Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2018 *

(Appeal — State aid — Decision declaring the recovery of State aid incompatible with the internal market to be impossible — Decision finding that there is no State aid — Actions for annulment brought by competitors of beneficiaries of State aid — Admissibility — Regulatory act not entailing implementing measures — Direct concern — Concept of 'absolute impossibility' of recovery of State aid incompatible with the internal market — Concept of 'State aid' — Concepts of 'undertaking' and 'economic activity')

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

THREE APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 November 2016,

Scuola Elementare Maria Montessori Srl, established in Rome (Italy), represented by E. Gambaro and F. Mazzocchi, avvocati,

appellant,

the other parties to the proceedings being:

European Commission, represented by D. Grespan, P. Stancanelli and F. Tomat, acting as Agents,

defendant at first instance,

Italian Republic, represented by G. Palmieri, acting as Agent, and G. De Bellis and S. Fiorentino, avvocati dello Stato,

intervener at first instance (C-622/16 P),

European Commission, represented by P. Stancanelli, D. Grespan and F. Tomat, acting as Agents,

appellant,

the other parties to the proceedings being:

Scuola Elementare Maria Montessori Srl, established in Rome, represented by E. Gambaro and F. Mazzocchi, avvocati,

applicant at first instance,

* Language of the case: Italian.

Italian Republic, represented by G. Palmieri, acting as Agent, and G. De Bellis and S. Fiorentino, avvocati dello Stato,

intervener at first instance (C-623/16 P),

and

European Commission, represented by P. Stancanelli, D. Grespan and F. Tomat, acting as Agents,

appellant,

the other parties to the proceedings being:

Pietro Ferracci, residing in San Cesareo (Italy),

applicant at first instance,

Italian Republic, represented by G. Palmieri, acting as Agent, and G. De Bellis and S. Fiorentino, avvocati dello Stato,

intervener at first instance (C-624/16 P),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, T. von Danwitz (Rapporteur) and C. Toader, Presidents of Chambers, D. Šváby, M. Berger, C.G. Fernlund and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 6 February 2018,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2018,

gives the following

Judgment

1 By their appeals in Cases C-622/16 P and C-623/16 P 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), dismissing as unfounded the action brought by Scuola Elementare Maria Montessori for the 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 (OJ 2013 L 166, p. 24, 'the decision at issue').

2 By its appeal in Case C-624/16 P the Commission 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), dismissing as unfounded the action brought by Mr Pietro Ferracci for the annulment of the decision at issue.

Legal context

3 Article 1(d) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) defines 'aid scheme' 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'.

4 Article 14(1) of that regulation states:

'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 (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

Background to the disputes

5 For the purposes of the present proceedings, the background to the disputes, 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 of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), (together 'the judgments under appeal') may be summarised as follows.

6 Mr Ferracci is the owner of a tourist bed and breakfast establishment consisting of two bedrooms. Scuola Elementare Maria Montessori is a private educational establishment. In 2006 and 2007 they brought complaints to the Commission, claiming that, first, the amendment to the scope of the national scheme of the Imposta comunale sugli immobili (municipal tax on real property, 'ICI') by the Italian Republic and, second, Article 149(4) of the Testo unico delle imposte sui redditi (single text of taxes on income, 'the TUIR') constituted State aid that was not compatible with the internal market.

7 The amendment to the scope of ICI aimed essentially to establish that the exemption from that tax enjoyed from 1992 by non-commercial entities carrying on, on their real property, exclusively social assistance, welfare, health care, 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 essentially exempted ecclesiastical bodies recognised as legal persons governed by civil law and amateur sports clubs from the application of the criteria laid down in that provision for all other entities for the purpose of determining the loss of the status of non-commercial entity.

8 On 12 October 2010 the Commission decided to open the formal investigation procedure under Article 108(2) TFEU concerning the exemption from ICI and Article 149(4) of the TUIR.

9 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 exemption from ICI would be replaced as from 1 January 2012 by the exemption under the new rules on the Imposta municipale unica (single municipal tax, 'IMU'). Those rules were adopted on 19 November 2012.

10 On 19 December 2012 the Commission adopted the decision at issue, in which it found, first, that the exemption granted under the ICI rules to non-commercial entities carrying on specific activities on their real property constituted State aid that was incompatible with the internal market and had been unlawfully implemented by the Italian Republic, in breach of Article 108(3) TFEU. Next, the Commission considered that, in view of the particular circumstances of the case, it would be

absolutely impossible for the Italian Republic to recover the unlawful aid, so that the Commission did not order it to do so in the decision at issue. Finally, the Commission found that neither Article 149(4) of the TUIR nor the exemption under the new IMU scheme constituted State aid within the meaning of Article 107(1) TFEU.

The actions before the General Court and the judgments under appeal

11 By applications lodged with the Registry of the General Court on 16 April 2013, Mr Ferracci and Scuola Elementare Maria Montessori each brought an action for the annulment of the decision at issue, in so far as the Commission had found in that decision that it would be impossible for the Italian authorities to recover the aid considered to be unlawful and incompatible with the internal market ('the first part of the decision at issue'), that Article 149(4) of the TUIR did not constitute State aid ('the second part of the decision at issue'), and that the same applied to the new IMU scheme ('the third part of the decision at issue').

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

13 In the judgments under appeal the General Court declared both actions admissible under the third limb of the fourth paragraph of Article 263 TFEU, taking the view that the decision at issue was a regulatory act of direct concern to Mr Ferracci and Scuola Elementare Maria Montessori which did not entail implementing measures with respect to them. The General Court dismissed both actions on the substance.

Procedure before the Court of Justice and forms of order sought

14 By its appeal in Case C-622/16 P, Scuola Elementare Maria Montessori asks the Court to:

– 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 not to order recovery of the aid granted by means of the exemption from ICI and found that the measures relating to the exemption from IMU did not fall within the scope of Article 107(1) TFEU;

– in any event, set aside those parts of that judgment covered by such grounds of appeal as the Court may find valid and well founded; and

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

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

– dismiss the appeal in its entirety; and

– order the applicant to pay the costs of the present proceedings and those at first instance.

16 By its appeals in Cases C-623/16 P and C-624/16 P, the Commission, supported by the Italian Republic, asks the Court to:

– set aside the judgments under appeal in so far as the General Court declared the actions at first instance admissible on the basis of the third limb of the fourth paragraph of Article 263 TFEU;

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

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

17 Scuola Elementare Maria Montessori contends that the Court should:

– dismiss the Commission's appeal in Case C-623/16 P and uphold the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), in so far as the General Court declared admissible the action brought by it against the decision at issue; and

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

18 By decision of the President of the Court of 11 April 2017, Cases C-622/16 P to Case C-624/16 P were joined for the purposes of the oral procedure and the judgment.

The Commission's appeals in Cases C-623/16 P and C-624/16 P

19 In support of its appeals in Cases C-623/16 P and C-624/16 P, the Commission, supported by the Italian Republic, puts forward a single ground of appeal divided into three parts, arguing that the General Court misinterpreted and misapplied each of the three cumulative conditions in the third limb of the fourth paragraph of Article 263 TFEU.

First part

Arguments of the parties

20 The Commission submits that the classification of the decision at issue as a regulatory act is vitiated by errors of law. First, the General Court wrongly considered that any non-legislative act of general application is necessarily a regulatory act. Second, the General Court wrongly deduced the regulatory nature of the decision at issue from the general application of the national measures which formed its subject matter. Third, in that the first part of the decision at issue concerned a limited class of persons, the General Court should not, in any event, have found that all three parts of the decision at issue were of general application.

21 Scuola Elementare Maria Montessori disputes those arguments.

Findings of the Court

22 In the first place, it should be recalled that by the Treaty of Lisbon a third limb was added to the fourth paragraph of Article 263 TFEU, relaxing the conditions of admissibility of actions for annulment brought by natural and legal persons. That limb, without subjecting the admissibility of actions for annulment brought by natural and legal persons to the condition of individual concern, allows such actions to be brought against 'regulatory acts' which do not entail implementing measures and are of direct concern to the applicant (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).

23 As regards the concept of 'regulatory acts', the Court has held that its scope is more restricted than that of the concept of 'acts' used in the first and second limbs of the fourth paragraph of Article 263 TFEU and refers to acts of acts of general application other than legislative acts (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 58 to 61).

24 As the Advocate General observes in point 26 of his Opinion, the interpretation supported by the Commission, namely that there are non-legislative acts of general application, such as the decision at issue, that are not covered by the concept of 'regulatory act' within the meaning of the third limb of the fourth paragraph of Article 263 TFEU, cannot be accepted. There is no basis for that interpretation in the wording, origin or purpose of that provision.

25 As regards, first, the wording of the provision, it refers to 'regulatory acts' generally and contains no indication that that reference is only to certain kinds or subcategories of those acts.

26 As regards, next, the origin of the provision, it appears from the legislative history of Article III-365(4) of the draft Treaty establishing a Constitution for Europe, the content of which was repeated in the same words in the fourth paragraph of Article 263 TFEU, that the addition of the third limb to that provision was intended to broaden the conditions of admissibility of actions for annulment with respect to natural and legal persons, and the only acts of general application for which a restrictive approach was to be maintained were legislative acts (see, in particular, Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice, 25 March 2003 (CONV 636/03, point 22), and Cover note from the Praesidium to the Convention, 12 May 2003 (CONV 734/03, p. 20)).

27 As regards, finally, the purpose of the third limb of the fourth paragraph of Article 263 TFEU, as may be seen from paragraphs 22, 23 and 26 above, its objective is to relax the conditions of admissibility of actions for annulment brought by natural and legal persons against all acts of general application, with the exception of those of a legislative nature. To remove certain kinds or subcategories of non-legislative acts of general application from the scope of that provision would run counter to that objective.

28 Consequently, it must be considered that the concept of 'regulatory act' within the meaning of the third limb of the fourth paragraph of Article 263 TFEU extends to all non-legislative acts of general application. Since the decision at issue is not a legislative act, the General Court did not err in law by confining itself, for the purpose of examining the regulatory nature of the three parts of that decision, to assessing whether those parts are of general application.

29 In the second place, it should be recalled that, according to settled case-law of the Court, an act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in a general and abstract manner (judgments of 11 July 1968, *Zuckerfabrik Watenstedt* v *Council*, 6/68, EU:C:1968:43, p. 415; of 15 January 2002, *Libéros* v *Commission*, C-171/00 P, EU:C:2002:17, paragraph 28 and the case-law cited; and of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 51 and the case-law cited).

30 Article 1(d) of Regulation No 659/1999 defines 'aid scheme' 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'.

31 As regards the second limb of the fourth paragraph of Article 263 TFEU, the Court has repeatedly held in the field of State aid that decisions of the Commission authorising or prohibiting a national scheme are of general application. That general application derives from the fact that such decisions apply to

objectively determined situations and produce legal effects with respect to a category of persons envisaged in a general and abstract manner (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 31; of 17 September 2009, *Commission* v *Koninglijke Friesland/Campina*, C-519/07 P, EU:C:2009:556, paragraph 53 and the case-law cited; and of 28 June 2018, *Lowell Financial Services* v *Commission*, C-219/16 P, not published, EU:C:2018:508, paragraph 42 and the case-law cited).

32 As the Advocate General observes in points 48 and 49 of his Opinion, that case-law may be applied to the third limb of the fourth paragraph of Article 263 TFEU. The issue of whether or not an act is of general application concerns an objective characteristic of the act which cannot vary according to the different limbs of the fourth paragraph of Article 263 TFEU. Moreover, an interpretation according to which an act could at the same time be of general application in relation to the second limb of the fourth paragraph of Article 263 TFEU and not be of general application in relation to the third limb of the fourth paragraph of Article 263 TFEU would run counter to the objective behind the addition of that provision, which was to relax the conditions of admissibility for annulment actions brought by natural or legal persons.

33 Consequently, the General Court did not err in law in considering that the second and third parts of the decision at issue are of general application.

34 In the third place, as regards the first part of the decision at issue, it is true that, according to settled case-law of the Court, a recovery order is of individual concern to the beneficiaries of the aid scheme in question, in that, once such an order is adopted, they are exposed to the risk that the benefits they have received will be recovered and are therefore members of a restricted class (see, to that effect, judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraphs 33 to 35; of 29 April 2004, *Italy* v *Commission*, C-298/00 P, EU:C:2004:240, paragraph 39; and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 56).

35 However, contrary to the Commission's arguments, it cannot be deduced from that case-law that the first part of the decision at issue is not of general application and is therefore not regulatory.

36 It follows from that case-law that the fact that that part is of individual concern to the restricted class of beneficiaries of the aid scheme concerned does not preclude that part from being regarded as of general application where it applies to objectively determined situations and produces legal effects for categories of persons envisaged in a general and abstract manner.

37 That is so in the present case.

38 Since the Commission considered, in the first part of the decision at issue, that it was not appropriate to order the recovery of the aid granted by virtue of the exemption from ICI despite its being unlawful and incompatible with the internal market, that decision preserves the anticompetitive effects of the general and abstract measure which that exemption constitutes with respect to an indefinite number of competitors of the beneficiaries of the aid granted under that measure. The decision therefore applies to objectively determined situations and produces legal effects for categories of persons envisaged in a general and abstract manner.

39 It follows that the General Court was entitled to consider that the first part of the decision at issue is of general application. Consequently, the first part of the single ground of appeal of the Commission's appeals must be rejected.

Second part

Arguments of the parties

40 The Commission submits that the General Court erred in law by concluding that Mr Ferracci and Scuola Elementare Maria Montessori were directly concerned on the sole basis that they might potentially compete with the beneficiaries of the national measures in question. The General Court's approach was not consistent with that adopted by the Court in 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). To show that he is directly concerned, an applicant must demonstrate that the contested measure entails sufficiently concrete effects on his situation.

41 Scuola Elementare Maria Montessori contests those arguments.

Findings of the Court

42 According to settled case-law of the Court, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to 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 the EU rules alone without the application of other intermediate rules (judgments of 5 May 1998, *Glencore Grain* v *Commission*, C-404/96 P, EU:C:1998:196, paragraph 41 and the case-law cited; 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; and order of 19 July 2017, *Lysoform Dr. Hans Rosemann and Ecolab Deutschland* v *ECHA*, C-666/16 P, not published, EU:C:2017:569, paragraph 42).

43 As regards specifically the rules on State aid, it must be noted that their objective is to preserve competition (see, to that effect, judgments of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 27 and the case-law cited, and of 17 July 2008, *Essent Network Noord and Others*, C-206/06, EU:C:2008:413, paragraph 60). So, in that field, the fact that a Commission decision leaves intact all the effects of the national measures which the applicant, in a complaint addressed to that institution, claimed were not compatible with that objective and placed it in an unfavourable competitive position makes it possible to conclude that the decision directly affects its legal situation, in particular its right under the provisions on State aid of the FEU Treaty not to be subject to competition distorted by the national measures concerned (see, to that effect, judgment of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 30).

44 In the present case, with respect to the first of the two criteria mentioned in paragraph 42 above, the General Court considered in substance, in paragraph 42 of the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), and paragraph 45 of the judgment of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), that it was satisfied because the services offered by Mr Ferracci and Scuola Elementare Maria Montessori respectively were similar to those offered by the beneficiaries of the national measures assessed in the decision at issue and, consequently, the former 'might be in a competitive relationship' with the latter.

45 As the Commission rightly submits, that reasoning is vitiated by an error of law.

46 While it is not for the EU judicature, at the stage of the examination of admissibility, to rule definitively on the competitive relationships between an applicant and the beneficiaries of the national measures assessed in a decision of the Commission on State aid, such as the decision at issue (see, to that effect, judgments of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 28, and of 20 December 2017, *Binca Seafoods* v *Commission*, C-268/16 P, EU:C:2017:1001, paragraph 59), a direct effect on such an applicant cannot be deduced from the mere potential existence of a competitive relationship, such as that found in the judgments under appeal.

47 Given that the condition of direct concern requires the contested measure to produce effects directly on the applicant's legal situation, the EU judicature must ascertain whether the applicant has adequately explained the reasons why the Commission's decision is liable to place him in an unfavourable competitive position and thus to produce effects on his legal situation.

48 It must nonetheless be recalled that, if the grounds of a decision of the General Court reveal an infringement of EU law but the operative part of the judgment can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the annulment of that decision and a substitution of grounds must be made (judgment of 26 July 2017, *Council* v *LTTE*, C-599/14 P, EU:C:2017:583, paragraph 75 and the case-law cited).

49 That is the case here.

50 It may be seen from the applications brought by Mr Ferracci and Scuola Elementare Maria Montessori before the General Court that they submitted, with evidence in support and without being contradicted by the Commission on this point, that their establishments were situated in the immediate vicinity of ecclesiastical or religious entities carrying on similar activities to theirs which were thus active in the same market for services and the same geographical market. In so far as such entities were a priori eligible for the national measures assessed in the decision at issue, it must be considered that Mr Ferracci and Scuola Elementare Maria Montessori have adequately explained the reasons why the decision at issue was liable to place them in an unfavourable competitive position and, consequently, that that decision directly affected their legal situation, in particular their right not to be subject in that market to competition distorted by the measures in question.

51 Contrary to the arguments of the Commission, that conclusion is not called into question by 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). While the Court held in those judgments that the mere fact that provisions adopted as part of the common agricultural policy place an applicant in an unfavourable competitive position does not in itself allow it to be concluded that those provisions affect the applicant's legal situation, that line of case-law cannot be transposed to actions brought by competitors of beneficiaries of State aid.

52 The cases cited in the preceding paragraph did not concern the rules on State aid, the objective of which is precisely to preserve competition, as noted in paragraph 43 above.

53 Consequently, the actions brought by Mr Ferracci and Scuola Elementare Maria Montessori satisfy the first of the two criteria mentioned in paragraph 42 above.

54 With respect to the second of those criteria, the General Court considered in paragraph 45 of the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), and paragraph 48 of the judgment of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), that the decision at issue, both in its first part and in its second and third parts, produces legal effects purely automatically on the basis of the EU rules alone

without the application of other intermediate rules. As the Advocate General observes in substance in point 52 of his Opinion, that consideration, which is not contested by the Commission in these appeals, is not vitiated by any error of law.

55 It follows that the General Court was entitled to consider that Mr Ferracci and Scuola Elementare Maria Montessori were directly concerned by the decision at issue. The second part of the single ground of appeal of the Commission's appeals must therefore be rejected.

Third part

Arguments of the parties

56 The Commission submits that the General Court erred in law by considering that the national measures implementing the measures that were the subject of the decision at issue did not constitute implementing measures as regards Mr Ferracci and Scuola Elementare Maria Montessori. The General Court wrongly rejected its argument that they could have applied for the favourable tax treatment reserved to their competitors and brought proceedings before the national court against a refusal by the authorities, contesting on that occasion the validity of the decision at issue. The General Court's approach was inconsistent with the line of case-law of the Court starting with the judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852).

57 Scuola Elementare Maria Montessori contests those arguments.

Findings of the Court

58 According to settled case-law of the Court, the expression 'does not entail implementing measures' within the meaning of the third limb of the fourth paragraph of Article 263 TFEU must be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a legal remedy before the EU judicature for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court (judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 27, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 35 and the case-law cited).

59 By contrast, where a regulatory act entails implementing measures, judicial review of compliance with the EU legal order is ensured irrespective of whether those measures were adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions of admissibility in the fourth paragraph of Article 263 TFEU, to challenge an EU regulatory act directly before the EU judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails (judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 28, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 36 and the case-law cited).

60 Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the EU judicature against the implementing acts under the conditions stated in the fourth paragraph of

Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the unlawfulness of the basic act concerned. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act concerned before the national courts and cause them to refer questions to the Court for a preliminary ruling under Article 267 TFEU (judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 29, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 37 and the case-law cited).

61 The Court has, moreover, repeatedly held that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of the fourth paragraph of Article 263 TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons. Furthermore, in that assessment, reference should be made exclusively to the subject matter of the action (see, to that effect, judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraphs 30 and 31; of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraphs 50 and 51; and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraphs 38 and 39 and the case-law cited).

62 In the present case, in so far as the actions brought by Mr Ferracci and Scuola Elementare Maria Montessori sought the annulment of the first part of the decision at issue, it must be considered, as the Advocate General observes in point 69 of his Opinion, that, the materialisation of the legal effects of the decision not to order recovery of the aid found to be unlawful and incompatible with the internal market, which was the subject of that first part, did not need any implementing measures which could be the subject of judicial review by the EU judicature or the national courts. The General Court was therefore entitled to conclude that that part does not entail implementing measures within the meaning of the third limb of the fourth paragraph of Article 263 TFEU with respect to Mr Ferracci and Scuola Elementare Maria Montessori. Nor indeed does the Commission put forward any specific argument to challenge that conclusion.

63 As regards the second and third parts of the decision at issue, in which the Commission found that Article 149(4) of the TUIR and the exemption under the IMU scheme did not constitute State aid within the meaning of Article 107(1) TFEU, it must be recalled that the Court has indeed repeatedly held that, for the beneficiaries of an aid scheme, the national provisions establishing the scheme and the measures implementing those provisions, such as a tax notice, constitute implementing measures entailed by a decision declaring the aid scheme incompatible with the internal market or declaring it compatible with the internal market subject to compliance with commitments entered into by the Member State concerned (see, to that effect, judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraphs 35 and 36; of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraphs 52 and 53; and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraphs 39 and 40).

64 That case-law reflects the fact that a beneficiary of an aid scheme can, where he satisfies the conditions under national law for being eligible for that scheme, request the national authorities to grant him the aid as it would have been granted if there were an unconditional decision declaring the scheme compatible with the internal market, and contest before the national courts a measure refusing that request, pleading the invalidity of the Commission's decision declaring the scheme incompatible with the internal market or compatible with that market subject to compliance with commitments entered into by the Member State concerned, in order to cause those courts to refer questions to the Court for a preliminary ruling on its validity (see, to that effect, judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraphs 36 and 59, and order of 15 January 2015, *Banco Bilbao Vizcaya Argentaria and Telefónica* v *Commission*, C-587/13 P and C-588/13 P, not published, EU:C:2015:18, paragraphs 49 and 65).

65 However, that case-law cannot be applied to the situation of the competitors of beneficiaries of a national measure that has been found not to constitute State aid within the meaning of Article 107(1) TFEU, such as Mr Ferracci and Scuola Elementare Maria Montessori. The situation of such a competitor differs from that of the beneficiaries of aid referred to by that case-law, in that the competitor does not satisfy the conditions laid down by the national measure in question for eligibility for that aid.

66 In those circumstances, as the Advocate General observes in point 71 of his Opinion, it would be artificial to require that competitor to request the national authorities to grant him that benefit and to contest the refusal of that request before a national court, in order to cause the national court to make a reference to the Court on the validity of the Commission's decision concerning that measure.

67 The General Court was therefore entitled to find that the decision at issue did not, either in its first or in its second and third parts, comprise implementing measures with respect to Scuola Elementare Maria Montessori and Mr Ferracci.

68 Consequently, the third part of the single ground of appeal of the Commission's appeals must be rejected, and those appeals must therefore be dismissed in their entirety.

Scuola Elementare Maria Montessori's appeal in Case C-622/16 P

First ground of appeal

Arguments of the parties

69 Scuola Elementare Maria Montessori's first ground of appeal, criticising the General Court for finding the first part of the decision at issue valid, is divided into four parts. By the first part, Scuola Elementare Maria Montessori argues that the General Court infringed Article 108 TFEU, Article 14(1) of Regulation No 659/1999 and Article 4(3) TEU by accepting that the Commission was entitled to find that it was absolutely impossible to recover unlawful aid even at the stage of the formal investigation procedure, and not solely at the stage of enforcement of an order for recovery. Absolute impossibility of recovering unlawful aid is not a general principle of law within the meaning of the second sentence of Article 14(1) of Regulation No 659/1999.

70 By the second and third parts, Scuola Elementare Maria Montessori submits that the General Court misinterpreted the concept of 'absolute impossibility' by ruling that the first part of the decision at issue was valid, in so far as the Commission derived the absolute impossibility of recovering the unlawful aid in question from the sole fact that it was not possible to obtain the necessary information for the recovery of that aid from the Italian land registry and tax databases. That circumstance was a purely internal difficulty which, in accordance with the Court's case-law, could not allow the conclusion that recovery of the aid was absolutely impossible.

71 Furthermore, the General Court disregarded the burden of proof by rejecting Scuola Elementare Maria Montessori's arguments on the existence of alternative means which would have allowed the recovery of the aid in question. According to Scuola Elementare Maria Montessori, it was not for it to show that it was possible to recover the aid, but for the Italian Republic to cooperate sincerely with the Commission by indicating alternative methods allowing it to be recovered, even if only in part.

72 By the fourth part, Scuola Elementare Maria Montessori criticises the General Court for distorting the evidence by finding that it was impossible to obtain the necessary information for the recovery of the aid in question from the Italian land registry and tax databases.

73 The Commission, supported by the Italian Republic, contends with respect to the first part that the absence of an order for recovery in the decision at issue is consistent with Article 14(1) of Regulation No 659/1999, which prohibits the Commission from ordering the recovery of unlawful aid where recovery is contrary to a general principle of EU law. By virtue of the general legal principle that 'no one is obliged to do the impossible', the Commission cannot impose an obligation the performance of which is objectively and absolutely impossible.

74 With respect to the second and third parts, the Commission submits that absolute impossibility of recovering unlawful aid may also derive from the national rules concerned. The argument that alternative methods exist which would have permitted recovery of the aid calls in question findings of fact which cannot be the subject of an appeal. The burden of proof for showing the existence of such methods was, in accordance with general principles, on Scuola Elementare Maria Montessori, which relied on their existence.

75 With respect to the fourth part, the argument concerning distortion of evidence is inadmissible and in any event unfounded.

Findings of the Court

76 As regards the first part of the first ground of appeal, it must be recalled that in accordance with the first sentence of Article 14(1) of Regulation No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.

77 It is settled case-law that the adoption of an order to recover unlawful aid is the logical and normal consequence of a finding that it is unlawful. The principal objective of such an order is to eliminate the distortion of competition caused by the competitive advantage conferred by the unlawful aid (see, to that effect, judgments of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 113 and the case-law cited; of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642, paragraph 111 and the case-law cited; 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).

78 However, in accordance with the second sentence of Article 14(1) of Regulation No 659/1999, the Commission shall not require the recovery of the aid if this would be contrary to a general principle of EU law.

79 As the Advocate General observes in points 107 and 110 of his Opinion, the principle that 'no one is obliged to do the impossible' is among the general principles of EU law (see, to that effect, order of 3 March 2016, *Daimler*, C-179/15, EU:C:2016:134, paragraph 42).

80 While it follows from settled case-law of the Court that the only defence that may be relied on by a Member State against an action for failure to fulfil obligations brought by the Commission on the basis of Article 108(2) TFEU is the absolute impossibility of implementing correctly the Commission's decision to order recovery of the aid in question (see, to that effect, judgments of 15 January 1986, *Commission* v *Belgium*, 52/84, EU:C:1986:3, paragraph 14; of 1 June 2006, *Commission* v *Italy*, C-207/05, not published, EU:C:2006:366, paragraph 45; and of 9 November 2017, *Commission* v *Greece*, C-481/16, not published, EU:C:2017:845, paragraph 28 and the case-law cited), that case-law relates, however, solely to the pleas that can be raised in defence by the Member State against an order for recovery made by the Commission, not to whether or not the absolute impossibility of recovering the aid may already be established at the stage of the formal investigation procedure.

81 Moreover, and above all, Scuola Elementare Maria Montessori's argument that the absolute impossibility of recovering unlawful aid can be established only after the adoption of an order for recovery conflicts with the very wording of the second sentence of Article 14(1) of Regulation No 659/1999, under which the Commission is not to adopt an order for recovery if that would be contrary to a general principle of EU law.

82 The Court has previously held that the Commission cannot, on pain of its being invalid, adopt an order for recovery which, from the moment of its adoption, is objectively and absolutely impossible to implement (see, to that effect, judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 86).

83 In so far as Scuola Elementare Maria Montessori also bases the first part of its first ground of appeal on the principle of sincere cooperation, it must be recalled that under Article 4(3) TEU that principle applies throughout the procedure for the examination of a measure by reference to the provisions of EU law on State aid (see, to that effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 147 and the case-law cited, and of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 34).

84 Thus where, as in the present case, the Member State concerned already claims during the formal investigation procedure that recovery is absolutely impossible, the principle of sincere cooperation requires the Member State, at that stage, to submit to the Commission for assessment the reasons underlying that claim and requires the Commission to examine them scrupulously. Consequently, contrary to Scuola Elementare Maria Montessori's submission, that principle does not require the Commission to attach an order for recovery to every decision declaring aid to be unlawful and incompatible with the internal market, but requires it to take into consideration the arguments put to it by the Member State concerned on the existence of absolute impossibility of recovery.

85 It follows that the first part of the first ground of appeal must be rejected.

86 As regards the fourth part of this ground of appeal, it should be recalled that an appellant must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and demonstrate the errors of appraisal which, in his view, led to that distortion. In addition, it is settled case-law of the Court that the distortion must be obvious from the documents in the case file without there being any need to carry out a new assessment of the facts and the evidence (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 152 and 153, and of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 32 and the case-law cited).

87 In the present case, Scuola Elementare Maria Montessori mentions only, in this fourth part, the Commission's reply of 17 September 2015 to a question asked by the General Court as a measure of organisation of procedure, referred to in paragraph 100 of the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), in which the Commission described the provisions of the Italian legislation on tax databases.

88 It must be stated, first, that Scuola Elementare Maria Montessori does not challenge in any way the presentation of the material content of that evidence in paragraphs 101 and 102 of that judgment, but confines itself to calling in question the assessment made by the General Court on the basis of that content. Second, Scuola Elementare Maria Montessori has not shown in what way the General Court's assessment that the Italian tax databases did not make it possible retroactively to trace the kind of activities carried on by entities enjoying the exemption from ICI for their real property, or to calculate the amount of the unlawfully obtained exemptions, appears manifestly erroneous.

89 The fourth part of the first ground of appeal cannot therefore succeed.

90 As regards the second and third parts of this ground of appeal, which should be considered together, it must be recalled that, in accordance with the Court's settled case-law on actions for failure to fulfil obligations brought on the ground of infringement of a decision ordering the recovery of unlawful aid, a Member State which encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision at issue. In such a case, the Member State and the Commission must, by virtue of the principle of sincere cooperation, work together in good faith with a view to overcoming difficulties while fully observing the provisions of the FEU Treaty, in particular those on aid (see, to that effect, judgments of 2 July 2002, *Commission* v *Spain*, C-499/99, EU:C:2002:408, paragraph 24, and of 22 December 2010, *Commission* v *Italy*, C-304/09, EU:C:2010:812, paragraph 37 and the case-law cited).

91 However, the condition of absolute impossibility of implementation is not satisfied where the defendant Member State does no more than inform the Commission of the internal difficulties of a legal, political or practical nature, attributable to the national authorities' own acts or omissions, raised by implementation of the decision at issue, without taking real steps to recover the aid from the undertakings concerned and without suggesting to the Commission alternative methods of implementing the decision which would allow those difficulties to be overcome (see, to that effect, judgments of 13 November 2008, *Commission* v *France*, C-214/07, EU:C:2008:619, paragraph 50, and of 12 February 2015, *Commission* v *France*, C-37/14, not published, EU:C:2015:90, paragraph 66 and the case-law cited).

92 That case-law is applicable *mutatis mutandis* to the assessment during the formal investigation procedure of whether it is absolutely impossible to recover unlawful aid. Thus a Member State which at that stage of the procedure encounters difficulties in recovering the aid concerned must submit those difficulties to the Commission for consideration and cooperate in good faith with the Commission with a view to overcoming them, in particular by suggesting alternative methods allowing recovery, if only in part, of the aid. In all cases, the Commission is required to undertake a detailed examination of the difficulties pleaded and the suggested alternative methods of recovery. Only if the Commission finds, following such a detailed examination, that there are no alternative methods allowing even partial recovery of the unlawful aid in question may that recovery be considered to be objectively and absolutely impossible to carry out.

93 In the present case, it follows from paragraphs 76 and 85 of the General Court's judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), that the Commission confined itself, in the first part of the decision at issue, to deducing the absolute impossibility of recovering the unlawful aid in question solely from the fact that it was not possible to obtain the necessary information for recovery of the aid from the Italian land registry and tax databases, while omitting to consider the possible existence of alternative methods allowing recovery, if only in part, of the aid.

94 By upholding the decision on this point, the General Court erred in law.

95 As the Advocate General observes in points 116 and 117 of his Opinion, the circumstance that the information needed for recovery of the unlawful aid in question could not be obtained from the Italian land registry and tax databases must be regarded as caused by internal difficulties attributable to the national authorities' own acts or omissions. According to the settled case-law of the Court cited in paragraph 91 above, such internal difficulties do not suffice for it to be concluded that there is absolute impossibility of recovery.

96 As may be seen from paragraphs 90 to 92 above, recovery of unlawful aid may be considered to be objectively and absolutely impossible only if the Commission finds, following a detailed examination, that two cumulative conditions are satisfied, namely that the difficulties relied on by the Member State concerned are real and that there are no alternative methods of recovery. As noted in paragraph 93 above, the General Court upheld the first part of the decision at issue despite the fact that the Commission had omitted to carry out, in that decision, a detailed examination of whether the second of those conditions was met.

97 The error of law which thus vitiates the General Court's judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), overlaps with that also committed by the General Court by rejecting, in paragraphs 86 and 104 to 110 of that judgment, Scuola Elementare Maria Montessori's argument that the Commission should have examined the existence of alternative methods enabling recovery, if only in part, of the aid in question, on the ground that Scuola Elementare Maria Montessori had not been able to demonstrate their existence.

98 In so far as Article 14(1) of Regulation No 659/1999 requires the Commission, as a general rule, to adopt an order to recover unlawful aid and allows it to refrain from doing so only exceptionally, it was for the Commission to show in the decision at issue that the conditions for it to decline to adopt such an order were satisfied, not for Scuola Elementare Maria Montessori to prove before the General Court that there existed alternative methods enabling recovery, if only in part, of the aid in question. In those circumstances, the General Court could not confine itself to observing that Scuola Elementare Maria Montessori had not succeeded before it in showing that such alternative methods existed.

99 Consequently, the second and third parts of the first ground of appeal must be allowed and the remainder of the ground of appeal must be rejected.

Second ground of appeal

Arguments of the parties

100 Scuola Elementare Maria Montessori submits that the General Court erred in law by holding that the exemption from IMU which is the subject of the third part of the decision at issue did not constitute State aid within the meaning of Article 107(1) TFEU on the ground that the exemption did not apply to economic activities. In this respect, Scuola Elementare Maria Montessori argues that the General Court disregarded the case-law of the Court in rejecting its argument that the activities covered by that exemption were provided for consideration, on the ground that the exemption applies only to educational activities provided free of charge or against payment of a token amount. By defining as 'token' an amount that covers a fraction of the actual cost of the service, the Italian legislation allows the exemption to be granted to operators who finance their educational services primarily from the consideration they receive from pupils or their parents.

101 Scuola Elementare Maria Montessori further criticises the General Court for holding that the non-applicability of the exemption from IMU to economic activities is also ensured by the fact that the exemption extends only to activities which by their nature are not in competition with the activities of other operators who seek a profit. That fact is of no relevance to educational activities, since they compete by their nature with the activities of other operators in the market.

102 The Commission and the Italian Republic contest those arguments.

Findings of the Court

103 According to the Court's settled case-law, EU competition law, in particular the prohibition in Article 107(1) TFEU, applies to the activities of undertakings. In this context, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, to that effect, judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 107, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 39 and 41 and the case-law cited).

104 Any activity consisting in offering services on a given market, that is, services normally provided for remuneration, is an economic activity. The essential characteristic of remuneration lies in the fact that it is consideration for the service in question (see, to that effect, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraphs 37 and 38, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 45 and 47).

105 As regards educational activities, the Court has held that courses provided by educational establishments financed essentially by private funds that do not come from the provider itself constitute services, since the aim of such establishments is to offer a service for remuneration (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 48 and the case-law cited).

106 In the present case, the General Court found in paragraphs 136 and 140 of the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), that the exemption from IMU applied only to educational activities provided free of charge or against payment of a token amount covering only part of the actual cost of the service, with that part not being related to the cost.

107 It must be recalled that, in the case of an interpretation of national law by the General Court, the Court of Justice has jurisdiction on appeal only to determine whether that law was distorted, and the distortion must be obvious from the documents in the case file (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 20 and the case-law cited).

108 As Scuola Elementare Maria Montessori does not claim that there was distortion, its argument that the Italian legislation allows the exemption from IMU to be granted to educational activities that are financed primarily by pupils or their parents must be rejected at the outset as inadmissible.

109 As to Scuola Elementare Maria Montessori's argument that the General Court disregarded the Court's case-law cited in paragraphs 103 to 105 above, it must be considered that, as the Advocate General observes in points 142 to 144 of his Opinion, since the General Court found in its interpretation of national law that the exemption from IMU applies only to educational activities provided free of charge or against payment of a token amount not related to the cost of the service, it was able to reject, without committing an error of law, Scuola Elementare Maria Montessori's complaint that the exemption applied to educational services provided for remuneration.

110 In so far as Scuola Elementare Maria Montessori additionally criticises the General Court for holding that the non-applicability of the exemption from IMU to economic activities is also ensured by the fact that the exemption extends only to activities which by their nature are not in competition with the activities of other operators who seek a profit, its argument must be rejected as ineffective, since it relates to a ground included for the sake of completeness.

111 It follows that the second ground of appeal must be rejected.

112 Since the second and third parts of the first ground of appeal have, however, been allowed, the judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission* (T-220/13, not published, EU:T:2016:484), must be set aside in so far as the General Court found the first part of the decision at issue to be valid, and the appeal must be dismissed as to the remainder.

The action before the General Court in Case T-220/13

113 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded and the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter where the state of the proceedings so permits.

114 That is so in the present case.

115 It suffices to observe that, as Scuola Elementare Maria Montesori submits in substance in its first plea in law, the first part of the decision at issue is vitiated by an error of law for the reasons set out in paragraphs 90 to 99 above, in so far as the Commission found that it was absolutely impossible to recover the unlawful aid granted by virtue of the ICI scheme without examining scrupulously all the conditions required by the Court's case-law for it to be possible to make such a finding.

116 Consequently, the first plea in law of Scuola Elementare Maria Montessori must be upheld, and the decision at issue must be annulled to that extent.

Costs

117 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which applies to appeal proceedings by virtue of Article 184(1), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

118 Article 138(3) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1), further provides that 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, is to pay a proportion of the costs of the other party.

119 Finally, under Article 140(1) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

120 In the present case, as regards the appeal in Case C-622/16 P, it should be decided, having regard to the circumstances of the case, that Scuola Elementare Maria Montessori is to bear half of its own costs and the Commission, in addition to bearing its own costs, is to pay half of Scuola Elementare Maria Montessori's costs. As regards the action before the General Court in Case T-220/13, since only the first of the pleas in law put forward by Scuola Elementare Maria Montessori has ultimately been accepted, Scuola Elementare Maria Montessori is to pay two-thirds of the Commission's costs and bear two-thirds of its own costs, and the Commission is to pay one-third of the costs of Scuola Elementare Maria Montessori's costs and bear one-third of its own costs.

121 As regards the appeal in Case C-623/16 P, since Scuola Elementare Maria Montessori has applied for costs against the Commission and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

122 As regards the appeal in Case C-624/16 P, since Mr Ferracci has not applied for costs against the Commission and the Commission has been unsuccessful, the Commission must be ordered to bear its own costs.

123 The Italian Republic is to bear its own costs in Cases C-622/16 P to C-624/16 P.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets 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), in so far as it dismissed the action brought by Scuola Elementare Maria Montessori for the 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, to the extent that the European Commission did not order recovery of the unlawful aid granted by means of the exemption from the Imposta communale sugli immobili (municipal tax on real property);**

2. **Dismisses the appeal in Case C-622/16 P as to the remainder;**

3. **Annuls Decision 2013/284 to the extent that the European Commission did not order recovery of the unlawful aid granted by means of the exemption from the Imposta communale sugli immobili (municipal tax on real property);**

4. **Dismisses the appeals in Cases C-623/16 P and C-624/16 P;**

5. **Orders Scuola Elementare Maria Montessori Srl to bear half of its own costs incurred in connection with the appeal in Case C-622/16 P and to pay two-thirds of the European Commission's costs and bear two-thirds of its own costs in connection with the action before the General Court of the European Union in Case T-220/13;**

6. **Orders the European Commission, as regards its own costs, to bear one-third of the costs in connection with the action before the General Court of the European Union in Case T-220/13 and to bear the costs in connection with the appeals in Cases C-622/16 P to C-624/16 P and, as regards the costs of Scuola Elementare Maria Montessori Srl, to pay one-third of the costs in connection with the action before the General Court of the European Union in Case T-220/13, to pay half the costs in connection with the appeal in Case C-622/16 P, and to pay the costs incurred in Case C-623/16 P;**

7. **Orders the Italian Republic to bear its own costs in Cases C-622/16 P to C-624/16 P.**

[Signatures]