusal to recognise that they had the general application which it had nonetheless previously conferred on them prior to the Treaty of Lisbon.

29 In the words of the Court in paragraph 104 of the judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609).

30 See, to that effect, Lenaerts, K., Maselis, I., Gutman, K., *EU Procedural Law*, Oxford University Press, 2014, No 7.120.

31 According to the Court, 'a measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number *or even the identity* of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective' (judgment of 11 July 1968, *Zuckerfabrik Watenstedt* v *Council*, 6/68, EU:C:1968:43; emphasis added). See also judgments of 17 June 1980, *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* (789/79 and 790/79, not published, EU:C:1980:159, paragraph 9); of 30 September 1982, *Roquette Frères* v *Council* (242/81, EU:C:1982:325, paragraph 7); and of 29 June 1993, *Gibraltar* v *Council* (C-298/89, EU:C:1993:267, paragraph 17).

32 See, in those terms, Kovar, R., 'L'identification des actes normatifs en droit communautaire', in *Mélanges en hommage à Michel Waelbroeck*, vol. 1, Brussels, Bruylant, 1999, pp. 387 to 422, in particular p. 390.

33 In addition to the examples cited in point 39 of this Opinion, see judgment of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38, paragraph 15) or judgment of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 53).

50. Having regard to the reasons set out above, I therefore consider that the General Court did not err in law in inferring that the decision at issue is regulatory in nature from the fact that the national measures to which that decision relates are of general application.

2. Direct concern

51. The condition of direct concern was already present in Article 230 EC. Its scope has not changed since the entry into force of the Treaty of Lisbon. In order to satisfy that condition 'two cumulative criteria must be met, namely, first, the contested … measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules'. [34]

52. The second condition determining direct concern is not disputed. As the General Court correctly found, the decision at issue has legal effects on a purely automatic basis under the EU legislation alone and without application of other intermediate rules. [35]

53. On the other hand, the Commission considers that the General Court wrongly concluded that Mr Ferracci and Scuola Elementare Maria Montessori were directly concerned, because they failed to show that the decision at issue had a 'concrete and tangible' effect on their situation. The Commission considers that it is not sufficient to show that the contested measure has a 'theoretical and potential' effect on the market of a competitor of the beneficiary of the aid at issue for the purpose of being 'directly concerned' as provided for in the fourth paragraph of Article 263 TFEU.

54. In my view, such an interpretation results in confusion between the two conditions laid down in the second limb of the fourth paragraph of Article 263, namely, direct concern and individual concern.

55. In order to be individually concerned by an act of general application or by a decision which is not addressed to them, persons who bring an action for annulment must show that the contested act 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'. [36]

56. In matters relating to State aid, that condition is understood to mean that it is for the applicant to show that his position on the market concerned is 'substantially affected by the aid to which the decision at issue relates'. [37] It is therefore not sufficient for an undertaking to rely solely on its status as a competitor of the addressee undertaking to be regarded as being individually concerned. [38] Accordingly, it is actually as a result of that condition that the Court establishes that the contested measure has 'concrete and tangible' effects on the applicant's situation.

34 Judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66).

35 See judgments of the General Court of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485, paragraph 48), and *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraph 45).

36 Judgments of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 72).

37 See, to that effect, judgments of 13 December 2005, *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (C-78/03 P, EU:C:2005:761, paragraph 37); of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 54); and of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 97).

38 See, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 47).

57. If I had to summarise to the extreme the difference between the two conditions set out in the second limb of the fourth paragraph of Article 263 TFEU, I would say that direct concern relates to an applicant's *legal* situation (the contested measure must 'directly [affect] *the legal position* of the [person concerned]'),[39] whereas individual concern relates to an applicant's *factual* situation (the measure must affect them by reason of '*circumstances* in which they are differentiated from all other persons').[40]

58. By requiring the applicant to adduce evidence of a 'concrete and tangible effect' on his situation to demonstrate that he is directly concerned by the contested measure, the Commission enters into the factual assessment of the situation. In so doing, it distorts the condition of direct concern. It imports into the third limb of the fourth paragraph of Article 263 TFEU a condition which the drafters of the Treaty had not included, since they aimed to relax the conditions of admissibility of actions for annulment.[41] In my view, therefore, such a misreading of the condition relating to direct concern cannot be accepted.

59. The Commission bases its arguments on the judgments of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284), and of 17 September 2015, *Confederazione Cooperative Italiane and Others* v *Anicav and Others* (C-455/13 P, C-457/13 P and C-460/13 P, not published, EU:C:2015:616).

60. In *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284) the appellants were undertakings engaged in the refining of imported cane sugar. The Court held that the contested measures were not of direct concern to them because those measures applied only to European sugar *producers*. In *Confederazione Cooperative Italiane and Others* v *Anicav and Others* (C-455/13 P, C-457/13 P and C-460/13 P, not published, EU:C:2015:616) the appellants were industrial processors of fruit. However, the contested provisions applied only to fruit and vegetables processed by organisations of *producers*. In those circumstances, the Court held that the mere fact that the appellants were placed at a competitive disadvantage on account of the contested provisions was not sufficient for the view to be taken that their legal position was affected.

61. For the reasons set out in points 54 to 58 of this Opinion, those particularly stringent applications of the condition relating to direct concern should in my view be limited to the specific circumstances of *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284) and *Confederazione Cooperative Italiane and Others* v *Anicav and Others* (C-455/13 P, C-457/13 P and C-460/13 P, not published, EU:C:2015:616). Although, contrary to the view taken by the General Court in the judgments under appeal, it may seem artificial to consider that the appellants in *T & L Sugars and Sidul Açúcares* v *Commission* and *Confederazione Cooperative Italiane and Others* v *Anicav and Others* were not present on the same markets as the 'producers' covered by the contested provisions, the fact remains that the contested regulations directly produced their effects only on *the legal situation* of those producers, which the appellants were not. Only those producers fell within the scope of the contested measures.

39 Judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 68); emphasis added.

40 Judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 57); emphasis added.

41 On the objective of relaxing the conditions for an action for annulment, see judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 57).

62. On the other hand, in the context of an action against a Commission decision on State aid, I see no reason to declare invalid the case-law of the General Court — developed on the basis of the judgments of the Court of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18, paragraphs 6 to 10), and of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42, paragraph 30) — to the effect that a competitor of the beneficiary of aid is directly concerned by a Commission authorisation decision where the aid has already been granted or where the Member State's intention to provide the aid is not in doubt. [42]

63. In those circumstances, I consider that the General Court did not err in law in concluding that the measures referred to in the decision at issue affected the legal situations of Mr Ferracci and Scuola Elementare Maria Montessori and were of direct concern to them.

3. Existence of implementing measures

64. It should be recalled that the decision at issue comprises three parts. In the first part, the Commission found that the exemption granted to non-commercial entities carrying on, in real property owned by them, activities specified in the ICI regime constituted State aid incompatible with the internal market and unlawfully put into effect. However, it did not require its recovery. In the second and third parts, the Commission concluded, respectively, that neither Article 149(4) of the TUIR nor the exemption provided for in the new IMU regime constituted State aid within the meaning of Article 107(1) TFEU

65. According to the Commission, that decision entails implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, since the appellants could have applied for the tax treatment reserved for their alleged competitors and brought an action before the national court against any refusal by the authorities, thereby challenging the validity of the decision at issue on that occasion. [43]

66. I acknowledge that that conclusion is consistent with the logic of the judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852).

67. In that case, the Court held that a provision in a Commission decision which is intended to declare an aid scheme incompatible with the common market does not define the specific consequences which that declaration will have for each taxpayer. According to the Court, 'those consequences will be embodied in administrative documents such as a tax notice, which constitutes as such an implementing measure … within the meaning of the final limb of the fourth paragraph of Article 263 TFEU'. [44] Accordingly, the Court found that the General Court had been correct in holding that 'the measures for giving effect to the decision as to incompatibility — *including in particular the measure consisting of rejection of an application for grant of the tax advantage at issue*, a rejection which [the appellant] will also be able to contest before the national courts — are implementing measures in respect of the contested decision'. [45]

42 See, in particular, judgments of 6 July 1995, *AITEC and Others* v *Commission* (T-447/93 to T-449/93, EU:T:1995:130); of 22 October 1996, *Skibsværftsforeningen and Others* v *Commission* (T-266/94, EU:T:1996:153); of 3 June 1999, *TF1* v *Commission* (T-17/96, EU:T:1999:119, paragraph 30); of 12 February 2008, *BUPA and Others* v *Commission* (T-289/03, EU:T:2008:29, paragraph 81); and of 18 November 2009, *Scheucher-Fleisch and Others* v *Commission*, T-375/04, EU:T:2009:445, paragraph 36). The Court has also acknowledged that an EU measure, although it was not a Commission decision on State aid, could directly affect the legal situation of an individual where 'the possibility for addressees not to give effect to the [EU] measure is purely theoretical and their intention to act in conformity with it is not in doubt' (judgment of 5 May 1998, *Dreyfus* v *Commission*, C-386/96 P, EU:C:1998:193, paragraph 44). See also, recalling the principle, judgment of 10 September 2009, *Commission* v *Ente per le Ville Vesuviane and Ente per le Ville Vesuviane* v *Commission* (C-455/07 P and C-455/07 P, EU:C:2009:529, paragraph 46).

43 See paragraph 75 of the appeals in Cases C-623/16 P and C-624/16 P.

44 Judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 35).

45 Judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 36); emphasis added.

68. Such reasoning does not seem to me to be applicable in the present appeals for the following reasons.

69. First, the aid at issue in the first part of the decision at issue need not be recovered by the Italian Republic. That first part of the decision at issue therefore does not entail any implementing measure; it is definitive and self-sufficient.

70. Secondly, unlike the appellant in the case in which judgment was given on 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852), Mr Ferracci and Scuola Elementare Maria Montessori are not eligible for the aid at issue but potential competitors of its beneficiaries.[46] The Court has held that the question whether a regulatory act entails implementing measures should be assessed by reference solely to the position of the person who pleads the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU.[47]

71. From that perspective, it must be recognised that no measure 'adopted to implement' the decision at issue will apply to the situations of Mr Ferracci and Scuola Elementare Maria Montessori. It seems to me to be totally artificial to imagine that they might apply for aid which they know perfectly well cannot be granted to them with the sole aim of challenging the refusal decision before a court or tribunal.

72. In that regard, moreover, I fail to see what the effect might be of the difference between an aid scheme which is unlawful but need not be recovered (first part of the decision at issue) and an aid scheme found to be lawful but of which the appellants are not, in any event, beneficiaries (second and third parts of the decision at issue). In both cases, as I have already had the opportunity to indicate, how is it possible not to doubt the genuine effectiveness of a theoretical construct based on the existence of an act which has no other raison d'être than to be challenged in court?[48]

73. In that connection, it may be useful to recall that the origin of the final limb of the fourth paragraph of Article 263 TFEU lies in the Court's assertion that effective judicial protection is not guaranteed where an individual has no choice but to infringe the law in order to prompt the national competent authority to adopt an implementing measure which would lead him to have to defend himself before a court which could make a reference for a preliminary ruling.[49]

74. Moreover, the Court expressly recognised that 'the concept of a "regulatory act which … does not entail implementing measures", within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, [was] to be interpreted in the light of that provision's objective, which, as is clear from its origin, consists in preventing an individual from being obliged to infringe the law in order to have access to a court'.[50]

75. Although, formally, Mr Ferracci and Scuola Elementare Maria Montessori would not commit any infringement by applying for aid which is not intended for them, they would nonetheless be obliged to adopt behaviour which must, with absolute certainty, fail in order to have access to a court. Such a situation is not diametrically opposed, from the point of view of its philosophy, to that which justified the amendment to Article 230 EC.

46 In the case which gave rise to that judgment, it is true that the appellant was not covered by the recovery order and that it had, for the period concerned by the recovery obligation, waived the benefit of the aid at issue. In practice, its situation was therefore similar to the situations of Mr Ferracci and Scuola Elementare Maria Montessori.

47 See, to that effect, judgments of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 30), and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraph 32).

48 See, to that effect, my Opinion in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2013:335, point 62).

49 See, to that effect, judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 64).

50 Judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 27).

76. The cases relating to the Danish scheme of taxation of gambling, which the Commission relied on before the General Court and in support of its appeals, cannot alter that approach. [51]

77. That scheme was regarded by the Commission as compatible with the internal market under Article 107(3)(c) TFEU. In the context of the actions against that Commission decision, the Court held that that decision 'produces legal effects with regard to the appellant[s] only through [the] national legislative measure [which had postponed the entry into force of the scheme at issue until the Commission had made its final decision] and through the tax notices to be adopted on the basis of that measure, which will embody the specific consequences that the declaration of compatibility contained in that decision entails for each taxpayer, including [the] appellant[s]'. [52]

78. In the judgments under appeal, the General Court considered that the situations were not comparable because the operative part of the Commission decision at issue in the cases relating to the Danish scheme of taxation of gambling made provision for the adoption of the provisions implementing the notified measure, in particular *after* its adoption. [53]

79. Irrespective of the relevance of that assessment, there is a fundamental difference between the Danish scheme of taxation of gambling and the Italian provisions at issue in the present appeals. The Danish scheme in no way established a tax exemption for the benefit of certain providers. On the contrary, the national legislation relating to gambling taxes laid down all the different tax rates applicable, including those — higher — rates applicable to the undertakings which challenged the Commission decision. [54]

80. In such a situation, it was therefore not erroneous to regard the tax notices to be adopted on the basis of the national legislation as the implementing measures which the Commission decision 'entails'. Those notices will embody the consequences of the Commission decision and could, with neither difficulty nor artifice, be challenged before the national court.

81. For all those reasons, I consider that the General Court did not err in law in concluding that the decision at issue did not entail implementing measures in respect of Mr Ferracci and Scuola Elementare Maria Montessori.

4. Conclusion on the admissibility of the actions brought by Mr Ferracci and Scuola Elementare Maria Montessori before the General Court

82. In the light of the foregoing, I consider that the decision at issue is indeed a regulatory act which does not entail implementing measures in respect of Mr Ferracci and Scuola Elementare Maria Montessori and which is of direct concern to them.

83. Consequently, as I am of the opinion that the single ground of appeal put forward by the Commission in support of its appeals is unfounded, I consider that the Commission's appeals must be dismissed.

51 Judgments of the General Court of 26 September 2014, *Dansk Automat Brancheforening* v *Commission* (T-601/11, EU:T:2014:839) and *Royal Scandinavian Casino Århus* v *Commission* (T-615/11, not published, EU:T:2014:838), which were upheld by the Court by orders of 21 April 2016, *Dansk Automat Brancheforening* v *Commission* (C-563/14 P, not published, EU:C:2016:303) and *Royal Scandinavian Casino Århus* v *Commission* (C-541/14 P, not published, EU:C:2016:302).

52 Orders of 21 April 2016, *Royal Scandinavian Casino Århus* v *Commission* (C-541/14 P, not published, EU:C:2016:302, paragraph 46), and of 21 April 2016, *Dansk Automat Brancheforening* v *Commission* (C-563/14 P, not published, EU:C:2016:303, paragraph 58).

53 Judgments of the General Court of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485, paragraph 69), and of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraph 66).

54 Orders of 21 April 2016, *Royal Scandinavian Casino Århus* v *Commission* (C-541/14 P, not published, EU:C:2016:302, paragraph 45), and of 21 April 2016, *Dansk Automat Brancheforening* v *Commission* (C-563/14 P, not published, EU:C:2016:303, paragraph 57).

84. Since the admissibility of the actions brought by Mr Ferracci and Scuola Elementare Maria Montessori should be confirmed, it is necessary to examine the appeal brought by Scuola Elementare Maria Montessori, which concerns the substance of the action.

B. Substance of the action brought by Scuola Elementare Maria Montessori before the General Court

85. In support of its appeal against the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, 'the judgment under appeal'), Scuola Elementare Maria Montessori relies on two grounds of appeal. The first ground relates to the General Court's assessment concerning the absence of an order to recover the aid considered illegal and incompatible with the internal market (first part of the decision at issue). The second ground relates to the judgment under appeal in so far as the General Court held that the IMU exemption did not constitute State aid within the meaning of Article 107(1) TFEU (third part of the decision at issue).

1. First ground of appeal: absence of a recovery order

(a) Arguments of the parties

86. The first ground of appeal consists of four parts.

87. In the first place, Scuola Elementare Maria Montessori claims that the General Court infringed Article 108 TFEU, Article 14(1) of Regulation No 659/1999 and Article 4(3) TFEU by allowing the Commission to find that it was absolutely impossible to recover unlawful aid during the formal investigation procedure. It argues that the absolute impossibility of recovering unlawful aid does not constitute a general principle of law for the purposes of Article 14(1) of Regulation No 659/1999.

88. In the second place, Scuola Elementare Maria Montessori disputes the interpretation of the concept of 'absolute impossibility' adopted by the General Court in the judgment under appeal. The General Court is alleged to have relied exclusively on the Italian land register and tax databases, from which it was not possible to extrapolate, retroactively, the data necessary for recovery. That evidence concerns the domestic legal system and cannot, therefore, justify the absolute impossibility of recovering the aid.

89. In the third place, it is argued that the judgment under appeal is based on a misinterpretation of the concept of 'absolute impossibility', in so far as the General Court rejected the claims of Scuola Elementare Maria Montessori concerning the existence of alternative arrangements which would have allowed the Italian Republic to recover the aid in question regardless of the structure of the land registry and tax databases. The General Court also reversed the burden of proof by requiring that Scuola Elementare Maria Montessori demonstrate the possibility of recovering the aid.

90. In the fourth place, Scuola Elementare Maria Montessori complains that the General Court distorted the evidence by holding that it was impossible to infer from the land registry and tax databases the information necessary for the recovery of the aid in question.

91. The Commission contends, in the first place, that the absence of an order for the recovery of the unlawful aid in the decision at issue is consistent with Article 14(1) of Regulation No 659/1999, which prohibits the Commission from ordering recovery where this is contrary to a general principle of law. In accordance with the general principle of law that nobody is bound to do the impossible, the Commission may not impose an obligation whose implementation would, from the beginning, be impossible in objective and absolute terms.

92. In the second place, the Commission argues that Scuola Elementare Maria Montessori confuses the concepts of '*force majeure*' and 'absolute impossibility'. The second concept is broader than the first and covers situations which are in no way unpredictable or abnormal, such as the winding up of the beneficiary undertaking.

93. In the third place, the Commission maintains that the line of argument relating to the existence of alternative methods of recovering the aid in question is based on the erroneous claim that Scuola Elementare Maria Montessori has established the existence of such methods. The General Court rejected the arguments seeking to prove those methods existed. In so far as Scuola Elementare Maria Montessori contests that rejection, it is calling into question factual assessments, which cannot form the subject matter of an appeal.

94. In the fourth place, the Commission submits that the argument based on the distortion of evidence is inadmissible, since Scuola Elementare Maria Montessori merely asks the Court to make an assessment of the evidence different from that made by the General Court.

(b) Analysis

95. In reality, the first two parts of the first ground of appeal put forward by Scuola Elementare Maria Montessori require answers to three questions which logically follow one another:

– First, can the Commission refrain, *a priori*, from ordering the recovery of aid which it considers illegal and incompatible with the common market?

– Next, in the event of an affirmative answer to that first question, is it possible to identify in the present case one of the grounds capable of justifying the absence of a recovery order?

– Finally, in the event of an affirmative answer to that second question, did the General Court err in law in applying the ground thus identified?

(1) Whether the Commission was entitled not to order the recovery of unlawful aid

96. As regards the first question, I am of the opinion that the Commission may, even during the formal investigation procedure concerning an aid scheme, decide not to order the recovery of aid considered to be illegal.

97. Having recalled that the recovery of unlawful aid is the logical consequence of the finding that it is unlawful,[55] the General Court explains, in paragraph 75 of the judgment under appeal, that 'the purpose of the Treaty provisions on State aid is to restore effective competition, so that, *in principle*, the Commission decisions require the Member State concerned to secure, without delay, effective recovery of the aid in question'.[56]

98. I cannot discern any error of law in this. It seems to me correct to see in an order to recover illegal aid a principle, which may, by definition, be subject to exceptions.

55 That assertion of the General Court finds support in the case-law of the Court. See, to that effect, in particular, judgments of 21 March 1990, *Belgium* v *Commission* (C-142/87, EU:C:1990:125, paragraph 66), and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 116).

56 Emphasis added.

99. The case-law of the Court on the role of national courts in implementing the system for supervision of State aid confirms that analysis. Indeed, while stating that 'the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords',[57] the Court has already had the opportunity to clarify that 'it is only in exceptional circumstances *that it would be inappropriate to order repayment of the aid*'.[58] In so doing, the Court has already recognised the possibility, albeit exceptional, of derogating from the principle that recovery of unlawful aid should be ordered.

100. Moreover, that idea is expressly incorporated in Article 14(1) of Regulation No 659/1999, which provides that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

101. Thus, in the words of the Court, 'the Commission is always obliged to order the recovery of aid which it declares to be incompatible with the common market, *unless such recovery would be contrary to a general principle of EU law*'.[59]

102. Even if it occurs only exceptionally, the possibility of not ordering the recovery of illegal aid at the stage of the formal investigation procedure does not therefore seem to me to be in doubt.

103. Consequently, it is appropriate to address the second question raised by Scuola Elementare Maria Montessori's first ground of appeal and to identify the general principle of law which may have justified the absence of a recovery order in the decision at issue.

(2) Existence of a general principle of EU law which, in the present case, justifies the absence of an order for recovery of the aid found to be illegal

104. In the judgment under appeal, the General Court held that 'the Commission [had] not err[ed] in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be *absolutely impossible* for the Italian Republic to recover the aid considered to be illegal in the … decision [at issue]'.[60]

105. According to the Commission, the arguments which the Italian Republic put forward to reach that conclusion arise within the context of the principle '*impossibilium nulla obligatio est*', which may be translated as 'there is no obligation to perform the impossible'.[61] The Commission sees in this the expression of a general principle of EU law.

106. First of all, I note that, although that formulation may have been described as a 'maxim'[62] or mere 'adage'[63] by some of my predecessors, the Court itself recently described it as a 'principle'.[64] Moreover, the Court has, more recently, used it to justify the interpretation of a provision of EU law.[65]

57 Judgment of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 34). More recently, see also judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 111).

58 Judgment of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 35); emphasis added.

59 Judgment of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, not published, EU:C:2011:533, paragraph 124); emphasis added.

60 Judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraph 87); emphasis added.

61 See paragraph 12 of the Commission's response (C-622/16 P). That principle, already known to Roman law (Digest, pp. 50, 17 and 185, *Celsus libro octavo digestorum*) is also expressed as '*nemo potest ad impossibile obligari*'.

62 See Opinion of Advocate General Trstenjak in *Budějovický Budvar* (C-482/09, EU:C:2011:46, footnote 44).

63 See, setting out an argument put forward by Germany, Opinion of Advocate General Geelhoed in *Commission* v *Germany* (C-20/01 and C-28/01, EU:C:2002:717, point 30).

64 See judgment of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42).

65 See judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraph 96).

107. Secondly, although the general principles of EU law may be defined as the fundamental provisions of unwritten primary law which are inherent in the legal order of the European Union,[66] it seems to me that the principle '*impossibilium nulla obligatio est*' may be so described when it is applied in the field of State aid.

108. That recognition is consistent with the fact that the *validity* of a Commission decision concerning the recovery of State aid found to be unlawful is subject to the possibility of recovering the aid in question. According to the Court, 'the … absolute impossibility [of recovering unlawful aid] cannot invalidate the contested decision where it emerges only at the stage of implementation … However, *the Commission may not impose, by a decision such as the contested decision, which would then be invalid, an obligation whose implementation would, from the beginning, be impossible in objective and absolute terms*.'[67]

109. Recognition of that general principle is also consistent with the case-law of the Court according to which, 'when, during the implementation of a Commission decision on State aid, a Member State … *becomes aware of consequences unforeseen by the Commission*, it must submit those problems to the Commission for its assessment, proposing appropriate amendments to the decision in question'.[68] That obligation on the part of the Member State necessarily suggests that had the Commission become aware of the consequences of its decision — such as the impossibility of recovering the unlawful aid —, it could and should have taken them into account at the stage of the decision. Otherwise, there would be no reason to require a Member State which detects such consequences to notify them to the Commission in order to allow the Commission, where appropriate, to amend its decision.

110. In the light of the foregoing considerations, the principle '*impossibilium nulla obligatio est*', understood as an absolute impossibility of recovery, is a fundamental unwritten provision inherent in EU State aid law. It therefore seems to me that it can be described as a general principle of EU law for the purposes of Article 14(1) of Regulation No 659/1999.

(3) Application by the General Court of the principle 'impossibilium nulla obligatio est'

111. Since the principle '*impossibilium nulla obligatio est*' may be regarded as a general principle of EU law for the purposes of Article 14(1) of Regulation No 659/1999, it must be established that the General Court did not err in law in holding that the Commission itself had not made an error of law in finding, first, that the land register and fiscal databases did not allow the beneficiaries of the aid at issue to be identified and, secondly, that it was therefore impossible to secure recovery of the unlawful aid.[69]

112. By the second part of the first ground put forward in support of its appeal, Scuola Elementare Maria Montessori disputes that finding of the General Court, arguing that the evidence relied on by the Italian Government concerns the domestic legal system and cannot, therefore, justify the absolute impossibility of recovering the aid.

66 See, to that effect, Opinion of Advocate General Trstenjak in *Audiolux and Others* (C-101/08, EU:C:2009:410, point 69).

67 Judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 86); emphasis added.

68 Judgment of 12 February 2015, *Commission* v *France* (C-37/14, not published, EU:C:2015:90, paragraph 67); emphasis added. See also judgment of 10 June 1993, *Commission* v *Greece* (C-183/91, EU:C:1993:233, paragraph 19) or judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 88).

69 See judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484, paragraphs 85 and 87).

113. The concept of 'absolute impossibility' has been developed by the Court within the framework of monitoring the implementation of Commission decisions on State aid. According to the settled case-law, 'the only defence available to a Member State against an application by the Commission under Article 108(2) TFEU for a declaration that it has failed to fulfil its obligations is to plead that it was absolutely impossible for it properly to implement the decision of that institution ordering the recovery of the aid in question'.[70]

114. However, it must be stated that, while that defence exists in theory, it is, to date, regarded as well founded only in a specific situation. That is the situation where the undertakings in receipt of the aid in question were wound up without leaving recoverable assets;[71] a mere claim that an undertaking is in a difficult financial position or general and abstract statements relating to the sale of activities of certain undertakings are, moreover, considered insufficient to meet the requirements of an absolute impossibility of recovery.[72] On the contrary, in the case of undertakings which have ceased their activities, 'an absolute impossibility of implementation may be accepted … only on the basis of [the] individual circumstances [of the undertakings concerned]'.[73]

115. Next, it is equally certain that the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled those difficulties to be overcome. The significance and established nature of this rule is beyond doubt.[74]

116. More specifically, I note that the Court has already found that difficulties concerning the identification of beneficiaries on account of a lacuna in the applicable law or concerning the calculation of the amount of the aid to be recovered and the choice and implementation of recovery procedures are internal difficulties caused by the national authorities' own acts or omissions.[75] Nor, similarly, does the large number of undertakings involved warrant regarding recovery as technically impossible.[76]

117. In the present case, however, it must be noted that the arguments put forward by the Italian Government and accepted by the Commission are of that kind.

118. As the General Court states in paragraph 76 of the judgment under appeal, 'in the … decision [at issue], the Commission stated, in recitals 191 to 198, that, given the specific nature of the present case, it would be absolutely impossible for the Italian Republic to recover any aid unlawfully granted under the ICI provisions. In essence, it explained that it was not possible to identify from the land register or tax databases the type of activity (economic or non-economic) carried on on the real property belonging to the non-commercial entities, or to calculate objectively the amount of the tax to be recovered'.

70 Judgment of 24 January 2013, *Commission* v *Spain* (C-529/09, EU:C:2013:31, paragraph 99). That possibility was set out for the first time in the judgment of 15 January 1986, *Commission* v *Belgium* (52/84, EU:C:1986:3, paragraph 14). More recently, see judgment of 9 November 2017, *Commission* v *Greece* (C-481/16, not published, EU:C:2017:845, paragraph 28).

71 See judgment of 2 July 2002, *Commission* v *Spain* (C-499/99, EU:C:2002:408, paragraph 37). To that effect, Karpenschif, M., *Droit européen des aides d'État*, Brussels, Bruylant, 2nd ed., 2017, No 612.

72 See judgments of 2 July 2002, *Commission* v *Spain* (C-499/99, EU:C:2002:408, paragraphs 38 to 40), and of 13 November 2008, *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 63).

73 Judgment of 13 November 2008, *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 64).

74 Since it was first formulated in the judgment of 2 February 1989, *Commission* v *Germany* (94/87, EU:C:1989:46, paragraph 10), I have recorded no fewer than 31 references to that rule.

75 See, to that effect, judgment of 13 November 2008, *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 50).

76 See, to that effect, judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 90).

119. In paragraph 85 of the judgment under appeal, the General Court repeated that 'the Italian Republic explained that, owing to the structure of the land register and absence of relevant tax information, it was impossible to extrapolate, retroactively, on the basis of the land register and tax databases, the type of data necessary to undertake recovery of the alleged aid. In the light of those explanations, the Commission considered that it was impossible to identify the beneficiaries of the aid in question and that the aid could not objectively be calculated in the absence of available data, as it explained in the … decision [at issue]'.

120. Those arguments, relating to land register data and tax data, are similar to those put forward by the French Republic in the case in which judgment was given on 13 November 2008, *Commission* v *France* (C-214/07, EU:C:2008:619), which also concerned a tax exemption.[77]

121. Unlike the French Government, which argued that that case involved external constraints connected to the extent and complexity of the recovery process, the Court considered that it involved internal difficulties caused by the national authorities' own acts or omissions.[78] Very recently, the Court has even stated that 'apprehension of *even insuperable* internal difficulties, relating inter alia to verification of the situation of each undertaking concerned for the purposes of recovering the unlawful aid … cannot justify a failure by a Member State to fulfil its obligations under EU law'.[79]

122. Consequently, I am of the view that the General Court erred in law in concluding, in paragraph 87 of the judgment under appeal, on the basis of evidence relating solely to deficiencies in the land register and tax data, that 'the Commission [had] not err[ed] in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be absolutely impossible for the Italian Republic to recover the aid considered to be illegal in the … decision [at issue]'.

123. As pointed out earlier, the recovery of unlawful aid is the logical consequence of the finding that it is unlawful.[80] I concluded from this that the obligation to order the recovery of unlawful aid was a principle, which could be subject to exceptions.[81] However, like any exception, this one must be interpreted restrictively.

124. I therefore consider that, in matters of State aid, contrary to what the General Court held in the judgment under appeal, there can be no question of giving a wider scope to the general principle of law '*impossibilium nulla obligatio est*' than is given to the 'absolute impossibility' of recovering illegal aid at the stage of implementation of the Commission decision.

125. Consequently, if arguments relating to legal, political or administrative difficulties were not accepted by the Court in the context of implementing a Commission decision ordering the recovery of aid granted under an aid scheme, they cannot be accepted at the stage of the decision taken at the end of the formal investigation procedure.

77 The French Republic relied, in particular, on the fact that the aid scheme at issue did not necessarily involve a specific identification of the recipients in the context of a declaratory system and even on the fact that the tax declarations made at national level did not include certain information necessary for calculating the aid to be recovered (see judgment of 13 November 2008, *Commission* v *France*, C-214/07, EU:C:2008:619, paragraphs 23 and 28).

78 Compare paragraphs 21 and 50 of the judgment of 13 November 2008, *Commission* v *France*, C-214/07, EU:C:2008:619). The Commission has had occasion to distinguish those difficulties from the situation in which it was impossible to identify the beneficiaries of aid because the statutory period for retaining financial records had expired (see, to that effect, the Commission's position in the case giving rise to the judgment of 13 November 2008, *Commission* v *France*, C-214/07, EU:C:2008:619, paragraphs 13, 22 and 48). That said, if the Court were to be required to rule on that particular circumstance — which it did not have to do in *Commission* v *France*, cited above –, its most recent case-law even permits me to doubt the relevance of the distinction, since the Court recently held that 'apprehension of even insuperable internal difficulties … cannot justify a failure by a Member State to fulfil its obligations under EU law' (judgment of 13 September 2017, *Commission* v *Belgium*, C-591/14, EU:C:2017:670, paragraph 44).

79 Judgment of 13 September 2017, *Commission* v *Belgium* (C-591/14, EU:C:2017:670, paragraph 44 and case-law cited). Emphasis added.

80 See case-law cited in footnote 55.

81 See point 98 of this Opinion.

(c) Conclusion on the first ground of appeal

126. I conclude from the foregoing considerations that the General Court erred in law in holding, in paragraph 87 of the judgment under appeal, that the Commission had not erred in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be absolutely impossible for the Italian Republic to recover the aid considered to be unlawful in the decision at issue, relying solely on the impossibility of extrapolating retroactively, on the basis of the available land register and tax databases, the type of data necessary to undertake recovery of the alleged aid.

127. The arguments put forward by Scuola Elementare Maria Montessori in the third and fourth parts of the first ground of appeal also concern the General Court's application of the condition relating to the 'absolute impossibility' of recovering the aid at issue. Those arguments are therefore incapable of bringing about a more extensive setting aside of the judgment of the General Court with respect to the first part of the decision at issue. It is therefore not necessary to examine them.

2. Second ground of appeal

128. By its second ground of appeal, Scuola Elementare Maria Montessori criticises the judgment under appeal in that the General Court held that the IMU exemption does not constitute State aid within the meaning of Article 107(1) TFEU (third part of the decision at issue) on the ground that the conditions under which it is granted ensure that it is not applied to 'economic activities'.

(a) Arguments of the parties

129. In order to benefit from the IMU exemption, the activities covered by the applicable rules must be carried out on a 'non-commercial basis'.[82] That concept is defined in Article 1(1)(p) of Ministerial Decree No 200 of 19 November 2012 ('the Ministerial Decree'): the activities must be not-for-profit and there must be no competitive relationship between the activity of the entity benefiting from the exemption and the activities of profit-seeking operators in the market.

130. According to Scuola Elementare Maria Montessori, the concept of 'economic activity' exercised on a 'non-commercial basis' is unknown to EU competition law and the general criteria set out in Article 1(1)(p) of the Ministerial Decree diverge from those developed by the Court.

131. Moreover, according to the appellant, activities such as those connected with education and accommodation include, 'typically, an offer of goods and services on the market and … are *by their nature in competition* with the activities carried out by other market operators'.[83] The condition relating to the absence of competition is therefore, in effect, purely formal.

132. Furthermore, Scuola Elementare Maria Montessori considers that the General Court should have carried out a more in-depth examination of the 'objective' conditions that are set out in the Ministerial Decree and define the specific characteristics which each activity, in particular education and accommodation activities, must satisfy to benefit from the exemption at issue. Thus, in order for educational activities to be regarded as being carried out on a 'non-commercial' basis, the appellant states that they must be 'provided either free of charge or for a symbolic fee covering only a fraction of the actual cost of the service'.[84] With that condition, the appellant argues that the Ministerial Decree allows services offered by beneficiaries of the exemption to be financed by individuals by

82 See Article 91a(1) of Decree Law No 1 of 24 January 2012 on urgent provisions for competition, infrastructure development and competitiveness, converted into law, with amendments, by Law No 27 of 24 March 2012.

83 See paragraph 57 of the appeal of Scuola Elementare Maria Montessori (emphasis added by appellant).

84 Article 4(3)(c) of the Ministerial Decree.

means of the payment of consideration covering a substantial part of the costs.[85] As regards accommodation activities, in order for them to be regarded as being carried out on a 'non-commercial' basis, the appellant states that they must also be 'provided free of charge or for a symbolic fee which, in any event, must not exceed half the average price for similar activities in the same geographical area on a competitive basis'.[86] The appellant takes the view that, with that reference to half the average price for similar activities carried out on a competitive basis, the Ministerial Order recognises that a service offered at a symbolic price is economic in nature.[87]

133. By contrast, the Commission considers that the reasoning of the General Court is not only logical but also correct from a legal point of view. In the Commission's view, moreover, the appellant's criticism of the condition relating to the symbolic consideration which may be demanded to finance educational and accommodation activities (objective condition) is based on an incorrect premiss.

(b) Analysis

134. Scuola Elementare Maria Montessori criticises the use by the Italian legislation of a concept unknown to EU competition law, namely that of economic activity exercised on a 'non-commercial basis'. The appellant argues that the General Court's interpretation of that concept is contrary to the concepts of 'undertaking' and 'economic activity' as set out in the case-law of the Court.

135. I do not agree with that reading of the judgment under appeal. On the contrary, both the Commission (in the decision at issue) and the General Court (in the judgment under appeal) viewed the preliminary condition laid down by the Italian legislation for entitlement to the IMU exemption through the prism of the concepts of 'undertaking' and 'economic activity' as defined by the Court in its settled case-law.

136. First, it is established that 'EU competition law and, in particular, the prohibition laid down in Article 107(1) TFEU concern the activities of undertakings',[88] an undertaking including, in that field of EU competition law, 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.[89] Secondly, it is equally certain that 'any activity consisting in offering goods or services on a given market is an economic activity'.[90] In those circumstances, 'the fact that the offer of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit'.[91]

137. It is on the basis of those definitions, recalled in paragraphs 131 to 133 of the judgment under appeal, that the General Court examined the lawfulness of the IMU exemption scheme.

85 See paragraph 59 of the appeal of Scuola Elementare Maria Montessori.

86 Article 4(4) of the Ministerial Decree.

87 See paragraph 64 of the appeal of Scuola Elementare Maria Montessori.

88 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 39). See also judgment of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 88).

89 Judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 107); of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* (C-288/11 P, EU:C:2012:821, paragraph 50); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 41).

90 Judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 108); of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* (C-288/11 P, EU:C:2012:821, paragraph 50); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 45).

91 Judgments of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 27) and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 46). See also, to that effect, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 123).

138. As the General Court found, the Ministerial Decree expressly excludes from the scope of the IMU exemption activities which are in competition with those of other operators that seek to make a profit.[92] Consequently, the General Court did not err in law in ruling, in paragraph 137 of the judgment under appeal, that 'that legislation applie[d] only to entities that cannot be regarded as "undertakings" for the purposes of the application of EU law'.

139. As the Commission rightly points out in its response, although it is possible that that condition has not been fulfilled, that fact would have no bearing on the lawfulness of the scheme under consideration but constitute only an infringement of the national legislation.[93]

140. Alongside that general condition relating to the exercise of the activity on a 'non-commercial basis', the Ministerial Decree makes the IMU exemption subject to compliance with 'objective' conditions specific to certain types of activities. Contrary to what the appellant argues, the 'objective' conditions relating to educational and accommodation activities do not call into question the assessment of the exemption scheme.

141. With regard to educational activities, Scuola Elementare Maria Montessori recalls that the educational activity must be provided either free of charge or for symbolic consideration covering only a fraction of the actual cost of the service. Accordingly, the appellant takes the view that, under the Italian legislation, the services offered may be financed *essentially* by private individuals by means of the payment of consideration.[94]

142. As presented by the appellant, that argument may seem to have some force. However, it does not stand up to analysis. First, it is doubtful that a payment covering only '*a fraction* of the actual cost of the service' could finance the essential part of the service provided. Next, the fact remains that the appellant takes into account only part of Article 4(3)(c) of the Ministerial Decree. Indeed, it is 'astonishing' that the appellant omits the last condition, which is nonetheless expressly provided for by that provision. Although the Ministerial Decree authorises payment of a symbolic fee, Article 4(3)(c) of the Ministerial Decree adds that the fee charged must have *no connection* with the actual cost of the service.

143. For an educational activity to be regarded as a provision of services, 'courses [must be] provided by educational establishments financed *essentially* by private funds that do not come from the provider itself'.[95] Therefore, since the external contribution which may be charged must necessarily have no connection with the actual cost of the service, it seems to me impossible for it to finance the essential part of that service.

92 It will be recalled that, according to Article 91a(1) of Decree Law No 1, in order to benefit from the IMU exemption, the activities covered by the applicable rules must be carried out on a 'non-commercial basis'. According to Article 1(1)(p) of the Ministerial Decree, in order to fulfil that requirement, the activities must be not-for-profit and there must be no competitive relationship between the activity of the entity benefiting from the exemption and the activities of market operators that seek to make a profit.

93 See paragraph 69 of the Commission's response.

94 See paragraph 59 of its appeal. Similar reasoning is applied to accommodation activities: the possibility of charging a symbolic fee 'not exceeding half the average price charged for similar activities' is claimed to render economic in nature a service offered at a symbolic price (see paragraph 64 of that appeal).

95 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 48); emphasis added. See also, to that effect, judgment of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 40). Contrary to what the appellant suggests, the case-law cited by the General Court in paragraph 141 of the judgment under appeal is therefore entirely relevant.

144. Since the symbolic fee authorised by the Ministerial Decree cannot cover the essential part of the educational activity, it cannot be treated as financial consideration for that service. It is therefore not a payment within the meaning of EU competition law. In other words, Article 4(3)(c) of the Ministerial Decree ensures that entities eligible for the IMU exemption on the basis of an educational activity do not carry out an 'economic activity', in so far as their purpose is not to make an economic profit by means of that activity. [96]

145. With regard to accommodation activities, the conditions imposed by the Ministerial Decree also ensure that those activities are non-economic in nature. First, Article 1(1)(j) of that decree reserves the IMU exemption for accommodation services that are accessible only to certain categories of people and are not open on a continuous basis. Moreover, that provision expressly excludes hotels or similar establishments. Next, as in the case of educational activities, Article 4(4) of that decree authorises only the payment of a symbolic fee for accommodation activities which, 'in any event, must not exceed half the average price for similar activities carried out on a competitive basis in the same geographical area, *also taking into account the absence of any connection with the actual cost of the service*' [97] (that latter detail again being omitted by the appellant).

146. In those circumstances, I consider that the General Court did not err in law in its assessment of the 'objective conditions' relating to educational and accommodation activities.

(c) Conclusion on the second ground of appeal

147. I conclude from the foregoing considerations that the General Court did not err in law in its examination of the compatibility of the IMU exemption scheme. It correctly found that the appellant had failed to establish that that scheme could be applied to activities of an economic nature or that the Commission had, accordingly, infringed Article 107(1) TFEU.

VII. Reference of the cases back to the General Court

148. At the end of my analysis of the second ground relied on by Scuola Elementare Maria Montessori in support of its appeal, I consider that the General Court did not err in law in its examination of the compatibility of the IMU exemption scheme. If the Court agrees with my analysis, the judgment of the General Court will be final as regards the third part of the decision at issue.

149. By contrast, at the end of my analysis of the first ground relied on by Scuola Elementare Maria Montessori in support of its appeal, I reached the conclusion that the General Court had erred in law in holding, in paragraph 87 of the judgment under appeal, that the Commission had not erred in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be absolutely impossible for the Italian Republic to recover the aid considered to be unlawful in the decision at issue.

150. If the Court agrees with my analysis, the General Court's judgment will have to be set aside in that respect. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, in such circumstances, itself give final judgment in the matter, where the state of the proceedings so permits. I consider that this is so in the present case.

96 On the distinction between educational institutions by means of which the State fulfils its duties in the social, cultural and educational fields and those which, 'financed essentially out of private funds, in particular by students or their parents, … *seek to make an economic profit*', see judgment of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paragraph 17); emphasis added.

97 Emphasis added.

151. It is apparent from the grounds set out in points 118 to 125 of this Opinion that the Commission erred in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be absolutely impossible for the Italian Republic to recover the aid considered to be unlawful, relying solely on the impossibility of extrapolating retroactively, on the basis of the available land register and tax databases, the type of data necessary to undertake recovery of the alleged aid. The first part of the decision at issue must therefore also be annulled, in that the Commission decided that it was impossible for the Italian authorities to recover the aid found to be unlawful and incompatible with the common market.

VIII. Costs

152. According to Article 138(3) of the Rules of Procedure of the Court, applicable to proceedings on appeal under Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

153. If the Court agrees with my analysis of the appeals, that exception would seem to me to be applicable in this case. While the Commission's appeals are unfounded, Scuola Elementare Maria Montessori is unsuccessful only in one of the grounds relied on in support of its own appeal. Moreover, it must also be noted that the decision contested before the General Court is, in the final analysis, partially annulled.

154. In those circumstances, since the first of the three parts of the decision at issue is annulled, I consider that the Commission should be ordered to pay, in addition to its own costs in the proceedings before the General Court and the Court, one third of the costs incurred by Scuola Elementare Maria Montessori in the two sets of proceedings.

155. In accordance with Article 184(4) of the Rules of Procedure of the Court, the Italian Republic must bear its own costs.

IX. Conclusion

156. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) Set aside the judgment of the General Court of the European Union of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), is in so far as it determined that the Commission had not erred in law in finding, during the formal investigation procedure and before adopting a recovery order, that it would be absolutely impossible for the Italian Republic to recover the aid considered to be unlawful in Commission Decision 2013/284/EU of 19 December 2012 on State aid SA. 20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy, relying solely on the impossibility of extrapolating retroactively, on the basis of the available land register and tax databases, the type of data necessary to undertake recovery of the alleged aid;

(2) Annul the first part of Decision 2013/284, in that the Commission decided that it was impossible for the Italian authorities to recover the aid considered unlawful and incompatible with the common market;

(3) Dismiss the appeals brought by the Commission against the judgments of the General Court of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484) and *Ferracci* v *Commission* (T-219/13, EU:T:2016:485);

(4) Order the Commission to bear its own costs before the General Court and the Court and one third of the costs incurred by Scuola Elementare Maria Montessori in those two sets of proceedings.