SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

Constitutional Court ("CC") ("Corte Costituzionale"), 15.04.2008, 102/08 and related case No. 103/08 (same date and same subject), Regione Sardegna v. Presidenza del consiglio dei Ministri

II- Brief description of the facts and legal issues

Parties:

The applicant: President of the Council of Ministers;
The defendant: Region Sardinia.

Factual background:

The President of the Council of Ministers ("PCM") sought a declaration of unconstitutionality in respect of certain provisions contained in Law No. 4 of the Region of Sardinia of 11.05.2006, (Miscellaneous provisions on revenue, reclassification of costs, social policy and development), as emended by Article 3(3) of Law No. 2 of 2007 of Region of Sardinia, which granted certain tax benefits to undertakings based in Sardinia.

The Court made a reference for preliminary ruling pursuant to Article 234 EC concerning, *inter alia*, the interpretation of Article 4 of Law of Sardinia No. 4/06, as amended by Article 3(3) of Law No. 2 of 2007 of the Region of Sardinia, which provided for (i) the imposition of the regional tax on aircraft making stopovers for tourist purposes only on air carriers which are domiciled for tax outside the territory of the Region of Sardinia, and (ii) the imposition of the regional tax on recreational craft making stopovers only on undertakings which are domiciled for tax outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties.

The CC asked, the ECJ whether, in relation to undertakings domiciled for tax in the region of Sardina, carrying on the same transport, these provisions would effectively constitute the grant of State aid in their favour. The questions referred to the ECJ are the following:

(a) Is Article 49 of the Treaty to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of Law No 4 of the Region of Sardinia of 11 May 2006 (Miscellaneous provisions on revenue, reclassification of costs, social policy and development), as amended by Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007 (Provisions for the preparation of the annual and long-term budget of the Region - 2007 Finance Law), under which the regional tax on aircraft making stopovers for tourist purposes is levied only on undertakings, operating aircraft

which they themselves use for the transport of persons in the course of 'general business aviation' activities, which have are domiciled for tax outside the territory of the Region of Sardinia?

(b) Does Article 4 of Law No 4 of 2006 of the Region of Sardinia, as amended by Article 3(3) of Law No 2 of 2007 of the Region of Sardinia, by providing for the imposition of the regional tax on aircraft making stopovers for tourist purposes only on undertakings, operating aircraft which they themselves use for the transport of persons in the course of 'general business aviation' activities, which are domiciled for tax outside the territory of the Region of Sardinia, constitute, within the meaning of Article 87 of the Treaty, State aid to undertakings carrying on the same activities which are domiciled for tax in the Region of Sardinia?

(c) Is Article 49 of the Treaty to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of Law No 4 of 2006 of the Region of Sardinia, as amended by Article 3(3) of Law No 2 of 2007 of the Region of Sardinia, under which the regional tax on recreational craft making stopovers for tourist purposes is levied only on undertakings, operating recreational craft, which are domiciled for tax outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties?

(d) Does Article 4 of Law No 4 of 2006 of the Region of Sardinia, as amended by Article 3(3) of Law No 2 of 2007 of the Region of Sardinia, by providing for the imposition of the regional tax on recreational craft making stopovers only on undertakings, operating recreational craft, which are domiciled for tax outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties constitute, within the meaning of Article 87 of the Treaty, State aid to undertakings carrying on the same activities which are domiciled for tax in the Region of Sardinia?

The case is still pending under the reference C-169/08.

III- Summary of the Court's findings

The Court could not exclude *prima facie*, the possibility that the imposition of the regional tax only on those undertakings domiciled for tax outside the territory of the Region could lead to a discrimination and impose an unjustifiable tax burden on them.

The Court recalled the ECJ ruling in *Ferring* (Case C-53/00, Ferring SA and Agence centrale des organismes de sécurité sociale (ACOSS), [2001] ECR I-9067) under which the concept of aid was held to be wider than that the notion of subsidy because it embraces not only positive contributions, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect.

The Court decided that the regional tax provision could potentially impose a selective tax burden on the "non-resident" undertakings; the regional tax should constitute an unlawful State aid in respect of the undertakings domiciled for tax in the Region of Sardinia.

I- Information on the judgment

Institution: Constitutional Court ("CC") ("Corte Costituzionale"), 07.03.2008, 51, Regione Toscana, Emilia - Romagna, Sicilia, Piemonte, Campania questioning the constitutional compatibility of L. No. 48/05

II- Brief description of the facts and legal issues

Parties:

The applicant: Regione Toscana, Emilia Romagna, Sicilia, Piemonte, Campania;
The defendant: Presidente del Consiglio dei Ministri.

Factual background:

In five separate applications, Tuscany, Sicily, Piedmont, Campania and Emilia-Romagna Regions ("the Regions") questioned the constitutionality of certain Articles of Law No. 203 of 30 September 2005, converted into law, with amendments, by Law No. 248 of 2 December 2005 (Measures to combat tax evasion and urgent provisions relating to tax and financial matters), claiming that the measures provided by Law No. 203 of 2005 constituted State aid within the meaning of Article 87 EC.
The Regions argued that the implementation of these measures created an unjustified reduction of certain production costs (namely airport' fees) for the airlines that operate in Italy, conferring on them a competitive advantage over airlines not operating from Italian airports, resulting in a negative impact on competition in the European air transports' market.

In particular, the Piedmont Region pointed out, that by reforming the system for the determination of airport fees, Article 11-nonies of Law No. 248/2005 gave rise to State aid, because it caused a "contraction" in the income of "public" airport managing bodies and consequently granted benefits to the air carriers.
The Constitutional Court decided to join the related proceedings and produced a single decision.

III- Summary of the Court's findings

The CC dismissed the claim on the grounds that the provisions of Law Decree No. 203 of 2005 were not selective and so cannot be qualified as State aid.
In fact, the so called "price cap", provided by Article 11-nonies of the Law Decree, was a mechanism set up for the regulation of tariff structures and cannot constitute State aid.
The new levels of airport fees were determined by applying methods of calculation which took account of the price of the services provided by the managing bodies and objective parameters based on the profitability of the investment.
This method of calculation favoured all carriers, not only Italian but also foreign ones. Therefore the Court held that the measure was not in anyway selective by nature, a necessary prerequisite of the concept of State aid.

I- Information on the judgment

Supreme Court, Fiscal Division ("SC") ("Cassazione civile, sezione tributaria"), 29.10.2008 (published on 8.12.2008), 28918, Amministrazione dell'economia e Finanze v. Famiglia Coop Agricola Carli Albino Scarl

II- Brief description of the facts and legal issues

Parties:

The applicant: Amministrazione dell'economia e Finanze;
The defendant: Famiglia Coop Agricola Carli Albino Scarl.

Factual background:

Under Italian tax rules, cooperative societies benefit from significant fiscal reliefs. The ability to benefit from the reliefs is dependant upon the not-for-profit nature of the activity performed by the cooperative. Similarly to tax purposes, the not-for-profit nature is presumed when certain conditions, set out by law, are fulfilled. In the event of a dispute over the not-for-profit nature of a cooperative society, the Department for Work and Pensions is competent authority tasked with giving a formal opinion.
The Revenue Tax Agency served notice of an inquiry to the cooperative society on the income of legal persons (IRPEG) and on local income tax (ILOR), alleging that the conditions required in order to benefit from the tax reliefs had not been fulfilled and that consequently the income of the society was in fact higher than that declared. The cooperative society brought an action at first instance before the Tax Commission challenging the assessment.
The Revenue Tax Agency failed on its first and second instance in view of the opinion filed by the Department for Work and Pensions which stated that the cooperative society had a not-for-profit nature.
The case was brought before the Supreme Court which annulled the judgement and deferred the decision to a different Section of the Regional Tax commission.

Legal Issues:
The Supreme Court examined the following legal issues:
i) whether the opinion filed by the Department for Work and Pensions on the not-for-profit nature of a cooperative society is binding and unchallengeable;
ii) whether the Revenue Tax Agency has the right to challenge the opinion of the Department for Work and Pensions after it has been filed, by proving that the cooperative society is not not-for-profit in nature.

III- Summary of the Court's findings

Although a cooperative society is presumed to be not-for-profit in nature when certain requirements are fulfilled, in the event that mutuality is controversial or disputed the Department for Work and Pension is bound to give an opinion on the nature of the cooperative.
The Tax Commission recognized that the Department's opinion was legally binding and held that the Revenue Tax Agency had no right to challenge it by proving that the cooperation society did in fact fulfil the requirements imposed by the law.

As a matter of fact, cooperative societies are often structured as umbrella societies for many kinds of commercial activities, allowing them to benefit from tax exemptions.
The Supreme Court ruled that notwithstanding the opinion filed by the Department for Work and Pensions on the not-for-profit character of the society, the Revenue Tax Agency is entitled to ascertain and prove the lack of the requirements for every single tax period. The Court did not state directly on the binding nature of the Department's opinion, but highlighted that the evaluation of the Departments opinion has an object which is different to the Agency's investigation field.
The Supreme Court held that if the Agency is able to prove that the cooperative society carries out business activities, then fiscal relief must be refused. This ruling overcomes the opinion on the subjective requirements filed by the Department for Work and Pension.
The Court annulled the judgement and deferred the decision to a different Section of the Regional Tax commission.
At the same time the Court pointed out that the following questions have already been referred to the ECJ for preliminary ruling in a different case and that they could be relevant for the present case:
Do the Italian tax relief measures for cooperative societies constitute aid within Article 87 EC, with particular regard to the lack of an adequate survey and control system over the potential abuses?
Does the use of the legal form of a cooperative society to the sole purpose of achieving a tax saving constitute abuse of the law?

I- Information on the judgment

Supreme Court, Fiscal Division ("SC") ("Corte di Cassazione, sezione tributaria"), 15.05.2008, 12168, Amministrazione delle Finanze v. Cassa Risparmio di Ravenna S.p.A.

II- Brief description of the facts and legal issues

The SC annulled the Decision of the Regional Tax Commission of Emilia - Romagna which granted the defendant tax benefits provided for in Law No. 218 of 1990 (the "Amato Law" linked to the restructuring of the banking system) on the grounds that such Law is in breach of Article 87 EC. The SC ordered the recovery of the aid from the beneficiary

Parties:

The applicant: Amministrazione delle Finanze;
The defendant: Cassa Risparmio di Ravenna S.p.A.

Factual background:

Law No. 218/90 (the so called "Amato Law") provided for tax benefits in relation to restructuring operations in the public banking system. The defendant claimed that Law No. 218/90 applied to the specific circumstances in which its company was active and subsequently claimed a tax rebate before the Emilia Romagna regional fiscal Commission.

The Commission allowed both the grant of the tax benefits under Law No. 218/90 and the right to the tax rebate, in accordance with the defendant's requests.

The decision was challenged by Italian tax authorities before the SC. The defendant put forward the applicability of Law No. 218/90 and subsequently referred to directive No. 69/335 EC which introduced a tax break regime for merger by acquisition and transfer of business operations.

Legal issues:

The Supreme Court examined the following legal issues:

i) the applicability of provisions of Law No. 218/90 to the instant case notwithstanding the Commission's decision declaring the measures to constitute unlawful State aid.

ii) whether directive 69/335 EC could be applied in this case (merger by acquisition).

III- Summary of the Court's findings

The SC annulled the regional Commission's decision in light of the breach of Article 87 EC by Law No. 218/90.
First of all, the SC noted that the ECJ had already stated that the tax benefits established in the "Amato Law" must be considered as State Aid falling under Articles 87 and 88 EC (C-148/04, Unicredito Italiano, [2005] ECR I-11137). Secondly the SC held that the ECJ's judgement was directly binding on the Italian revenue authorities and on Italian judges; thus the national authorities were obliged to disapply the unlawful provisions.

Therefore, the grant of the benefits at first instance was unlawful. In fact, in the absence of any prior notification to the Commission and in view of the Commission's negative decision (pursuant Article 88 EC) regarding the measure under scrutiny, such benefits could not be granted to the defendant.
Specifically with regard to the second issue the Court declared:

The regime of exemption ruled by directive 69/335 EC, and which the defendant sought to rely on, applies only to transfer of business/merger operations culminating in a real increase in the company's capital. The aim of the provision is, indeed, the promotion of the reorganization of firms by granting tax breaks. On the contrary, a transfer of business/merger by acquisition operation in relation to a company already 100% owned by the incorporating company will not increase the company's capital.

Since the defendant's operation did not increase the capital of the company due to the pre-existing 100% ownership by the incorporated firm, it did not fall under the provisions of directive 69/335 EC.

In the light of the unlawfulness of the provisions under Law No. 218/90 and the inapplicability of directive No. 69/335 EC, the Court stated that the ordinary taxation system should apply. Therefore the Court ordered the recovery of the unlawful and granted to the company by the Court of first instance.

I- Information on the judgment

Supreme Court, Fiscal Division ("SC") ("Corte di Cassazione, sezione tributaria"), 30.03.2007, 7893, TRA.IN S.p.A. v. Ministero dell'Economia e delle Finanze, Agenzia delle Entrate

II- Brief description of the facts and legal issues

The SC ruled that provisions on tax breaks are of strict interpretation and not subject to be extended to cases different than the one ruled, the extension otherwise constituting aid within the meaning of Article 87 EC

Parties:

The applicant: TRA.IN S.p.A Public transport undertaking;
The defendant: Department of Economy and Finance, Tuscan Tax Commission.

Factual background:

Legislative Decree No. 446/1997 introduced a Regional tax on production activities. The provisions regarding the estimate assessment of the Regional taxation regime have been subject to multiple amendments which have created doubts over whether specific requirements would be subject to regional taxation and if so under which time limits. The general rule provided that the taxation regime had to be in line with the rules laid down by the Italian Income Tax Code. In addition, capital gains and losses related to capital goods not deriving from business transfers and - in light of an amendment to the law in 1999 - subsidies granted in accordance with the law must also be included in the taxation regime.

Law No. 151/1981 introduced a State fund to grant subsidies to undertakings operating in the public transport system at adjusting their financial deficit. Law No. 18/1987 set the rule that these subsidies were not to be considered as positive nominal elements of the undertaking's income and were not to be included in the taxable income. Subsequently the State fund was abolished and the subsidy was granted by virtue of a regional fund.

The dispute arose in relation to a tax rebate claimed by the applicant, who is a public transport undertaking and beneficiary of the above mentioned subsidies.

The claim was based on the fact that the Revenue Tax Agency had incorrectly included the subsidies in the undertaking's Regional taxable income for the years 1999 and 2000 whereas due to the specific rule set forth by Law No. 18/1987 and the original version of the law on the regional income tax, subsidies could not be considered as a positive nominal element of the undertaking's income.
After the rejection of its request at first instance the undertaking appealed against the judgement before the Tuscan Regional Tax Commission which rejected the claim as well. The decision was based on the fact that the specific tax break granted to the undertakings operating in the public transport sector was not included in the regime on Regional taxes which, instead, expressly included subsidies in accordance with the law on the taxable income.

The applicant appealed against this decision before the fiscal Section of the SC which upheld the judgement and rejected all the applicant's submissions as unfounded.

Legal issues:

The Supreme Court examined the following legal issues:

i) whether the tax exemption in relation to subsidies available under the general tax income regime may be extended to the regional tax regime;

ii) whether the extension of the tax break would constitute State aid under Article 87 EC.

III- Summary of the Court's findings

Firstly the Court reconstructed the complex and significantly amended Law which introduced the Regional Tax on production activities in order to determine what the nominal elements of the taxable income were under the Regional tax system on production activities compared to the taxation regime under the income tax regime with regard to the tax break granted to public transport undertakings.

The Court held that under the income tax regime the specific provision of Law No. 18/1987 grants a tax break to undertakings operating in the public transport sector by excluding subsidies from the nominal elements of taxable income.

Further the Court declared that the Law on Regional Tax was based on the general rule that taxable income must be calculated in accordance with the provisions of the Income Tax Code and that subsidies granted by law and capital gains and losses referring to capital goods not deriving from business transfers must be included in taxable income. This second provision is unusual in the sense that notwithstanding the general rule refers to the income tax regime while assessing taxable income, the regional tax regime states that certain elements exempt under the general income tax regime, must always be included for the purposes of regional taxable income.

In light of the above the Court clarified that the inclusion of the subsidies in the regional taxable bases was operating since 1999 when Legislative Decree No. 176 amended the original provision adding the express wording "subsidies delivered according to the law". According to the Court this is the only lawful interpretation of the provisions confirmed expressly by the legislator in 2003 when stating that the subsidies exempt under the income regime had to be included in the regional taxable income. The legislator did not amend the law, he merely expressly acknowledged a provision which had been in force since 1999.

As to the second issue, the Court alleged that the extension of a tax break via interpretation and in the absence of a specific provision introducing such an exemption, would constitute aid within the meaning of Article 87 EC in view of the obvious economic advantage granted to a small and select number of undertakings by means of (even if indirect) State resources, falsifying competition.

Finally the Court stated that tax breaks must be expressly provided for by a specific provision and can never be extended by interpretation to different fiscal regimes.

I- Information on the judgment

Supreme Court ("SC") ("Corte di Cassazione"), Order of 17.02.2006, 3525, Ministero delle Finanze v. F.M

II- Brief description of the facts and legal issues

Parties:

The applicant: Ministero delle Finanze;
The defendant: F.M.

Factual background:

Under Italian tax rules, cooperative societies benefit from significant tax exemptions.
After an inspection of the Italian tax policy, the local tax office of Monfalcone decided that Mr. F.M.'s individual income tax return, for the years 1984, 1985 and 1986, was inaccurate.
Mr. F.M. was a member of the cooperative "Maricoltori Alto Adriatico". He sought to benefit from the cooperative's tax relief regime but, according to the Italian's policy control, he actually operated in the fish market as an individual entity.
Mr. F.M. brought an action before the fiscal Commission of first instance, claiming that it was not possible to deny the validity of the cooperative's qualification without the obligatory Department for Work and Pensions' opinion (in the role of vigilance committee).
He won at first instance but the local tax office appealed against the judgment before the fiscal Commission of second instance and there Mr. F.M. lost.
The central fiscal Commission then confirmed that it could not legitimately deny the cooperative tax break without the obligatory Department's opinion.
The Department of Finance brought an appeal against the central fiscal Commission before the SC claiming that the inspection was only carried out in relation to Mr. F.M., it had nothing to do with the cooperative "Maricoltori Alto Adriatico" and so the Department for Work and Pensions' opinion was not necessary.
In January 2006, the Court submitted an application regarding the cooperatives' tax break to the European Commission.The Court asked the following questions: are the tax relief measures for cooperative societies classifiable as compatible State aid? Has the Commission already dealt with the issue of tax relief in favour of cooperatives?
The Commission gave no response.
The Supreme Court then referred the following questions to the ECJ:
Are the tax relief measures for cooperative societies, pursuant to Articles 10, 11, 12, 13 and 14 of Presidential Decree No 601 of 1973, compatible with the rules on competition and, in particular, are they classifiable as State aid within the meaning of Article 87 EC, especially given that the system of monitoring and for the prevention of abuse provided for under Legislative Decree No 1577 of 1947 is inadequate?
In particular, for the purposes of determining whether the tax relief measures at issue are classifiable as State aid, can those measures be regarded as proportionate in relation to the objectives of cooperative undertakings; can the decision on proportionality take into consideration not only the individual measure but also the advantage conferred by the measures as a whole, with the resulting distortion of competition?
For the purposes of answering the preceding questions, taking account of the fact that the system of monitoring has been seriously and further undermined by the reform of company law, above all in

relation to cooperatives that are predominantly rather than fully mutual, under Law No 311 of 2004, and regardless of whether the tax relief measures in question can be classified as State aid, can the use of the legal form of a cooperative society, even in cases not involving fraud or deception, be regarded as an abuse of law, where that form is used solely or predominantly in order to achieve a tax saving?
The case is still pending in Luxemburg under the case number C-80/08.

III- Summary of the Court's findings

(a) Cooperative societies benefit from total or partial tax exemption system. Their aim is to achieve a specific economic target by reducing costs and increasing salaries. Cooperative societies supply goods, services and more favourable working conditions to their members. The Italian Republic recognises the cooperative's social function. Nonetheless, it is necessary that they respect certain fundamental principle (eg. the mutual advantage for the members, the equal allocation of the society control).
The cooperative societies' tax break should be qualified as a State aid because it involves a lower tax income into the public budget.
The Court also pointed out that the system of monitoring for the prevention of abuse is inadequate.
It is possible to summarise two key points.
Members' contribution is artificial for many large cooperative societies. In most of these cooperatives it is enough to merely complete an enrolment form to become a member. In this way the client/consumer thinks that he may obtain some benefits (e.g. a lower price for goods or services). In reality, the client/customer will be unlikely to receive any real benefits. The cooperative will nonetheless receive a tax break.
In order to consider tax relief measures for cooperative societies as proportionate in relation to the objectives of cooperatives, it is necessary to verify whether the cooperatives' tax break is: a) appropriate; b) fundamental; c) proportionate (it being impossible to achieve the same aim using another fiscal measure).
(b) The Court pointed out that the use of the legal form of a cooperative society for the sole purpose to obtain tax relief might constitute an abuse of law. In fact, the Court underlined that where the society operates *de facto* under market conditions this implies it lacks the not-for-profit character required to benefit from the tax relief regime.

I- Information on the judgment

Court of First instance of Sassari, Civil division ("Tribunale di Sassari, sezione civile"), 26.01.2009, 3863/2008 RGAC (Order). This is an appeal of order of Court of first instance of Sassari, Alghero Division of 9.9.2008, AirOne S.p.A. v. Ryanair Ltd e Sogeal S.p.A.

II- Brief description of the facts and legal issues

The decision of the Commission to open a formal investigation procedure on the same State aid measure at stake before national courts, is not *per se* sufficient to prove the *fumus boni iuris* to grant interim relief. Such Commission decision is a mere doubtful, summary, preliminary act not subject to cross-examination (*inaudita altera parte*).

Parties:

The applicant: AirOne S.p.A;
The defendant: Ryan Air Ltd and Sogeal S.p.A.

Factual background:

The Court, in line with its previous judgment of 9 September 2008 (Case of the Court of first instance of Sassari Alghero, 09.09.2008, on the same issue), rejected the claims made by Air One asking for a declaration of unlawful State aid granted to Ryanair and for an interlocutory injunction suspending any further facilitation, pending the case before the Commission.

Air One identified an unlawful State aid in the commercial relationship between Sogeaal (the airport operator) and the low cost airline Ryanair, who may have benefited from State aid in the form of unfair and/or discriminatory ground-handling charges, and several marketing arrangement.

The commercial relationship between the operator and the airline, according to Air One, created an distortion of competition damaging Air One, mainly on the Sassari/Rome/Sassari route; mainly for the sake of fair competition on this route, AirOne
asked the Court to present Sogeaal from granting any further financial benefits in favor of Ryanair.

Legal issues:

The Court of first instance of Sassari examined the following issues:

i) the necessity, for the applicant, to provide strong evidence of the unfair competition suffered by the alleged use of unlawful State aid by a competitor in order to challenge State aid;

ii) the necessity, for the applicant, to provide evidence to prove the existence of the *fumus boni juris* essential to obtain an interlocutory injunction; the existence of unlawful State aid is not sufficient per se under Italian rules to grant such a interim suspension;

iii) the (non) relevance, for the national proceeding, of Article 88(2) EC formal investigation procedure on the same State aid measure.

III- Summary of the Court's findings

The Court rejected the applicant's demand mainly on the grounds that Air One did not prove that alleged State aid met the selective criterion and that the measures under scrutiny constituted discriminatory and unjustified advantages for Ryanair.

The Court considered the fact that the commercial agreements between Sogeaal and Ryanair were strongly related to the commercial policy and the essential services of the law-cost airline. The fact that Sogeaal has been suffering losses for the last 10 years, raised by AirOne to prove that the agreement was not in line with the MIEP consolidated approach, was completely neglected by the Court.

In replaying to AirOne arguments aimed at suspending the grant of aid, pending the case before the European Commission, the Court stated that the decision of the European Commission to open a formal investigation procedure due to doubts about the compatibility of the measure with the common market is not binding on national courts and it is not sufficient to demonstrate the *fumus boni juris* necessary to grant interim relief since the Commission is allowed to adopt such a decision without taking into account the defendant's arguments.

According to the applicant the granting of unlawful State aids allowed Ryanair to apply very low prices distorting competition between the two air carriers.

According to the Court, the complaint was too generic with regard to applied economic measures and related effects and did not allow the Court to identify the nature, the terms or the capability of the alleged financial breaks to affect competition.

The Court opined, in addition to the above, that the decision of the European Commission to start a formal investigation procedure, after the Air One complaint, on the same State aid measure is not *per se* sufficient to prove the *fumus boni iuris* required in order to grant interim relief.

The Court considered the Commission decision to be a preliminary, doubtful, summary act not subject to cross examination (*inaudita altera parte*); as such it can not affect the national Court analysis of the economical measures under discussion.

As a matter of fact, the Court underlined that the relevant principle to evaluate the presumed illegitimacy of the measures is the principle of a "private investor operating in a market economy". According to the community case-law, the Commission as well as the national judges have to base their judgment on the principle of a private investor in a market economy, assessing if an hypothetic private investor, under the same conditions, would have taken the same economic decisions.

The Court rejected the alleged illegitimacy and the discriminatory character of the financial benefits given to Ryanair, namely the reduction of the *handling* charges and the reduction of the *handling* service's price, on the grounds that such discount could also be applied by Sogeaal to other airlines. Also the marketing and business agreement between Sogeeal and Ryanair was not considered to have a potential detrimental effect on competition between the two air carriers since the two operators are active on different markets and different routes, with different target customers.

The Court also denied the existence of the *periculum in mora* criterion, mainly because the analysis of the volume of passengers showed a decrease of customers for the applicant rather than a distraction

of customers in favor of Ryanair. As a consequence the possibility of unfair competition related to the alleged State aid in any case had to be excluded.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Court of Fist instance of Brescia, Labour Division ("CF") ("Tribunale di Brescia, sezione lavoro"), 08.07.2008, 212/08, Brandt Italia S.p.A. v. INPS, ESATRI S.p.A.

II- Brief description of the facts and legal issues

The Court of Fist instance of Brescia applied the Commission Decision declaring the reduction in social security contributions incompatible State aid ordering their recovery from the beneficiary, the purchaser, who received a non-repayable grant for every employee transferred, although the Commission never denied that the tax benefit would also confer advantages to the transferring company. The Court of Fist instance of Brescia rejected the argument related to the legitimate expectations principle.

Parties:

The applicant: Brandt Italia S.p.A.;
The defendant: INPS, ESATRI S.p.A.

Factual background:

Brandt Italia S.p.A. objected to two different tax bills and summoned INPS-SCCI and the company responsible for the tax collection to the Court of first instance of Brescia. The related proceedings were joined and consequently the Court took a single decision.
Brandt Italia, according to the Legislative Decree No. 23/2003, received a non-repayable grant for every employee transferred.
INPS-SCCI wanted to obtain the difference between the contributions paid by Brandt Italia under the Legislative Decree No. 23/2003 and the contributions that would be paid under the ordinary fiscal law.

III- Summary of the Court's findings

The Court pointed out that the European Commission had already declared that the previsions of the Legislative Decree No. 23/2003 are qualified as incompatible State aid and so they are subject to Article 87 EC (decision 2004/800/CE).
The Court highlighted the prevalence of the community legislation over the national legislation. As a consequence the above-mentioned Decree in conflicts with the European Law.
Moreover in February 2004 Italy submitted a request to the Commission to verify the compatibility of the benefits provided by the Italian Law with the European legislation. The Commission considered the non-repayable grant provided by the Italian Law to constitute State aid because it involves an economic benefit for the beneficiary who receives the free grant.
The Court also rejected the argument in relation to the legitimate expectations principle.
According to the legitimate expectations principle it is not possible to refund tax or State aid if the beneficiary acted in good faith.

The beneficiary did not act in good faith because:
Brandt knew that it would be unable to utilize the tax benefits and due to this the original agreement for the company's sale, with the prevision of a lower price, were modified;
The price was restored to that originally established only after the social security contributions' arrival;

The Italian legislator intended to apply the Legislative Decree only for a very short period and for specific situations.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Court of First Instance of Reggio Calabria, Labour Division ("CF") ("Tribunale di Reggio Calabria, sezione lavoro"), 11.02.2008, M.C.T. S.p.A. v. INPS, SCCI S.p.A. and Equitalia Etr S.p.A.

II- Brief description of the facts and legal issues

The Court of First Instance of Reggio Calabria referred to the Italian Constitutional Court for a preliminary ruling on the conformity with constitutional law of the Regulation No. 695/1999 which sets up a different statute of limitation for the recovery of contributions constituting unlawful aid with respect to the internal rules

Parties:

The applicant: M.C.T. S.p.A.;
The defendant: INPS, i.e. the Italian National Institute for Social Security.

Factual background:

The applicant was a company which had benefited from pension contribution breaks with respect to work and formation contracts (i.e. CFL, *contratti di formazione e lavoro*) between 1995 and 2001.

The European Commission, through Decision No. 128/2000 of 11.5.1999, introduced new criteria for the grant of the above mentioned pension contribution breaks, formally inviting Italy to recover those pension contribution breaks which had already been granted but were not compliant with the set criteria, by specifying that the recovery had to be performed "*in compliance with the proceedings provided by national law*".

Italy challenged the Commission's Decision No. 128/2000 before the ECJ, asking for it to be declared null and void. The ECJ, through a ruling issued on 7.3.2002 (Case C-310/99, Italy v. Commission, [2002] ECR I-2299), rejected the challenge and confirmed the legitimacy of the Decision. Furthermore, through a ruling issued on 1.4.2004 (Case C-99/02, Commission v. Italy, [2004] ECR I-3353), the ECJ condemned Italy for infringement of the same Decision.

Italian public administration finally started the recovery procedure. As to the case at issue, the INPS (i.e. the Italian National Institute for Social Security) carried out the recovery of the unlawful aid by requesting to the applicant to pay back about EUR 14.2 million.

On the basis that the statute of limitation for the recovery of contributions set out by national rules (5 years) had already expired, the applicant brought an action against the INPS before the CF, asking that the payment request be revoked or declared null and void.

The applicant also claimed that recovery was not legitimate because the aid had been granted pursuant to national rules in force in the relevant period, notwithstanding that the national rules providing for the aid were in breach of EU rules.

The CF recognised the direct applicability of the Commission's Decision which had ordered the recovery of unlawful pension contribution breaks and its prevalence over national incompatible rules. Moreover, the Court pointed out that the statute of limitation provided by EC Regulation No. 695/1999 (10 years, and not 5 years as provided by national rules) is applicable to the recovery

sought by national public administrations. However, the judge stated that the national authority is subject to certain constrains when applying the new statute of limitation regime. Indeed, if a person/subject is holder of a "legally expired situation" (i.e. expiration of the statute of limitation, statute of repose, *res judicata*/final judgement) these situations cannot be overruled by the limitation period set out in the EC Regulation without violating the fundamental constitutional values, i.e. the certainty of the so called "expired situations" and the equality in front of the law.

The said EC decision introduces a different and longer statute of limitation regime solely for contributions/subsidies constituting unlawful State aid. Risk that the application of this regime would harm the general principle of equality in the sense that potentially equal situations (the run out of statute of limitation of the right to recover an unlawful subsidy/contribution) would be treated differently only because of the different qualification given to the subsidy.

Accordingly, the Court affirmed the necessity to defer the question to the Supreme Constitutional Court in order to ascertain whether the two different statute of limitation regimes are in accordance with the Italian Constitution and in particular with the right of equality.

Legal issues:

The Court examined the following issues:

i) whether Commission's Decisions are directly applicable;

ii) whether national Courts are allowed to evaluate the lawfulness and legitimacy of State aid;

iii) whether time for prescription (statute of limitation) provided by EC Regulation No. 695/1999 also applies to the recovery sought by national public administrations;

iv) whether and to what extent legitimate reliability may be invoked by the beneficiary of an unlawful aid.

III- Summary of the Court's findings

As to the first issue, the Court clearly stated that the Commission's Decisions are directly applicable and prevail over any incompatible national rule, of any source and grade, due to the hierarchical supremacy of EU provisions. Accordingly, no doubts arise as to the direct applicability of Decision No. 128/2000 of 11 May 1999, which established the criteria to be followed for the award of pension contribution breaks and ordered the recovery of those pension contribution breaks which were not granted pursuant to such criteria. In other words, since the Decision sets forth clear and precise obligations to be fulfilled by Italy, no further implementing provisions are needed.
Secondly the Court examined its own position in respect of the above said Decision, by concluding that although national Courts are bound to respect the Commission's Decisions, the national judges when applying European decisions directly to situations already regulated at national level, are not "*legibus solutus*", but must comply with the principles and limits set by the Italian Constitution.
Before ensuring the enforcement of EU provisions the CF pointed out the necessity to defer the question to the Italian Constitutional Court in order to ascertain the compatibility of a specific State aid statute of limitation regime with the internal rules on statute of limitation.
To this extent, Council Regulation No. 695/1999 sets forth the key-rules for the recovery of unlawful State aid. Specifically the said Regulation establishes that: (i) the Commission can exercise

its powers in relation to recovery of unlawful State aid within 10 years; (ii) such period starts on the day when the unlawful aid is granted to the beneficiary; and (iii) such period is interrupted by any intervention by the Commission or by a Member State which acts on the basis of the Commission's orders. In other words, instruments and modalities adopted by the State cannot prevent the recovery of all aid unlawfully granted, otherwise the effectiveness of EU law would be jeopardised.
In light of the above, and with specific reference to the case at issue, the Court concluded that in the event that the statute of limitation (10 years) provided by Regulation No. 695/1999 prevailed over the one (5 years) established by national rules, the principle of equality granted by the Italian Constitution would be harmed.
Finally the Court investigated the issue whether the beneficiary's legitimate reliability on the aid already granted may somehow limit the recovery of unlawful aid. In this respect the Court highlighted on the one hand that, when dealing with State aid rules, the concept of "legitimate reliability" cannot be limited to the national background, but must be necessarily extended to the global framework of the proceedings for the assessment of the compatibility of State aid with EU provisions, but that on the other hand the EC rules encounter an insurmountable limit in the so called "*expired situations*", i.e. questions definitely set by judgement, statute of repose or statute of limitation.
Accordingly, the legitimate reliability cannot be invoked by the beneficiary of the unlawful aid whenever Art. 88 EC has been breached and the statute of limitation for the recovery as established by national rules has not yet expired.
On the contrary, each time the national judge encounters expired situations (statute of repose, statute of limitation, *res judicata*) the direct application of EC rules on the recovery of unlawful State-aid is potentially likely to violate the right of equality granted by the Italian Constitution and therefore a pronouncement of the Constitutional Court is indispensable in order to settle which one must be the statute of limitation regime with regard to "expired situations" under national law.

I- Information on the judgment

Court of First Instance of Rome, Labour Division ("CF") ("Tribunale di Roma, sezione lavoro"), 21.12.2007, Ericsson Telecomunicazioni S.p.A. v. INPS, SCCI S.p.A.

II- Brief description of the facts and legal issues

Pursuant to the Commission's Decision of 11.5.1999 ordering the recovery, the Court of First Instance of Rome confirmed the recovery of an unlawful aid, granted by Law No. 335/1995. According to the Court the statute of limitation set forth by Article 15 of Regulation No. 695/1999 is also applicable to the recovery sought by national public administrations.

Parties:

The applicant: Ericsson Telecomunicazioni S.p.A.;
The defendant: INPS, i.e. the Italian National Institute for Social Security.

Factual background:

The applicant was a major company in the telecommunications sector, and had benefited from pension contribution breaks with respect to work and formation contracts (i.e. CFL, *contratti di formazione e lavoro*) between 1995 and 2001.

The European Commission, through Decision No. 128/2000 of 11.5.1999, introduced new criteria for the grant the said pension contribution breaks, formally inviting Italy to recover those pension contribution breaks which had already been granted but were not compliant with the set criteria, by specifying that the recovery had to be performed "*in compliance with the proceedings provided by national law*".

Italy challenged the Commission's Decision No. 128/2000 before the ECJ, asking for it to be declared null and void. The ECJ, through a ruling issued on 7.3.2002 (Case C-310/99, Italy v. Commission, [2002] ECR I-2289), rejected the challenge and confirm the legitimacy of the Decision. Furthermore, through a ruling issued on 1.4.2004 (Case C-99/02; Commission v. Italy, [2004] ECR I-3353), the ECJ condemned Italy for infringement of the same Decision.

Italian public administration finally started the recovery procedure. As to the case at issue, the INPS (i.e. the Italian National Institute for Social Security) carried out the recovery of the unlawful aid by requesting the applicant pay back about EUR 3.5 million.

On the basis that the statute of limitation for the recovery of contributions set out by national rules (5 years) had already expired, the applicant brought an action against the INPS before the CF, asking for the payment request to be revoked or declared null and void.

The applicant also claimed that the recovery was not legitimate because the aid had been granted pursuant to national rules in force in the relevant period, notwithstanding that the national rules providing for the aid were in breach of EC rules.

The CF recognised the direct applicability of the Commission's Decision which had ordered the recovery of unlawful pension contribution breaks and its prevalence over national incompatible rules. Moreover the Court pointed out that the statute of limitation provided by EC Regulation No.

695/1999 (10 years, and not 5 years as provided by national rules) is also applicable to the recovery sought by national public administrations. Accordingly, the Court affirmed the legitimacy of the recovery sought by the INPS and rejected the applicant's action.

Legal issues:

The Court examined the following issues:

i) whether Commission's Decisions are directly applicable;

ii) whether national Courts are allowed to evaluate the lawfulness and legitimacy of State aid;

iii) whether time for prescription provided by EC Regulation No. 695/1999 also applies to the recovery sought by national public administrations;

iv) whether and to which extent legitimate reliability may be invoked by the beneficiary of an unlawful aid.

III- Summary of the Court's findings

As to the first issue, the Court clearly stated that the Commission's Decisions are directly applicable and prevail over any incompatible national rule, of any source and grade, due to the hierarchical supremacy of EU provisions. Accordingly, no doubts arise on the direct applicability of Decision No. 128/2000 of 11 May 1999, which definitely established the criteria to be followed for the award of pension contribution breaks and ordered the recovery of those pension contribution breaks which were not pursuant to such criteria. In other words, since the Decision sets forth clear and precise obligations to be fulfilled by Italy, no further implementing provisions are needed.
Secondly the Court examined its own position in respect of the above Decision, by concluding that even national Courts are bound by the Commission's Decisions, they themselves having no discretion to evaluate the compatibility of a State aid with EU requirements. Therefore the Court pointed out that national Courts must always ensure the enforcement of EU provisions, by denying the application of any incompatible national provision.
In dealing with the third issue, the Court affirmed that national proceedings for recovering unlawful aid cannot represent obstacles to the actual recovery of all aid unlawfully granted.
To this extent, Council Regulation No. 695/1999 sets forth the key-rules for the recovery of unlawful State aid. Specifically the Regulation establishes that: (i) the Commission can exercise its powers in relation to recovery of unlawful State aid within 10 years; (ii) such period starts on the day when the unlawful aid is granted to the beneficiary; and (iii) such period is interrupted by any intervention by the Commission or by a Member State which acts on the basis of the Commission's orders. In other words, instruments and modalities adopted by the State cannot prevent the recovery of all types of aid unlawfully granted, otherwise the effectiveness of EC law would be jeopardised.
In light of the above, and with specific concern for the case at issue, the Court concluded that the statute of limitation (10 years) provided by Regulation No. 695/1999 prevails over the one (5 years) established by national rules.
Finally the Court investigated the issue of whether the beneficiary's legitimate reliability on the aid already granted may somehow limit the recovery of the unlawful aid. In this respect the Court highlighted that, when dealing with State aid rules, the concept of "legitimate reliability" cannot be limited to the national background, but must be extended to the global framework of the proceedings for the assessment of the compatibility of State aid with EU provisions.

Accordingly, legitimate reliability cannot be invoked by the beneficiary of the unlawful aid whenever Article 88 EC has been breached. In this respect the Court clarified that any diligent economic operator is able to ascertain whether the proceedings for the grant of the aid provided by the law have been properly performed, notwithstanding the actual behaviour of national administrations, even when national authorities are the only responsible actors for the unlawfulness of the aid.

I- Information on the judgment

Court of First Instance of Roma (CF) ("Tribunale di Roma"), 27.01.2006, Injunction 27.01.2006, Air One v. Alitalia

II- Brief description of the facts and legal issues

The Court of First Instance of Roma admitted the claim of AirOne and granted interim relief prohibiting Alitalia to participate to the public tender for acquiring the competitor on the grounds that, since Alitalia received rescue aid, its participation in the tender would be in breach of Article 2598 of the Italian civil code (unfair competition).

Parties:

The applicant: Air One S.p.A.;
The defendant: Alitalia S.p.A.

Factual background:

Alitalia, after having received rescue aid, granted by the Italian Government and authorized by the European Commission, has participated in the public tender to acquire its competitor Volare.

Air One, competitor of Alitalia, brought a claim requesting the CF declare that the aid granted by Italy is being misused by Alitalia through its participation in the public tender, declare that Alitalia's behavior constitutes an infringement of EC and/or Italian competition law and order the recovery of the aid.

Legal issues:

The Court examined the following issues:

i) whether the participation in the public tender for acquiring a competitor by an air carrier who received rescuing State aid would be in breach of Article 2598 of the Italian civil code (unfair competition),

ii) whether the conditions related to *fumus boni iuris* and *periculum in mora*, provided by Italian law in order to grant interim relief, should be considered fulfilled in the present case.

III- Summary of the Court's findings

The CF noted that, pursuant to Article 88 EC and Regulation No. 659/1999, only the European Commission can find that aid granted by a State or through State resources is not compatible with the common market, or that such aid is being misused, and, as a consequence, can adopt the necessary decisions. The European Commission's power is subject to the sole jurisdiction of the ECJ.

The CF has declared that national courts, as a result of the direct effect of the Article 88(3) EC, should rule on the infringement of State aid rules, as long as this infringement constitutes parallel violation of the national rules invoked by the applicant.

In the present case the participation in the tender by Alitalia was contrary to the spirit of to the decision of the European Commission which authorised rescue aid to Alitalia subject to the conditions, *inter alia*, that the amount of aid was limited to that necessary to manage the company and that Italy will send the Commission either a liquidation plan or a restructuring plan for Alitalia within six months of authorisation of payment of the aid.

Consequently Alitalia, by partially investing the aid to acquire a competitor and increase its fleet, had misused the aid granted and authorized.

Moreover the participation in the tender represents a parallel violation of the article 2598, para 3 (unfair competition) of the Italian civil code which provides that it constitutes an act of unfair competition "to avail oneself directly or indirectly or any other means which do not conform with the principles of correct behaviour in the trade and are likely to injure another's business".

As a result of this reasoning the CF concluded that the existence of the first condition (i.e. "*fumus boni iuris*") for the applicability of interim measures was demonstrated.

About the "*Periculum in mora*" condition the CF has established that the second condition for the applicability of interim measures was also satisfied considering that the award of the tender to Alitalia was forthcoming.

As a consequence the CF granted interim relief constituting a prohibition on Alitalia to participate in the public tender.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Administrative Supreme Court, VI Division ("ASC") ("Consiglio di Stato, sezione VI"), 30.09.2008, 4692, Federchimica v. Ministero delle Politiche Agricole e Forestali

II- Brief description of the facts and legal issues

The ASC annulled the Ministerial Decree 3.1.2000 providing for annual contributions in favour of traders of fertilisers on the grounds that it was unlawful State aid, never notified, and that the Commission already opened the formal investigation procedure.

Parties:

The applicant: Federchimica, Confagricoltura, Compag and others;
The defendant: Italian Ministry for Agricultural and Forest Policies.

Factual background:

Article 123, paragraph 1, letter a) of Law No. 388/2000 (Italian Budget Law 2001) imposed - *inter alia* - on all traders of fertilisers the obligation to pay, starting from 2001, an annual contribution equal to 2% of their revenues. Such contribution was intended to finance a special fund for the promotion of biological agriculture.

The relevant amount was the same for national products as well as for imported products. A Ministerial Decree issued on 3 January 2002 by the Ministry for Agricultural and Forest Policies implemented the above provision by providing the list of fertilisers subject to the payment of the annual contribution.

The applicants were major associations representing operators that are active in the sectors of chemical industry and agriculture together with several companies active in those sectors. They challenged the Ministerial Decree of 3 January 2002 before the Regional Administrative Court of Rome, by alleging - *inter alia* - the breach of Articles 88 and 249 EC, as well as of the Commission's Decision of 2 October 2001.

In particular, through the above mentioned Decision, the Commission manifested its doubts on the compatibility of the measures provided by Article 123 of Law No. 388/2000 with State aid rules. In fact the Fund financed by annual contributions from traders of fertilisers was intended to promote a specific category of market operators (those dealing with biological agriculture), so meeting the requirement of "selectivity" of Article 87 EC. Moreover the Commission believed that the contribution could lead to protectionism in favour of national operators, since its amount was identical for national products and imported products (2% of revenues). However the Commission did not take a final and definitive position towards the aid at issue, so that the formal investigation procedure on the lawfulness of the aid was not yet concluded.

The alleged breach of EC provisions was therefore due to the fact that the challenged Ministerial Decree was issued before a final decision on the compatibility of the aid by the Commission.

The Regional Administrative Court rejected the challenge.

Finally the Supreme Administrative Court upheld the ruling of first instance and declared the Ministerial Decree of 3 January 2002 null and void, due to the infringement of Article 88 EC.

The ASC's ruling was thus focused on one main issue: whether a Member State can legitimately implement State aid before the Commission's final decision on the compatibility of such measures with EU provisions.

III- Summary of the Court's findings

In the instant case at issue, the Commission had already started the formal investigation procedure, but had not yet concluded it. In fact, through Decision of 2 October 2001 the Commission had merely expressed some doubts on the legitimacy of the aid, it had not issued a final and definitive decision.

In this respect, the Court recalled the provisions of Article 88(3) EC, according to which "*the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision*".

In light of the above, the Court concluded that Italy was not entitled to enforce State aid rules provided by Article 123 of Law no. 388/2000 before the conclusion of the investigation procedure conducted by the Commission under Article 88(2) EC.

The ASC also evaluated the possible applicability to the case at issue of the principle expressed by the ECJ in its ruling of 13.1.2005 (Case C-175-02, Pape [2005] ECR I-127) according to which the prohibition on putting the proposed measures into effect until the investigation procedure has resulted in a final decision does not apply to a tax whenever such tax or a specific part of it is not necessarily intended to finance a State aid. In this respect the Court concludes that such principle is not relevant to the case at issue, because Article 123 of Law No. 388/2000 does not specify which part of the contribution is actually destined to finance the aid.

I- Information on the judgment

Regional Administrative Court of Piedmont (Torino), II Division ("RAC") ("T.A.R. Piemonte (Torino), sezione II"), 26.10.2007, 3302, Comune di San Mauro torinese v. Consorzio di Bacino 16 and S.E.T.A. S.p.A.

II- Brief description of the facts and legal issues

The Regional Administrative Court of Piedmont judged that the decisions of local authorities to confer the management of the service without any invitation to tender do not breach State aid rules if the following conditions are met: the local authority exercises over the person concerned a control similar to that which it exercises over its own departments and that person carries out the essential part of its activities with the controlling local authority

Parties:

The applicant: Municipality of San Mauro Torinese;
The defendant: Consorzio di Bacino 16 and SETA S.p.A.

Factual background:

The applicant was a Municipality located in the Region of Piedmont.

Pursuant to Regional Law No. 24/2002, providing that the waste disposal service shall be managed by means of compulsory consortia managed by Municipalities, the applicant joined the *Consorzio di Bacino 16* (hereinafter "Consortium").

The Consortium awarded the management of the waste disposal service to SETA S.p.A without any invitation to tender (so-called "in-house providing").

The applicant did not agree with the decision taken by the Consortium, believing that the conditions required by the law for in-house providing were not met.

In fact, provided that in-house providing should always ensure equal opportunities to all competitors in relation to the award of the public service concerned, the applicant believed that the Consortium had breached Article 86 EC.

In particular, the applicant alleged that the direct assignment of the waste disposal service to SETA S.p.A. was unlawful, since the latter could be considered neither as an entity over which the Consortium exercised a form of control similar to that exercised over its own departments, nor as an entity which carried out the essential part of its activities together with the Consortium.

Moreover, the applicant had never acquired any shares in SETA S.p.A.

Despite that, the Consortium also decided to confer the waste disposal service within the territory of the applicants to SETA S.p.A.

Therefore the applicant challenged before the RAC of Turin, the Consortium's resolutions concerning the award to SETA S.p.A. of the waste disposal service without any invitation to tender,

by alleging - among other breaches of law - the infringement of EC rules over in-house providing and State aid.

The RAC declared the challenged provisions null and void, on the ground that the award of the waste disposal service without any invitation to tender had been carried out in breach of State aid rules.

III- Summary of the Court's findings

The Court pointed out that the case under its scrutiny should be examined in the light of Articles 43, 49 and 86(1) EC, which prohibit any restrictions on freedom of establishment and freedom of services, as well as any acts or behaviours that guarantee public enterprises favourable positions in the marketplace. In other words, the direct award of public services, without any invitation to tender, must not have the effect of altering free competition between market operators.

State aid elements are present in the guarantee of a market position which is favourable to the beneficiary and thus discriminatory against all its potential competitors, who are thereby prevented from obtaining the award of the service. Therefore the beneficiary has a safe and steady relationship with the market and can rely upon the certain acquisition of a specific service. The distortion of free competition originating from the failure to carry out a tender procedure for the award of the service may potentially jeopardise the balance of the entire marketplace.

In this respect, in-house providing gives rise to an unlawful State aid when specific conditions are not fulfilled.

Thus the RAC ruling examined in detail the conditions required by State aid rules for the legitimacy of in-house providing, which as the follows:

the contracting authority must exercise over the entity to which the public service is awarded a form of control similar to that exercised over its own departments; and
the entity to which the public service is awarded must carry out the essential part of its activities together with the controlling authority or authorities.
In relation to the first requirement, the Court affirmed that the requisite level of control over the company to which the public service is awarded does not occur whenever the participation of the public entity in the company is merely symbolic and the public entity is not allowed to influence the strategic decisions taken by the company. This means that the company should not demonstrate an independent economic interest which could jeopardise the public entity's control over it.

With specific concern for the case at issue, the Court held that the requirement of the said control over the company to which the service is awarded should be verified with respect to the entire share capital of SETA S.p.A.. In particular, such requirement should be fulfilled by the relationship between the Consortium and the company, and not by the relationship between the single Municipalities and the company. Accordingly, since the Consortium only held 0.88% of the company's share capital, the Court concluded that its participation in the company was merely symbolic, so that the Consortium was not able to exercise over the company a control similar to the one exercised over its own departments.

In the Court's opinion, neither the first nor the second requirement was met. Specifically the Court looked at whether SETA S.p.A. actually carried out the essential part of its activities together with

the Consortium. In this respect the Court highlighted that it was self-evident, from the company's by-laws, that the company was active in the marketplace in several additional activities not connected to the Consortium, as such the Consortium could not be considered to be the main scope of the company.

Since both the requirements for in-house providing were missing, the Court declared null and void all the Consortium's provisions in relation to the award of the waste disposal service, which represented an illegitimate and unlawful State aid.

I- Information on the judgment

Regional Administrative Court of Sardinia (Cagliari), I Division ("RAC") ("T.A.R. Sardegna (Cagliari), sezione I"), 08.06.2007, 1204, Sardegna Lines S.p.A. v. Regione Autonoma della Sardegna

II- Brief description of the facts and legal issues

The Regional Administrative Court clarified that when the Commission declares an aid to be incompatible the unlawful aid should be recovered notwithstanding the fact that the national law that provided for the measure has not been repealed

Parties:

The applicant: Sardegna Lines S.p.A.;
The defendant: Regione Autonoma della Sardegna and Credito Industriale Sardo S.p.A.

Factual background:

The applicant was a company active in the sector of water transport.

On 22.7.1992 Credito Industriale Sardo S.p.A. (C.S.I.), one of the major banks of Sardinia, granted the applicant an subsidised loan under Regional Law no. 20/1951.

However, the European Commission, through Decision No. 98/1995 of 21.10.1997, declared the subsidised loan to be incompatible pursuant to Regional Law No. 20/1951 with Article 88(3) EC, and ordered to Italy to recover the aid unlawfully granted.

Both Italy and the Region of Sardinia challenged the Decision before CFI.

Meanwhile, the Regional Committee executed the Commission's decision through Resolution No. 26/36 of 4.6.1998, by establishing the interest rate to be applied for the recovery; subsequently the Region of Sardinia instructed C.S.I. to recover the aid. On 19.9.1998 C.S.I. requested the applicant pay back the aid.

The applicant challenged the above mentioned provisions issued by the defendants before the RAC, asking for them to be declared null and void. To this extent the applicant alleged that the aid were indeed legitimate, because the Commission's Decision was not directly applicable and Regional Law No. 20/1951, on the basis of which the aid had been granted, was still in force.
The applicant also alleged that the recovery had been illegitimately extended to the whole amount of the financing, instead of being limited to the difference between the easy interest rate and the market interest rate.

The RAC, whilst confirming the legitimacy of the recovery, declared the challenged provisions null and void in relation to the part whereby the recovery had been extended to the whole amount of the financing, instead of being limited to the difference between the interest rate of the subsidised loan and the market interest rate.

Legal issues:

The Court examined the following issues:

i) whether Commission's Decisions are directly applicable;

ii) whether the effectiveness of a Commission's Decision is suspended by its challenge before the EC Court of first instance;

iii) whether Commission's Decisions may be challenged before national Courts;

iv) whether the recovery should be limited to the difference between the interest rate of the subsidised loan and the market interest rate, or extended to the whole amount of the financing.

III- Summary of the Court's findings

In dealing with the first issue, the Regional Administrative Court pointed out that, under Article 249 EC, Commission's Decisions are binding on all subjects to whom they are addressed.

Moreover, the Court recalled Article 88 EC, according to which if the Commission finds that aid granted by a State or through State resources is not compatible with the common market or that such aid is being misused "*it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission*".

Accordingly, in the Court's opinion, Commission's Decisions ordering the recovery of unlawful State aid, such as Decision No. 98/1995 relevant to the case at issue, are undoubtedly directly applicable. The Region of Sardinia was thus obliged to recover the aid.

The Court further stated that, according to consolidated principles, the enforcement of EC State aid rules must always be ensured by denying the application of any incompatible national provision, even if the latter is still in force. As a consequence the applicant's claim that the aid could not be recovered because the Regional Law on whose basis they had been granted was still in force, was definitely groundless.
As to the second issue, the Court clarified that the Commission's Decisions are indeed directly applicable and effective even when an annulment procedure is pending. In other words, a State is bound by the Decision establishing the illegitimacy of a State aid, and thus obliged to carry out the recovery, notwithstanding that the procedure for the annulment of the Decision itself is still pending, because an action of annulment brought against EC acts have no suspensive effect.

The third issue investigated by the Court refers to the possibility to challenge Commission's Decisions before national Courts, by alleging their illegality. In this respect the Court pointed out that the illegality of Commission's Decisions may be invoked only before Community Courts.

Finally the Court assessed the question whether the recovery should be limited to the difference between the easy interest rate and the market interest rate, or extended to the whole amount of the financing.

In this regard, the Court has referred to the Commission's statements, which only ordered to recover the difference between the amount that the beneficiary would have paid according to the ordinary market conditions and the amount actually paid for the subsidised loan.

Consequently the Court concluded that the recovery was to be limited to such difference, so that any request for payment exceeding this limit was undue and thus unlawful.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Regional Administrative Court of Lombardia (Brescia Division) ("RAC") ("T.A.R. Lombardia, sezione di Brescia"), 21.03.2006, 577, Sacbo Società per l'Aeroporto civile di Bergamo S.p.A. v. Ministero Trasporti infrastrutture, ENAC, Alitalia S.p.A.

II- Brief description of the facts and legal issues

The Regional Administrative Court of Lombardia not excluded, *prima facie,* that Law No. 248/05 providing for the reduction of the airport charges in favour of Alitalia (and other air carriers) could be in breach of Article 87 EC on the ground that even general measures could be regarded as selective if they confer an advantage only to specific undertakings.

Parties:

The applicant: Sacbo Società per l'Aeroporto civile di Bergamo S.p.A.;
The defendant: Ministero Trasporti infrastrutture, ENAC, Alitalia S.p.A.

Factual background:

The Court assessed the applicant's request for an interim injunction in relation to the annulment of several administrative provisions (Guidance Provision by the Ministry of Infrastructure and Transportation of December 30, 2005 and ENAC Notes 4071 and 4072 of January 20, 2006) that implemented Law 248/2005 on "Measures to combat tax evasion and urgent provisions relating to tax and financial matters".

This law sets forth, inter alia, several provisions (collectively referred to as the "System requirements") governing airport management companies and the compensation system for the airport operator.

As a matter of fact the applicant highlighted that Law No. 248/05, which provides for the reduction of airport charges in favour of air carriers, but particularly in favour of Alitalia (then the national carrier), was in breach of Article 87 EC and was also a violation of the principle of the freedom of economic initiative protected by the Italian Constitution.

Indeed for Sacbo the measures provided by Law 248/2005 could constitute an unlawful State aid, not notified to the European Commission, on the ground that according to ECJ case law even general measures could be selective if they confer an advantage only to specific undertakings.

The Court considered it not manifestly groundless that a State aid in favour of the Italian flag carrier could exist on the grounds that Alitalia also considered the measure under scrutiny to be an incisive remedy for its complicated economic situation.

However, the Court did not grant the interim relief requested by the applicant since no serious and irreparable damage related to the measures provided for by Law 248/2005 was proven by the applicant.

Legal issues:

The Regional Administrative Court of Lombardia examined the following issues:

i) the possibility of the existence of an unlawful State aid in favor of Alitalia granted by the provisions of Law 248/05;

ii) the necessity for the airport operator to provide evidence to prove the serious and irreparable damage required to grant interim measures.

III- Summary of the Court's findings

The Court did not exclude, *prima facie*, the existence of an unlawful State aid in favor of Alitalia granted by Law 248/2005.

As a matter of fact the RAC stated that even general provisions may be regarded as selective as long as they concern only one or few undertakings; in this case there is a possibility that State aid may exist.

The Court considered that the main beneficiary of the new reduction of the airport charges would be by far the national flag carrier. Compared to the other operators, Alitalia is mainly active in the air standing posts. These findings were grounded on Alitalia's own statements concerning the positive effects of the measures on its difficult economic situation and on information referring to the Law No. 287, so called "*Save Alitalia Decree*".

The Court, leaving aside the European Commission sole competence to rule on the compatibility of the economic measures with the common market accepted the applicant's request for an interim measure on the grounds that, according to the ECJ case law, the Commission's powers not preclude private operator from bringing proceedings before a national court in order to determine whether a State measure, which has not been notified should have been notified pursuant to Article 88(3) EC.

The Court recognized the applicant had *locus standi*/individual concern (*legitimatio ad processum*) on the grounds of a potential damage that Socbo could suffer by the measure above, however, it rejected the plea for an interim measure made by the airport operator since it showed no strong proof of, the serious and irreparable damage necessary to obtain the interim injunction. The applicant has not shown the negative effect of the reduction of airport charges on its business management.

I- Information on the judgment

Provincial Tax Commission of Modena, sezione VI ("TC") ("Commissione Tributaria Provinciale di Modena, sezione VI"), 10.03.2008, 481

II- Brief description of the facts and legal issues

Pursuant to Commission Decision 2003/193/EC of 5.6.2002, the Provincial Tax Commission of Modena judged that the tax exemption in favour of public utilities with a majority public capital holding constituted unlawful State aid and should be recovered with interest and with no discretionary power on the part of the local administration.

Parties:

The applicant:-
The defendant:-

III- Summary of the Court's findings

The Tax Commission recalled the Commission Decision 2003/193/EC concerning alleged State aid granted by Italy in the form of tax exemptions and access to subsidised loans to various public utilities.
With regard to the national legal background the Commission pointed out that in Italy municipalities have traditionally provided directly or indirectly various services to their local communities (such as distribution and treatment of water, public transport, gas distribution, etc.) through various organisational arrangements.
In 1990 Law No. 142 reformed the legal arrangements available to municipalities to provide those services. Moreover, a further option for administering such services was introduced by Article 12 of Law No. 498 of 1992, namely the possibility of setting up a joint stock company with a minority public shareholding.
At the end of its analysis the European Commission held that certain national provisions (i.e. a special tax regime, an exemption from all transfer taxes related to the conversion of special and municipal undertakings into joint stock companies and a three-year income tax exemption (tax on incomes of legal persons (IRPEG) and local income tax (ILOR)) applicable to joint stock companies with a majority public shareholding set up under Law No 142/90 and Law Decree No. 331/1993 constituted State aid within the meaning of Article 87 EC and were incompatible with the common market.

The Commission also held that the Member State should take all necessary measures to recover the aid from the recipients immediately.

In the wake of the Commission decision, the Tax Commission of Modena confirmed the legitimacy of the recovery of the unlawful State aid with the related interests and underlined that the local administrations do not have any discretion with respect to prescribed recovery on the ground that challenging recovery order is not a tax assessment act but an injunction of payment.

JUDGMENTS SELECTED FROM THE 2006 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL – PART I

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 4 June 2003, No. 186

The Constitutional Court declared a question relating to the constitutionality of the legal standing of Italian public authorities to submit notifications to the Commission under Article 88 (3) EC inadmissible.

II- Brief description of the facts and legal issues

Facts and legal issues: The Province of Trento sought a declaration of constitutional invalidity in respect of the provision contained in Article 2 (10) of Law No. 499/1999, according to which State aid schemes granted to the agricultural and food industry and contained in the programmatic document created by the above law ("*Documento Programmatico Agroalimentare*") had to be notified by the Italian government to the Commission under Article 88 EC. The Province of Trento contended that it was competent to notify such State aid to the Commission and, thus, State filings were not required.

III- Summary of the Court's findings

The Constitutional Court declared the complaint inadmissible. It did not pronounce itself on the issue concerning the necessity and/or opportunity for the State to notify State aid under Article 88 (3) EC, observing that the State's filings (i) do not frustrate possible previous filings by the Province; and (ii) in any case, do not breach any constitutional right of the Province itself.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 19 October 2001, No. 337

In October 2001, the Constitutional Court dismissed a claim questioning the constitutional validity of Law No. 448 of 23 December 1998, which granted certain tax benefits to undertakings based in Southern Italy ("Law No. 448").

II- Brief description of the facts and legal issues

The Region of Lombardia challenged the validity of a number of provisions of Law No. 448, also under Articles 92 and 93 EC and, consequently, Article 10 of the Italian Constitution.

III- Summary of the Court's findings

The Constitutional Court declared the question of the compatibility of Law No. 448 with Articles 92 and 93 EC and, consequently, Article 11 of the Italian Constitution (rather than Article 10, as erroneously pointed out by the Region of Lombardia) inadmissible, as it was time-barred. The Court noted in passing that the State aid had been declared compatible with the Common Market by the Commission.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 23 March 1999, No. 85

In March 1999, the Constitutional Court declared that the Regional Law of Abruzzi of 11 June 1997 ("the Abruzzi Law") infringed Article 10 of the Italian Constitution.

II- Brief description of the facts and legal issues

The President of the Council of Ministers claimed that the Abruzzi Law, which granted aid to cooperatives active in the fishery sector, was in breach of Article 92 EC and thus of Article 10 of the Italian Constitution. In the Abruzzi Law, the aid to be granted to the fishing sector was qualified and treated as de minimis, therefore not triggering the notification requirement provided for by Article 93 EC.

III- Summary of the Court's findings

That provision of the Abruzzi Law was found to infringe the EC Treaty, since the de minimis exemption did not apply to the fishing sector. Consequently, the Abruzzi Law also breached Article 11 (rather than Article 10, as erroneously pointed out by the President of the Council of Ministers) of the Italian Constitution, which permits such limitations on sovereignty as are necessary for an organisation ensuring peace and justice among nations and promoting international organisations that pursue such ends.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 22 July 1996, No. 271

The Constitutional Court ruled that a regional law concerning financial aid for the promotion of employment in Sicily was compatible with the provisions of the Italian Constitution since it complied with Article 93 EC.

II- Brief description of the facts and legal issues

Regional Law No. 85 of 21 December 1995 granted financial aid for the promotion of employment in various sectors (i.e. self-employment, agriculture and handicraft). The State Commissioner in Sicily claimed that the Regional Law No. 85 was constitutionally invalid since it infringed Article 93 EC and, consequently, Article 11 of the Constitution. He claimed that, although Regional Law No. 85 had been notified to the Commission under Article 93 EC, the entry into force of Regional Law No. 85 had not been subject to Commission approval. Not only did Regional Law No. 85 lack such a clause, but it had also been passed as an immediately enforceable "urgent law".

III- Summary of the Court's findings

The Court held that a specific clause making the entry into force of Regional Law No. 85 subject to Commission approval was not necessary in order to comply with Article 93 EC and thus Article 11 of the Italian Constitution. Since Regional Law No. 85 contained a general clause subordinating the activity of the region under Regional Law No. 85 to compliance with EC law, the Constitutional Court declared that Regional Law No. 85 did not breach Article 93 EC or Article 11 of the Constitution.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 29 April 1996, No. 134

The Constitutional Court dismissed a claim relating to the alleged constitutional invalidity of a regional law granting special aid to carriers which had become victims of the Mafia.

II- Brief description of the facts and legal issues

A regional law of 4 August 1995 granted special aid to some carriers that had suffered loss caused by Mafia incendiary attacks. The State Commissioner of Sicily challenged the constitutional validity of that regional law under Article 11 of the Italian Constitution ("the European Clause"), since Article 93 EC would have been violated. The State Commissioner of Sicily claimed that the provisions of the regional law made no reference to the fact that the said measures had been authorised by the Commission under Article 93 EC.

III- Summary of the Court's findings

Since the defendant filed with the Constitutional Court a formal opinion from the Commission, which confirmed that the provisions of the law did not qualify as State aid, the Constitutional Court declared that the law did not infringe the Italian Constitution.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 30 March 1995, No. 94

The Constitutional Court held that two regional acts granting aid to fisheries complied with the provisions of the Italian Constitution, since they had been issued in accordance with Article 93 EC.

II- Brief description of the facts and legal issues

The State Commissioner of Sicily challenged the validity of two legislative acts adopted by the Regional Assembly of Sicily under Article 93 EC and, consequently, Article 11 of the Italian Constitution ("the European Clause"). The two acts were:

(i) a regional deliberation of 4 March 1994 (i.e. a regional law not yet in force), passed by the Regional Assembly of Sicily and granting aid to the fishing industry; and

(ii) a regional law of 10 May 1994, based on a previous one, providing for aid to the fishing industry.

III- Summary of the Court's findings

The Constitutional Court ruled that the two acts were compliant with Article 93 EC. In doing so, the Constitutional Court referred to ECJ case law. In particular, the Constitutional Court emphasised that the ECJ had clarified[1] that once a region had formally notified the regulation granting the aid to the Commission, any further and subsequent legislative acts based on the regulation could be served informally, as in this case. The Constitutional Court therefore dismissed the claim.

[1] Joint Cases C-91/83 and C-127/83 Heineken Brouwerijen BV v Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrecht [1983] ECR 3435.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of July 1969, No. 120

The Constitutional Court ruled that a regional law, passed by the Regional Assembly during the session on 11 June 1969, which granted certain benefits to the citrus fruit market was in breach of the Italian Constitution, since the said law failed to comply with the provisions of Articles 92 and 93 EC.

II- Brief description of the facts and legal issues

The State Commissioner of Sicily sought a declaration of the constitutional illegality of the regional law introducing "Intervention Measures in the Food and Agricultural Sector" on the grounds that it infringed the provisions of Articles 92 and 93 EC. In order to promote the citrus fruit market, the regional law authorised the Sicilian Authority for Industrial Promotion ("*Ente siciliano di promozione industriale*", "ESPI") to grant compensation to companies which had suffered loss due to the purchase of considerable amounts of citrus fruit before the above mentioned regional law came into force. Compensation was offered exclusively in connection with the products purchased by the company, provided that a threshold of 50 tons per producer was not exceeded.

III- Summary of the Court's findings

The Constitutional Court ruled that the regional law was incompatible with the Italian Constitution, referring to the findings in its Judgment No. 49 of 9 April 1963 (see section 3.1.8 below). Furthermore, the Constitutional Court stated that aid relating to market intervention in the fruit and vegetable sector would only be deemed to comply with Articles 92 and 93 EC if authorised by the Commission.

I- Information on the judgment

Constitutional Court ("Corte Costituzionale"), Judgment of 9 April 1963, No. 49

The Constitutional Court ruled that a regional law on aid measures for shipping companies was in breach of the Italian Constitution as the said law failed to comply with the procedure set forth in Article 93 EC.

II- Brief description of the facts and legal issues

On 5 November 1962, the Regional Assembly of Sicily passed a regional law providing for measures in favour of shipping companies. In July 1962, the regional law was notified to the Commission in accordance with Article 93 (3) EC. Thereafter, the Sicilian regional government did not await Commission approval before implementing the regional law. A claim was therefore brought before the Constitutional Court by the State Commissioner of Sicily, who represented the Italian government and was in charge of the approval of Sicilian regional laws prior to their implementation, in order to seek the annulment of such law for breach of Article 93 (3) EC. The Region of Sicily argued that Article 93 (3) EC was only applicable to Member States and not also to regions.

III- Summary of the Court's findings

The Constitutional Court decided that the Sicilian regional government had acted in breach of the Italian Constitution, referring in its reasoning mainly to Article 5 of the Italian Constitution, which regulates the relationship between the State and the regions. The regional law concerned an area of law, i.e. an international treaty, where compliance must be confirmed by the central government. The Constitutional Court held that it was illegal for a region to grant aid without prior approval of the Commission under Article 93 (3) EC Treaty.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 4 March 2005, No. 4769, D.S. et al. v. E.S.P.I. Ente Siciliano Promozione Industriale In Liquidazione

In this judgment, the Supreme Court recognised that a negative decision of the Commission under Article 88 (2) EC had direct effect.

II- Brief description of the facts and legal issues

A number of employees of SIRAP S.p.A., a company declared bankrupt on 1 October 1993, sued E.S.P.I. Ente Siciliano Promozione Industriale In Liquidazione ("ESPI") asking for damages for loss suffered as a result of the bankruptcy of SIRAP S.p.A.. The employees alleged that the bankruptcy of SIRAP S.p.A. had been caused by ESPI's refusal to pay certain contributions to SIRAP S.p.A., as provided for by Article 4 of the Sicilian Regional Law No. 23/1991 of 15 May 1991. The request was dismissed both by the Tribunal and the Court of Appeal of Palermo.

III- Summary of the Court's findings

The Supreme Court cited the decision of the Commission of 2 February 1994, whereby the contributions provided for by Article 4 of Regional Law No. 23/1991 were declared to constitute unlawful State aid. In line with its previous case law (Judgment No. 17564/2002, see section 0 below), the Supreme Court stated that decisions of the Commission under Article 88 EC are binding both on national courts and national governments and clarified that the former comply with such decisions, whereas the latter must repeal legislative acts granting unlawful State aid. The Supreme Court ruled that, since the contributions amounted to unlawful State aid, ESPI correctly refused to grant the aid to SIRAP S.p.A.. On these grounds, the Supreme Court dismissed the claimants' request.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 8 February 2005, No. 2534, Banca Antoniana Popolare Veneta S.c.a.r.l. v. C. Produzione Industriale S.p.A. in amministrazione straordinaria

In this judgment, the Supreme Court addressed in detail a number of questions regarding the interpretation of Law No. 95/75 providing for the special treatment of large insolvent undertakings ("Prodi Law")[2]. In particular, the Supreme Court confirmed, referring to previous case law, that it is not the Prodi Law in its entirety, but only single provision included therein that amount to illegal State aid.

II- Brief description of the facts and legal issues

C. Produzione Industriale S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Banca Antoniana Popolare Veneta S.c.a.r.l. by bringing an action for recovation. The request was upheld by the Tribunal of Padova and by the Court of Appeal of Venice. Banca Antoniana Popolare Veneta S.c.a.r.l. appealed to the Supreme Court, alleging that the Prodi Law was in breach of Articles 87 and 88 EC.

III- Summary of the Court's findings

The Supreme Court cited its previous case law (Judgment No. 13165/2004, see section 0 below), in which it had clarified that, according to the relevant case law of the ECJ[3], it is not the Prodi Law in its entirety but only specific measures adopted within its framework that amount to the granting of (illegal) State aid. The Supreme Court also specified that, in its view, the Commission's decision of 16 May 2000 was fully compliant with the case law of the ECJ. In particular, the Supreme Court cited paragraph 50 of the Commission's decision, according to which the Prodi Law referred back to the Italian Bankruptcy Law and, in cases where the Prodi Law provided for the application without derogation of the mechanisms and procedures of that law, these mechanisms constituted general measures that were not in any way selective. Only specific provisions of the Prodi Law, including the granting of a number of special advantages involving public resources to identifiable recipients, constituted State aid within the meaning of Article 87 EC.

The Supreme Court therefore stated that the Prodi Law could be enforced in all those cases where the specific measures adopted under it did not amount to State aid. A case-by-case analysis was required in order to ascertain whether a specific measure adopted under the Prodi Law amounts to State aid. On the merits, the Supreme Court observed that, since it had not been shown that the action for revocation under the Prodi Law had been commenced prior to the suspension of the company's activities, that action was not selective and did not therefore amount to State aid. The Court also clarified that, since measures which did not constitute State aid did not need to be notified to the Commission under Article 88 EC, it was irrelevant for the purposes of the case that the Prodi Law had not been notified to the EC Commission in its entirety.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

---

2 The Italian Insolvency Law provides that the Commissioner ("*Commissario Straordinario*") may propose to commence an action to recover all payments made by the insolvent company, with a view to paying as many creditors as possible before the company is liquidated. The Prodi Law, in oversimplified terms, provided for an alternative procedure for large insolvent undertakings with a view to, on the one hand, paying all creditors and, on the other, saving the insolvent company by avoid liquidation.

3 Case C-200/97, Ecotrade v Altiforni e ferriere di Serrola [1998] ECR I-7907.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 21 September 2004, No. 18915, Banca Fideuram S.p.A. v. F.S. S.rl. in amministrazione straordinaria

In this judgment, the Italian Supreme Court upheld a judgment of the Court of Appeal of Turin on the interpretation of Law No. 95/79 which provides for the special treatment of large insolvent undertakings ("Prodi Law").

II- Brief description of the facts and legal issues

F.S.S.r.l. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca Fideuram S.p.A. before the Tribunal of Turin for an alleged infringement of Article 67 of the Italian Bankruptcy Law (i.e. Royal Decree No. 267 of 16 March 1942). The decision of the Tribunal, which partially allowed the request of F.S.S.r.l. in Amministrazione Straordinaria, was appealed to the Court of Appeal of Turin by Banca Fideuram S.p.A.. On appeal, Banca Fideuram S.p.A. claimed that the Prodi Law was incompatible with the Common Market for violation of Article 87 EC. The appeal was unsuccessful, so Banca Fideuram S.p.A. brought this case before the Supreme Court.

III- Summary of the Court's findings

The Italian Supreme Court dismissed the claim. It recalled the judgment of the ECJ in Piaggio[4] and the Commission decision of 16 May 2000, and stated that the application of a system derogating from ordinary rules on insolvency must be regarded as granting State aid within the meaning of Article 87 EC in situations where the undertaking (a) was permitted to continue trading in circumstances in which that would not be permitted if ordinary insolvency rules applied, or (b) enjoyed one or more advantages, such as a State guarantee, a reduced rate of taxation, an exemption from the obligation to pay fines and from other pecuniary penalties or a total or partial de facto waiver of public debts which could not have been claimed by an insolvent undertaking to which the ordinary insolvency rules applied. The Court also clarified that the compatibility of national law with EC law may be assessed ex officio by the national courts.

[4] Case C-295/97, Piaggio v Ifitalia [1999] ECR I-3735.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 16 July 2004, No. 13165, Intesa Gestione Crediti S.p.A. v. C.D.C.R. S.r.l. in amministrazione straordinaria

In this judgment, the Supreme Court addressed a number of questions regarding the interpretation of Law No. 95/75, providing for the special treatment of large insolvent undertakings ("Prodi Law"). In particular, the Supreme Court clarified that it is not the Prodi Law in its entirety, but only single provision included therein, that amount to illegal State aid.

II- Brief description of the facts and legal issues

C.D.C.R. S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Cassa di Risparmio di Puglia, bringing an action for revocation. The request was upheld by the Tribunal and the Court of Appeal of Bari. Intesa Gestione Crediti S.p.A., in its capacity as purchaser of Cassa di Risparmio di Puglia, appealed to the Supreme Court, alleging that the Prodi Law was in breach of Articles 87 and 88 EC.

III- Summary of the Court's findings

The Supreme Court cited the relevant case law of the ECJ[5] and stated that it is not the Prodi Law in its entitrety but only specific measures adopted within its framework that amount to the granting of (illegal) State aid. The Supreme Court also specified that, in its view, the Commission's decision of 16 May 2000 was fully compliant with the ECJ case law. In particular, the Supreme Court cited paragraph 50 of the Commission's decision, according to which the Prodi Law referred back to the Italian Bankruptcy Law and, in cases where the Prodi Law provided for the application without derogation of the mechanisms and procedures of that law, these mechanisms constituted general measures that were not in any way selective. Only specific provisions of the Prodi Law, including the granting of a number of special advantages involving public resources to identifiable recipients, constituted State aid within the meaning of Article 87 EC. The Supreme Court therefore stated that the Prodi Law could be enforced in all those cases where the specific measures adopted under it did not amount to State aid. A case-by-case analysis was required in order to ascertain whether a specific measure adopted under the Prodi Law amounted to State aid. On the merits, the Supreme Court declared the grounds of appeal inadmissible. Although the compatibility of the Prodi Law in its entirety with EC law may be assessed ex officio by the national courts, the evaluation of the compatibility of some of its provisions (rather than the Prodi Law as a whole) with Articles 87 and 88 EC would involve a new investigation of the facts, which is an activity reserved to the Supreme Court.

[5] Case C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998], ECR I-7907 and Case C-295/97, Piaggio v Ifitalia [1999] ECR I-3735.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 30 April 2004, No. 8319, Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze S.p.A. and Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato S.p.A.

This judgment concerned the compatibility with EC State aid rules of certain tax benefits granted to bank foundations. The Supreme Court confirmed the direct effect of Article 87 (3) EC and asked for a preliminary ruling under Article 234 EC.

II- Brief description of the facts and legal issues

The Fondazione Cassa di Risparmio di San Miniato ("the bank") and other parties sued the Italian Ministry of Finance in the regional tax court in order to claim a tax benefit for profits from a participation held in a bank ("Cassa di Risparmio di Firenze S.p.A."), according to the provisions of Presidential Decree No. 601 of 29 September 1973 and Law No. 1745 of 29 December 1962. The request of the bank was dismissed by the Court of First Instance but heard on appeal by the competent regional tax court. The Italian Ministry of Finance appealed the decision to the Supreme Court, seeking the annulment of the regional tax court's decision.

III- Summary of the Court's findings

First, the Italian Supreme Court recalled Commission Decision No. C 54/B/2000 of 22 August 2002, which excludes banking foundations from the scope of the State aid rules on the grounds that they do not constitute "undertakings" under Article 87 EC. Having recalled the general principle according to which national courts cannot implement State aid measures unless these have been declared compatible with the Common Market by the Commission, the Supreme Court held that (i) the compatibility of the tax benefit with EC law, in particular with the principles of effectiveness and non-discrimination, must be verified, also ex officio, by national courts; (ii) decisions of the Commission assessing the compatibility of the measure with the Common Market are binding on Member States and all institutions of the Member State; and (iii) should the national courts doubt the validity of a Commission decision, they can (or as courts of last instance must) refer the matter to the ECJ under Article 234 EC. Since the Supreme Court found that there were significant doubts as to the validity of the Commission decision, it referred the matter to the ECJ under Article 234 EC.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 19 March 2004, No. 5561, C. Torino S.p.A. in amministrazione straordinaria v. Banca S. Paolo Torino IMI S.p.A.

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law"), and whether there is scope for appeal to the Supreme Court.

II- Brief description of the facts and legal issues

C. Torino S.p.A. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca S. Paolo Torino S.p.A. in the Trinunal of Udine for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was allowed by the Tribunal of Udine and by the Court of Appeal of Trieste. Banca S. Paolo Torino S.p.A. appealed to the Supreme Court on the grounds that Law No. 95/79 was in breach of Articles 92 and 93 EC.

III- Summary of the Court's findings

The Supreme Court recalled its relevant case law[6] according to which the Supreme Court cannot decide matters ex officio if this involves a new investigation of the facts and/or changing the legal argument underlying the dispute. Since the question of the compatibility of Law No. 95/79 with the EC State aid rules had not been brought before either the Tribunal of Udine or the Court of Appeal of Trieste, the Supreme Court dismissed this ground of appeal. The Supreme Court also specified that it is not the Prodi Law in its entirety, but only specific measures adopted within its framework that may amount to State aid, if the undertaking subject to the Prodi Law enjoys one or more advantages that cannot be claimed under general insolvency rules.

[6] Judgments No. 5241/2003, No. 13470/2002 and No. 9681/1999.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 17 December 2003, No. 19365, Ministero delle Finanze e Agenzia delle Entrate v. Fondazione Cassa di Risparmio della Spezia

In this judgment, the Supreme Court assessed the compatibility of certain tax benefits granted to banking foundations with the EC State aid rules.

II- Brief description of the facts and legal issues

Fondazione Cassa di Risparmio della Spezia sued the Italian Ministry of Finance in the competent tax court in order to claim certain tax benefits under Article 6 of Presidential Decree No. 601 of 29 September 1973 and Article 10 bis of Law No. 1745 of 29 December 1962. The action was upheld by the Court of First Instance and affirmed on appeal. The Ministry of Finance appealed to the Supreme Court, seeking the annulment of the regional tax court's decision.

III- Summary of the Court's findings

The Supreme Court rejected the appeal, recalling the Commission's decision of 22 August 2002 (C 54/b/2000), that excluded banking foundations from the scope of EC State aid rules on the grounds that the latter do not constitute "undertakings" within the meaning of Article 87 EC. The Supreme Court also clarified that it is necessary to carry out a case-by-case analysis to assess whether the relevant activities are to be considered "economic" for the purpose of the State aid assessment.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 4 April 2003, No. 5241, Comit S.p.A. v. Docks Siderurgici S.p.A. in Amministrazione Straordinaria

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law").

II- Brief description of the facts and legal issues

Docks Siderurgici S.p.A. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca Commerciale Italiana S.p.A. in the Tribunal of Udine for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was allowed by the Tribunal of Udine and by the Court of Appeal of Trieste. Banca Commerciale Italiana S.p.A. appealed to the Supreme Court on the grounds that Law No. 95/79 was in breach of Articles 92 and 93 EC.

III- Summary of the Court's findings

First, the Supreme Court noted that (i) the question of the compatibility of Law No. 95/79 with the EC State aid rules was not brought before either the Tribunal of Udine or the Court of Appeal of Trieste, and that it was raised only before the Supreme Court; and that (ii) it was not the Prodi Law in its entirety, but only specific measures adopted within its framework that could amount to State aid, with reference to the judgment of the ECJ in *Ecotrade*[7].

The Supreme Court remarked that the compatibility of the Prodi Law with EC law may be assessed *ex officio* by national courts. However, it stressed that the Supreme Court cannot decide *ex officio* matters that involve a new investigation of the facts and/or change the legal argument underlying the dispute. Accordingly, the Supreme Court dismissed these grounds of appeal.

[7] Case C-200/97, Ecotrade v Altifornie Ferriere di Derrola [1998] ECR I-7907.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 10 December 2002, No. 17564, Ministero delle Finanze v. Torrefazione Caffè Mattioni S.r.l.

The Italian Supreme Court rendered this groundbreaking judgment in December 2002, in which the Supreme Court considered a number of issues regarding the relationship between EC law and national law. In this judgment, the Italian Supreme Court expressly recognised the direct effect of a negative decision of the Commission under Article 88 (2) EC for the first time.

II- Brief description of the facts and legal issues

Torrefazione Caffè Mattioni S.r.l. sued the local tax authority and the Italian Ministry of Finance in the Tax Court of Gorizia to claim certain tax benefits provided for by Law No. 26 of 29 January 1986. The action was upheld by both the local and regional tax courts. The Italian Ministry of Finance and the local tax authority appealed to the Supreme Court, claiming that the Commission had declared that the aid granted under Law No. 26/1986 was incompatible with the Common Market. The Supreme Court annulled the decision of the regional tax court on these grounds.

III- Summary of the Court's findings

First, the Supreme Court remarked that (i) the Italian government was under a duty to enforce negative decisions of the Commission under Article 88 (2) EC, adopting all necessary means to abrogate the legislative measures declared incompatible with the Common Market; (ii) national authorities, including judicial ones, are bound by Commission decisions adopted under Article 88 (2) EC; and (iii) the decision of the Commission had become definitive, since it had not been challenged under Article 230 EC within the prescribed time limit.

The Supreme Court stated that, if the Italian government fails to abrogate a legislative measure granting aid, which the Commission declared incompatible with the Common Market, that decision of the Commission under Article 88 (2) EC has direct effect, if it is sufficiently clear, precise and unconditional and does not give discretionary powers to the Italian government in its implementation. The Supreme Court also specified that (i) the decision must not be final to have direct effect. Should the decision not be final and should the national courts doubt its validity, the national courts can then refer the matter to the ECJ under Article 234 EC; and (ii) the compatibility of a measure with EC law may be assessed *ex officio* by national courts.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 16 September 2002, No. 13470, Banca Commerciale Italiana Comit S.p.A. v. Ferdofin Siderurgica S.r.l. in amministrazione straordinaria

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law").

II- Brief description of the facts and legal issues

Ferdofin Siderurgica S.r.l. sued Banca Commerciale Italiana S.p.A. in the Tribunal of Turin for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was upheld by both the Tribunal and the Court of Appeal of Turin. Banca Commerciale Italiana S.p.A. appealed to the Supreme Court claiming that Law No. 95/79 was in breach of Articles 92 and 93 EC.

III- Summary of the Court's findings

First, the Supreme Court noted that the question of the compatibility of Law No. 95/79 with EC State aid rules had not been brought before either the Tribunal or the Court of Appeal of Turin but had been raised before the Supreme Court for the first time. The Supreme Court observed that it could not decide this issue *ex officio*, since a new investigation of the facts would be necessary and Italian procedural rules did not provide for this. The Supreme Court also clarified that a judgment by the ECJ assessing the incompatibility of national law with EC law is not to be regarded as a source of new law ("*jus superveniens*"), but is of a declaratory nature. On these grounds, the Supreme Court dismissed the appeal.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 23 June 2000, No. 8539, Ditta De Filippi Leonardo v. Mario Maraldi S.p.A. in amministrazione straordinaria

In this judgment, the Supreme Court clarified that actions for revocation under Decree No. 270/99 ("second Prodi Law") are not in breach of EC State aid rules.

II- Brief description of the facts and legal issues

Mario Maraldi S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Ditta De Filippi Leonardo, bringing an action for revocation. The request was upheld by the Tribunal of Forlì and by the Court of Appeal of Bologna. Ditta De Filippi Leonardo appealed to the Supreme Court.

III- Summary of the Court's findings

Although the issue of the compatibility of actions for revocation with Articles 87 and 88 EC was not explicitly raised by the appellant, the Supreme Court clarified that actions for revocation under the second Prodi Law complied with EC State aid rules. The second Prodi Law clarifies that actions for revocation are admissible only once the liquidation phase has started, thereby implementing the case law developed under the (first) Prodi Law, according to which only actions for revocation brought during the liquidation phase, i.e. after attempts to continue the business activity have failed (and only after such phase has ended), are deemed to comply with EC State aid rules.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 19 April 2000, No. 5087, Fallimento Traghetti Mediterraneo S.p.A. v. Tirrenia di Navigazione S.p.A.

The Supreme Court upheld a decision of the Court of Appeal of Naples, rejecting a claim for unfair competition by means of State aid.

II- Brief description of the facts and legal issues

Fallimento Traghetti Mediterraneo S.p.A. sued Tirrenia Navigazione S.p.A. in the Tribunal of Naples, claiming unfair price competition and unfair solicitation of clients. In particular, Fallimento Traghetti Mediterraneo S.p.A. argued that Tirrenia benefited from State aid granted by Law No. 684/74, which allowed Tirrenia to set tariffs below costs. The Tribunal of Naples dismissed the claim. The Court of Appeal of Naples confirmed the decision of the Tribunal. Fallimento Traghetti Mediterraneo appealed to the Supreme Court, alleging, *inter alia*, that the financial aid granted to Tirrenia Navigazione S.p.A. amounted to unlawful State aid, which had not been notified to the Commission.

III- Summary of the Court's findings

The Supreme Court dismissed the claim. The argument relating to the notification of Law No. 684/74 to the Commission was not addressed. The Supreme Court acknowledged that State aid is, in theory, generally prohibited, as long as it affects trade between Member States and distorts competition on the market. The Supreme Court, however, affirmed that the distortion of competition test is irrelevant in order to assess the compatibility of a State aid, since such a distortion is the necessary consequence of granting State aid. It stated, therefore, that a State aid can be compatible with the Common Market, even where it distorts competition, if the State aid is aimed at protecting interests that could not otherwise be satisfied (such as public transport services).

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 11 September 1999, No. 9681, Ecotrade S.r.l. v. Altiforni Ferrieri Servola S.p.A. in amministrazione straordinaria

In the course of these proceedings, the Italian Supreme Court asked for a preliminary ruling under Article 177 EC from the ECJ concerning the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law"). The ECJ answered the questions raised by the Italian Supreme Court in its well-known *Ecotrade* judgment of 1 December 1998[8].

II- Brief description of the facts and legal issues

The tribunal and the Court of Appeal of Trieste upheld the request of Altiforni Ferrieri under Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. Ecotrade appealed to the Supreme Court, asking for, *inter alia*, a declaration of incompatibility of the Prodi Law with Article 93 EC.

III- Summary of the Court's findings

The Supreme Court complied with the decision of the ECJ and held that, in order to verify the compatibility of the Prodi Law with EC rules on State aid, it was necessary to compare the effects resulting from the application of the Prodi Law with those resulting from the application of general insolvency rules. The Supreme Court referred the case to the Court of Appeal of Trieste, the judicial authority competent to carry out this comparative analysis.

[8] Case C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 23 May 1980, No. 3397, Comafrica S.p.A. v. Smo-Società Mercantile Oltremare

The Supreme Court declared that national courts have jurisdiction to interpret Article 92 EC and its direct effect on individuals.

II- Brief description of the facts and legal issues

Smo-Società Mercantile Oltremare sued its competitor Comafrica S.p.A. before an Italian civil court, claiming that it had infringed Article 92 EC and requesting damages for loss suffered due to unfair competition. Comafrica imported bananas from Martinique and benefited from financial aid granted by the French government.
Comafrica appealed directly to the Supreme Court pursuant to Article 41 of the Italian Code of Civil Procedure in order to settle the question of jurisdiction.
Comafrica argued that:
Article 92 EC only addressed Member States and could not therefore be infringed by an individual;
as Smo's claim concerned the compliance by the French State with Article 92 EC, the issue could only be settled at EC level and not by an Italian judge; and
only administrative courts, and not civil courts, had the power to suspend or modify an administrative importation licence.

III- Summary of the Court's findings

The Supreme Court held that Article 92 EC has direct effect; Italian courts may also assess cases of unfair competition arising from State aid within the meaning of Article 92 EC ; and
The remedy ordered by a civil court does not necessarily lead to the suspension or modification of the importation licence, and, accordingly jurisdiction of the civil courts must be acknowledged in cases concerning unfair competition connected with State aid, without further inquiring into the legal meaning of the importation licences in question.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 15 April 1980, No. 2441, Amministrazione Finanze dello Stato v. Ditta Perricone e Leone

The Supreme Court addressed a number of questions relating to the relationship between EC law and national law. This case is a good example of the old approach adopted by the Italian courts in relation to this question, showing an inclination to subordinate EC legislation to national constitutional rules.

II- Brief description of the facts and legal issues

Ditta Perricone e Leone was a Sicilian olive oil producer. According to Article 26 of Law No. 21/1970, which provided for special measures for Sicily after the earthquakes of 1967 and 1968, Ditta Perricone e Leone was exempt from paying of excise tax. The Italian government sued Ditta Perricone e Leone in the Tribunal of Palermo in order to obtain payment of the excise tax. The action by the Italian government was dismissed by the Tribunal of Palermo and the Court of Appeal of Palermo. The Italian government appealed to the Supreme Court, alleging, *inter alia*, that the measures contained in Article 26 of Law No. 21/1970 amounted to illegal State aid.

III- Summary of the Court's findings

The Supreme Court observed, as a matter of principle, that (i) any measure constituting State aid - including aid compatible with the Common Market under Article 92 (2) EC - must be notified to the Commission; (ii) national laws adoped in breach of EC law are unconstitutional under Article 10 of the Italian Constitution; (iii) relevant cases should therefore be referred to the Contitutional Court; and (iv) a referral to the Constitutional Court can be made without first referring the case to the ECJ. However, the Supreme Court dismissed the claim on the grounds that the Italian government had failed to prove, in the course of the proceedings, that Law No. 21/1970 had not been notified to the Commission and that it was therefore unconstitutional.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 1 March 1979, No. 1317, Amministrazione Finanze dello Stato v. Isolabella e Figlio S.p.A.

In this case, the Supreme Court addressed the issue of the relationship between Article 92 EC, a decision of the Commission authorising State aid and the provisions of Article 95 EC.

II- Brief description of the facts and legal issues

Isolabella e Figlio S.p.A., an importer of cognac, sued Amministrazione Finanze dello Stato in the Tribunal of Milan in order to obtain the reimbursement of certain customs duties, alleging that higher fiscal charges on imported products than national products amounted to a breach of Article 95 EC. The Tribunal of Milan and the Court of Appeal of Milan upheld the claim. The Supreme Court partially annulled the decision of the Court of Appeal of Milan and sent the case back to the Court of Appeal of Bologna that upheld the claim. Amministrazione Finanze dello Stato appealed to the Supreme Court, asking for the annulment of the judgment of the Court of Appeal of Bologna, alleging, *inter alia*, that lower fiscal charges on national products amounted to State aid that had been notified to and approved by the Commission.

III- Summary of the Court's findings

The Supreme Court upheld the claim, stating that (i) the imposition of a lower fiscal charge on national products had been duly authorised by the Commission in its opinion to the Italian Republic of 28 February 1969; and (ii) this formal authorisation justified an exception to Article 95 EC.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 1 March 1979, No. 1321, Amministrazione Finanze dello Stato v. Ferraretto Giovanni F&C S.r.l.

In this case, which mirrors the case mentioned at section 0 above, the Supreme Court addressed the issue of the relationship between Article 92 EC, a decision of the Commission authorising State aid and the provisions of Article 95 EC.

II- Brief description of the facts and legal issues

Ferraretto Giovanni F&C S.r.l., an importer of cognac, sued Amministrazione Finanze dello Stato in the Tribunal of Milan in order to obtain the reimbursement of certain custom duties, alleging that higher fiscal charges on imported products than national products amounted to a breach of Article 95 EC. The Tribunal of Milan and the Court of Appeal of Milan upheld the claim. The Supreme Court partially annulled the decision of the Court of Appeal of Milan and sent the case back to the Court of Appeal of Turin that upheld the claimant's request. Amministrazione Finanze dello Stato appealed to the Supreme Court, asking for the annulment of the judgment of the Court of Appeal of Turin, alleging, *inter alia*, that lower fiscal charges on national products amounted to State aid that had been notified to and approved by the Commission.

III- Summary of the Court's findings

The Supreme Court upheld the claim, stating that (i) the imposition of a lower fiscal charge on national products had been duly authorised by the Commission in its opinion to the Italian Republic of 28 February 1969; and (ii) this formal authorisation justified an exception to Article 95 EC.

IV- Comment

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 11 December 1978, No. 5939, Amministrazione Finanziaria dello Stato v. Oleificio S. Leonardo

The Supreme Court upheld a decision by the Court of Appeal of Palermo of 27 February 1976 IN which the Court of Appeal authorised fiscal aid for the production of olive oil. The Supreme Court agreed with the findings of the Court of Appeal that, in cases of emergency, fiscal aid such as that granted by the Region of Sicily to areas where the standard of living is much lower than national average and which had suffered damage from earthquakes was in accordance with Articles 92 (2) (b) and 92 (3) (a) EC.

II- Brief description of the facts and legal issues

Olive oil production tax was levied on the olive oil produced by the owner of Oleificio S. Leonardo, an olive oil producer. He filed a petition with the Court of First Instance of Palermo against the Ministry of Finance, raising the inapplicability of the olive oil production tax levied under the legislation passed by the Region of Sicily, granting tax benefits to the inhabitants of certain areas of Sicily which had been affected by an earthquake. The Court of First Istance of Palermo and the Court of Appeal of Palermo upheld the petition. The Ministry of Finance appealed to the Supreme Court.

The Ministry of Finance argued that the financial aid granted by the Region of Sicily and implemented by regional legislation infringed Article 92 EC and, consequently, the Italian Constitution, since (i) no evidence of Commission communications or authorisations addressed to the Region of Sicily had been placed before the court; and (ii) financial aid had been granted to some areas of Sicily long after the earthquake, favouring particular undertakings or products which distorted competition.

III- Summary of the Court's findings

The Supreme Court affirmed the decision of the Court of Appeal of Palermo, according to which:

(i) financial aid after natural disasters, such as earthquakes, is treated by Article 92 EC as being compatible with the Common Market; and

(ii) pursuant to the provisions of Articles 92 and 93 EC, Member States may grant aid to promote the economic development of areas where the standard of living is much lower than national average or with a high rate of unemployment, provided that the Commission is formally notified thereof.

The Supreme Court decided that the compatibility of State aid with the Common Market must be assessed in accordance with the procedure provided for by Article 93 (3) EC. As the claimant had failed to prove that the Region of Sicily had not notified the aid to the Commission, the claim relating to the constitutional invalidity of the regional legislation granting fiscal aid to certain Sicilian areas could not be upheld. According to the Supreme Court:

(i) the burden of proof regarding alleged infringements of Community law is on the claimant;

(ii) the claimant's main criticism related to the factual analysis rather than legal interpretation in this case, which is beyond the jurisdiction of the Supreme Court (that is strictly limited to legal interpretation); and

(iii) the issue whether the procedure set forth in Article 93 EC should be followed for every kind of aid (i.e. under Article 92 (2) as well as Article 92 (3)) is beyond the Supreme Court's jurisdiction and had to be referred to the ECJ under Article 177 EC.

I- Information on the judgment

Court of Appeal of Venice ("Corte d'Appello di Venezia"), Judgment of 26 June 2003, Banca Intesa S.p.A. v. Cavirivest S.p.A. in a.s.

The Court of Appeal of Venice issued this judgment in June 2003, holding that Law No. 95/79, which provided for special treatment of large insolvent undertakings ("Prodi Law"), was contrary to EC law in its entirety, that it could therefore not be enforced and that the relevant exception could be raised *ex officio* by the Court.

II- Brief description of the facts and legal issues

Cavirivest S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Banca Commerciale Italiana by bringing an action for revocation. When the Court of First Instance upheld the claim, Banca Commerciale Italiana appealed to the Court of Appeal of Venice.

III- Summary of the Court's findings

The Court of Appeal of Venice stated that the issue of compatibility of the action for revocation initiated by a company under the special administration regime provided for by the Prodi Law with Community law could be raised by the Court *ex officio*.

Moreover, the Court of Appeal of Venice held that the Prodi Law provides for State aid, which is contrary to the provision of Article 87 EC. The Prodi Law itself, rather than single provisions included therein (including that concerning the action for revocation), could not be enforced by the national courts since it was incompatible with Community law. In particular, the conclusion of the Court was based on the ECJ's judgment in *Piaggio* and the Commission decision of 16 May 2000, finding the Prodi Law incompatible with the Common Market.

I- Information on the judgment

Court of Appeal of Turin ("Corte d'Appello di Torino"), Judgment of 23 May 2002, Berutti & C. S.r.l. v. Amm. straordinaria Infos Telematica S.p.A.

In May 2002, the Court of Appeal of Turin affirmed that the action for revocation started by a company under the special administration regime provided for by Law No. 95/79 ("Prodi Law") after the suspension of the company's activities was not incompatible with EC rules on State aid, since, at that stage, insolvency proceedings would only be aimed at winding up the company.

II- Brief description of the facts and legal issues

The case concerned an action for revocation started by a company subject to the special administration regime provided for by the Prodi Law during the course of liquidation. The appellant claimed that the Prodi Law could not be applied, since it was incompatible with Community law to the extent that it provided for the grant of State aid in favour of the companies subject to this special regime.

III- Summary of the Court's findings

Having analysed the relevant ECJ judgments[9] as well as the Commission decision of 16 May 2000, the Court of Appeal of Turin excluded that they implied the obligation for national courts not to apply the Prodi Law as a whole. Instead, the Court of Appeal of Turin deemed that they implied such an obligation only for those provisions departing from ordinary insolvency rules. The regime provided for by the Prodi Law would then not be entirely inapplicable. Consequently, the Court of Appeal of Turin deemed that actions for revocation started by a company under the special administration regime provided for by the Prodi Law after suspension of the company's activity (in this case, in the course of liquidation proceedings) were not incompatible with the EC law prohibition on State aid, since no damage to the market can be caused by a company that has ceased all business activity.

[9] Cases C-295/97, Piaggio v Ifitalia [1999] ELR I-3735 and C-200/97, Ecotrade v Altigornie Ferriere di Serrola [1998] ECR I-7907.

I- Information on the judgment

Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 4 April 2002, Banca Nazionale del Lavoro v. Fedorfin Siderurgica S.r.l. in amministrazione straordinaria

In April 2002, the Court of Appeal of Turin affirmed that the action for revocation started by a company under the special administration regime provided by the Law No. 95/79 ("Prodi Law") after the suspension of or absent any business activity was not incompatible with EC rules on State aid.

II- Brief description of the facts and legal issues

The case concerned an action for revocation started by Fedorfin Siderurgica S.r.l. in amministrazione straordinaria, a company in liquidation and subject to the special administration regime provided, for by the Prodi Law.

III- Summary of the Court's findings

Having analysed the ECJ's judgments in *Piaggio* and *Ecotrade*[10] and the Commission decision of 16 May 2000, the court of appeal in Turin excluded that they implied the obligation for national courts not to apply the Prodi Law in its entirety. Instead, the Turin Court deemed that they implied such obligation only for those provisions departing from ordinary insolvency rules. Following this approach of assessing each legal provision under the Prodi Law in relation to EC law on State aid, the Court of Appeal of Turin affirmed that actions for revocation started by a company under the special administration regime after the suspension of or absent any business activity are not incompatible with EC law, since no damage can be caused by a company that has ceased all business activity. Moreover, since the action for revocation may be started by the commissioner ("*commissario*") under the Prodi Law only in the course of insolvency proceedings, such provision is fully compatible with EC law on State aid.

[10] Cases C-295/97, Piaggio v Ifitalia [1999] ELR I-3735 and C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907 respectively.

I- Information on the judgment

Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 12 February 2002, Amm. straord. Presafin S.p.A. v Banca Monte dei Paschi di Siena S.p.A.

In February 2002, the Court of Appeal of Turin stated that, in order to comply with EC law, it was not necessary for the Italian courts to disregard Law No. 95/79 ("Prodi Law") in its entirety, but only those provisions departing from ordinary insolvency rules and granting benefits that would not normally be granted to insolvent companies.

II- Brief description of the facts and legal issues

The Court of Appeal of Turin was requested to rule on the compatibility of the Prodi Law with Community law, with a view to assessing whether the admission of Presafin S.p.A. to the special administration regime provided for by the Prodi Law and the appointment of the special administration commissioners ("*commissario*") were valid.

III- Summary of the Court's findings

Having analysed the ECJ's judgments in *Piaggio* and *Ecotrade*[11], as well as the Commission decision of 16 May 2000, the Court of Appeal of Turin excluded that they implied the obligation for national courts not to apply the Prodi Law in its entirety. Indeed, these Community decisions only required national courts not to apply the Prodi Law to the extent that it differed from ordinary insolvency rules, granting benefits that would not normally be granted to insolvent companies. Therefore, the Court of Appeal of Turin concluded that the decree opening the special administration proceedings under the Prodi Law and appointing the commissioner was a due act in the event that a company was declared insolvent. Therefore, and without prejudice to the above, the decree must be considered to be valid under Italian law.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[11] Cases C-295/97, Piaggio v Ifitalia [1999] I-3735 and C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907 respectively.

I- Information on the judgment

Court of Appeal of Milan ("Corte d'Appello di Milano"), judgment of 8 January 2002, Banca Nazionale dell'Agricoltura S.p.A. v Redaelli Tecnologie dell'Acciacio, Tecna in a.s. S.p.A.

In January 2002, the Court of Appeal of Milan stated that the issue of compatibility of the special administration regime provided for by Law No. 95/79 ("Prodi Law") with EC rules on State aid could not be assessed by the Court *ex officio*. Pursuant to national civil procedural rules, it could only be raised by an interested party.

II- Brief description of the facts and legal issues

The case concerned an action for revocation brought by Redaelli Tecnologie dell'Acciacio, Tecna in a.s. S.p.A., a company subject to the special administration regime under the Prodi Law, against Banca Nazionale dell'Agricoltura S.p.A. for the reimbursement of payments made on or to the declaration of insolvency. The appellant raised the objection concerning the incompatibility of the Prodi Law with the EC law prohibition of granting State aid in its last submission, before the conclusion of the proceedings, rather than in its first submissions.

III- Summary of the Court's findings

The Court of Appeal of Milan held that the issue raised by way of objection by the appellant fell outside the scope of the appeal and, since it introduced a new challenge, should have been submitted in accordance with the provisions of the civil procedure rules. Therefore, the Court of Appeal of Milan concluded that the Community decisions invoked by the appellant, which could have been the subject of an objection by an interested party (in due time), could not be considered by the Milan Court *ex officio*.

I- Information on the judgment

Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 24 December 2001, Cordifin S.p.A. v Ferdofin Siderurgica S.r.l. in amministrazione straordinaria

In its judgment of December 2001, the Court of Appeal of Turin stated that the provisions of the Prodi Law governing the special administration procedure were not entirely and *per se* incompatible with the Community law on State aid. On the contrary, national courts had to assess on a case-by-case basis whether the application of such rules resulted in the granting of State aid.

II- Brief description of the facts and legal issues

Ferdofin Siderurgica S.r.l. in amministrazione straordinaria, a company subject to the special administration regime under the Prodi Law brought an action for revocation against Cordifin S.p.A., claiming the reimbursement of payments made to the latter during the year preceding the commencement of the special administration procedure.

III- Summary of the Court's findings

The Court of Appeal of Turin confirmed that, in the context of the special administration procedure, an action for revocation started during the liquidation phase when attempts to continue the business had failed (and only after such phase has ended) did not give raise to State aid issues, but constituted a mere application of the general bankruptcy rules aimed at restoring the *par condicio creditorum*.

The Court of Appeal of Turin clarified that, within the framework of the Prodi Law, the possibility to start an action for revocation existed only during the liquidation phase and with express reference to the bankruptcy rules. The object of the law was therefore not the protection of the insolvent company subject to the special administration regime, but of its creditors, so that no State aid issues arose.

I- Information on the judgment

Court of Appeal of Cagliari ("Corte d'Appello di Cagliari"), Decree of 21 July 1999, Exol S.p.A. v Nuova Cartiera di Arbatax S.p.A.

In July 1999, the Court of Appeal of Cagliari dismissed the action filed by Exol S.p.A. ("Exol") against Nuova Cartiera di Arbatax S.p.A. ("NCA").

II- Brief description of the facts and legal issues

NCA applied to the Court of First Instance of Cagliari ("*Tribunale di Cagliari*") in order to be admitted to the special administration regime provided for by Law No. 95/79 ("Prodi Law") (see section 0 below). The application was based on the assumption that NCA was required to repay State aid. In April 1992, the Court of First Instance of Cagliari declared that NCA was insolvent and ordered that its decision be notified to the Ministry of Industry and Commerce for it to enact measures subsequent to such insolvency status. In October 1998, Exol, a creditor of NCA, asked the Court of Appeal of Cagliari to set aside Law No. 80/1993 ("the second Prodi Law"), following the Commission's decision of 20 March 1996 (which declared the second Prodi Law incompatible with Articles 92 and 93 EC and Article 61 EEA and asked therefore that NCA be declared bankrupt.

III- Summary of the Court's findings

The Court of Appeal of Cagliari dismissed the action by Exol and declared that natural or legal persons which were not directly affected by a Commission decision were not entitled to bring an action to directly enforce it, even if they had a material interest which coincided with the interest underlying the Commission decision. Exol was found not to have such an interest and was thus not entitled to ask the Court of Cagliari to disregard the second Prodi Law.

I- Information on the judgment

Court of Appeal of Naples ("Corte d'Appello di Napoli"), judgment of 13 July 1999, Alilauro S.p.a. v CAREMAR

In July 1999, the Court of Appeal of Naples dismissed the action filed by Alilauro S.p.A.("Alilauro"), a company, against Caremar.

II- Brief description of the facts and legal issues

Alilauro claimed that Caremar used a high-speed motorboat for transporting people in the Gulf of Naples and sold the relevant tickets at a price below cost, such practice being subsidised by State aid. The charging of below-cost prices was allegedly driven by a predatory interest and aimed at creating a monopoly in the relevant market, in breach of Article 3 of Law No. 287/90. Alilauro therefore asked the Court of Appeal of Naples to suspend the aid granted to Caremar.

III- Summary of the Court's findings

The Court of Appeal of Naples rejected all allegations made by Alilauro stating that (i) in the event that a claim under Article 82 EC is pending before the Commission, the national judge is not obliged to suspend national proceedings relating to an alleged breach of Article 88 (3) EC; and (ii) according to Article 15 of Law No. 287/90, the suspension of State aid is a measure which only the Italian Antitrust Authority ("*Autorità Garante della Concorrenza e del Mercato*") may adopt.

I- Information on the judgment

Court of First Instance of Genova ("Tribunale di Genova"), judgment of 22 November 2001, Soc. IAM Rinaldo Piaggio v Dornier Luftfarth GmbH

II- Brief description of the facts and legal issues

-

III- Summary of the Court's findings

The Court of First Instance of Genoa held that, in accordance with the decision of the ECJ in *Piaggio*[12], Law No. 95/79 of 3 April 1979, providing for special treatment of large insolvent undertakings ("Prodi Law"), constituted State aid. If new aid is not notified to the Commission under Article 93 (2) EC, national courts can assess the compatibility of the aid with relevant EC legislation. On the merits, the Court of First Instance of Genoa decided that the Prodi Law was in breach of Articles 92 and 93 EC since it (i) authorised insolvent undertakings to continue their business activities in circumstances where this would not have been permitted if ordinary rules on insolvency had been applied; and (ii) allowed those undertakings to enjoy a number of advantages that could not be claimed by an insolvent undertaking subject to the application of ordinary insolvency rules.

[12] Case C-295/97, Piaggio v Ifitalia [1999] I-3735.

I- Information on the judgment

Court of First Instance of Genova ("Tribunale di Genova"), ordinance of 26 April 1993, Grandi traghetti di navigazione S.p.A. v. Viamare di navigazione S.p.a. and Finmare S.p.A.

The Court of First Instance of Genoa dismissed the action filed by Grandi Traghetti di Navigazione S.p.A. ("GTN"), a maritime corporation, against Viamare di Navigazione S.p.A. ("VDN"), a maritime corporation owned by Finmare S.p.A., which is a competitor of GTN in the market of cargo ferry transportation.

II- Brief description of the facts and legal issues

In July 1992, VDN began running a cargo ferry service between Genoa and Termini Imerese (Sicily). Over the following months, VDN added two further vessels to the service and started scheduled coasting trade. GTA filed a petition against VDN for unfair competition based on price cuts and unfair solicitation of clients. GTA argued that the price cuts could only have been implemented by means of financial aid granted by the Italian government, which had injected funds in Finmare, VDN's parent company. In particular, GTA requested the Court:

a) to grant an injunction against VDN pursuant to Article 700 of the Italian Civil Procedure Code ("*Codice di Procedura Civile*"); and

(b) to request a preliminary ruling from the ECJ on whether such behaviour could be considered to constitute State aid under Articles 92 and 93 EC.

III- Summary of the Court's findings

The Genoa Court held that granting State aid in breach of Articles 92 and 93 EC qualified as an act of unfair competition, not only for the State, but also for the beneficiary which may be the subject of an injunction granted by the civil judge.

In this particular case, however, the Genoa Court dismissed the action finding that:

(i) Article 92 EC was not applicable to shipping services, since until 1 January 1999 only Italian ships could provide such services pursuant to Article 6 of Regulation EC No. 3577/92;

(ii) financial aid granted to VDN by Finmare should not to be considered to amount to State aid, since it was channelled through the financial market, and the State had not granted any kind of guarantee to Finmare, which was owned by the State and 3,138 minority shareholders; and

(iii) accordingly, the State was not obliged to make a notification under Article 93 EC.

I- Information on the judgment

Court of First Instance of Cagliari ("Tribunale di Cagliari") judgment of 14 April 1992, Nuova Cartiera di Arbatax S.p.A.

The Court of First Instance of Cagliari declared Nuova Cartiera di Arbatax S.p.A. ("NCA") insolvent and ordered that its decision be notified to the Ministry of Industry and Commerce for the Ministry to take subsequent measures.

II- Brief description of the facts and legal issues

NCA filed a petition with the Court of First Instance of Cagliari in order to be admitted to the special administration regime under Law No. 95/1979 ("Prodi Law"). The request was based, inter alia, on the assumption that NCA should repay ITL 67.529 billion of State aid after the Commission had declared the aid illegal by decision of 27 November 1991. Since NCA's capital amounted to ITL 100 billion, the amount due represented more than 51% of its capital (i.e. the percentage set by the Prodi Law as one of the conditions for admission to the special administration procedure).

III- Summary of the Court's findings

The Court of First Instance of Cagliari upheld NCA's request to be admitted to the special administration regime.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 27 October 2003, No. 6610, Soc. Coop. ASTER v Camera di Commercio di Gorizia

The Administrative Supreme Court addressed a number of issues, including issues relating to (i) the different areas of jurisdiction of the European institutions and the national courts on State aid matters; and (ii) the different rationale behind actions for annulment under Article 230 EC and preliminary rulings under Article 234 EC.

II- Brief description of the facts and legal issues

Aster and a number of other companies active in the transport sector appealed against a decision of the Administrative Court of Friuli Venezia Giulia. Aster alleged that fiscal incentives for mineral oils allowed by the Chamber of Commerce of Gorizia to undertakings with head offices in the province of Gorizia amounted to unlawful State aid and asked the Administrative Court of Friuli Venezia Giulia to make a reference for a preliminary ruling in that regard to the ECJ. The Administrative Court of Friuli Venezia Giulia rejected the claim and Aster appealed to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court stated that, under Article 92 EC some forms of State aid may be compatible with the Common Market. The Court stated that it is, in principle, the duty of the European institutions (European Council and Commission) to assess compatibility under Article 93 EC and clarified that the national measures in question had been duly authorised at European level[13]. The Administrative Supreme Court also explained that a review of the legality of acts adopted by the European institutions is to be carried out under Article 230 EC and that references for preliminary rulings under Article 234 EC cannot serve as an instrument for contesting the validity of an act, where that act does not give rise to doubts concerning its interpretation.

[13] In particular, the Administrative Supreme Court referred to Council directives No. 92/81/EEC, No. 92/82/EEC and No. 94/74/EEC and Council decisions of 31 October 1992 and 30 June 1997.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 16 September 2003, No. 5250, Ministero dell'Industria v Società Siderurgica Lucchini

The Administrative Supreme Court recalled its previous case law (i.e. Judgment No. 465 of 29 January 2002, see section 0 below), confirming that Commission decisions declaring State aid incompatible with the Common Market are directly applicable and all subsequent national measures must therefore comply with them.

II- Brief description of the facts and legal issues

The Ministry of Industry did not implement an aid scheme for the steel industry provided for under Law No. 183/1976 and Decree No. 902/1976 of the President of the Republic, since it was incompatible with Community rules on aid to the steel industry established by Commission decisions No. 2320/81/ECSC of 7 August 1981 and No. 3484/85/ECSC of 27 November 1985. Società Siderurgica Lucchini appealed to the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), which upheld its request to receive the aid. The Ministry of Industry appealed to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the appeal by the Ministry of Industry and quashed the decision of the Regional Administrative Court of Lazio. It stated that, since Commission decisions declaring State aid incompatible with the Common Market are directly applicable, national authorities must comply with them. National legislation that is not compliant with a Commission decision cannot be enforced, even if it had not been abrogated and would, therefore, still be in force. Allowing a company to benefit from the aid would also be in breach of the recovery obligation imposed on Member States. The Administrative Supreme Court also specified that the only way to challenge a Commission decision is to bring an action for annulment before the ECJ under Article 230 EC, or, at most, a request for a preliminary ruling under Article 234 EC.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 9 May 2003, Ministero dell'Industria, del Commercio e dell'Artigianato v Società Industrie cantieri metallurgici italiani S.p.A.

The Administrative Supreme Court upheld an appeal against a judgment of the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale* del Lazio") stating that the Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") unlawfully suspended a procedure for granting aid provided for under Italian law, on the grounds that the aid had been declared incompatible with the Common Market by ECSC decisions.

II- Brief description of the facts and legal issues

The Ministry of Industry, Commerce and Craftsmanship did not implement an aid scheme provided for under national law in favour of Società Industrie Cantieri Metallurgici Italiani S.p.A., a company. The aid at issue was declared incompatible with the Common Market by the Commission, but the Italian law providing for the aid was not officially repealed. The company successfully appealed to the Regional Administrative Court of Lazio claiming that the Ministry was not competent to disregard an Italian law in order to enforce an ECSC decision.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the Ministry's petition against the decision of the Regional Administrative Court of Lazio, confirming that, under Article 249 EC, Commission decisions "*shall be binding in* [their] *entirety upon those to whom* [they are] *addressed*" and that these decisions are directly effective without needing to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provides for a beneficiary's right of appeal against Commission decisions.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 25 February 2003, No. 1029, AEM S.p.A. v Autorità Energia Elettrica e Gas

The Administrative Supreme Court made a request for a preliminary ruling under Article 234 EC to the ECJ in order to clarify, inter alia, whether an administrative measure, which imposed an increased charge for access to and use of the electricity transmission system on certain undertakings in order to finance general revenue charges incurred by the electricity system, can be regarded as a State aid for the purposes of Article 87 EC.

II- Brief description of the facts and legal issues

AEM S.p.A. and AEM Torino S.p.A. appealed against a decision of the Regional Administrative Court of Milan ("*Tribunale Amministrativo Regionale della Lombardia*") and contested two decisions (No. 231/2000 and No. 232/2000) of the Electricity and Gas Authority ("*Autorità per l'Energia Elettrica e per il Gas*") as well as a ministerial decree of 26 January 2000 which increased the charge imposed on certain hydroelectric and geothermal power stations for access to and use of the national electricity transmission system. AEM and AEM Torino claimed that the increased charge fell entirely within the regime of aid for the functioning of certain undertakings which is financed by levies on the supplies by other undertakings in that sector, which amounted to State aid within the meaning of Article 87 EC, granted contrary to the procedure laid down in the EC Treaty.

III- Summary of the Court's findings

The Administrative Supreme Court deemed it necessary to clarify, first, whether the regime adopted by the contested decisions of the Electricity and Gas Authority amounted to State aid within the meaning of the rules laid down in Article 87 EC. Therefore, it decided to stay the proceedings and request a preliminary ruling from the ECJ on the following question: "*Can an administrative measure which imposes on certain undertakings using the electricity transmission system an increased charge for access to and use of that system, intended to finance general revenue charges of the electricity system, be regarded as a State aid for the purposes of Article 87* et seq. *of the* [EC] *Treaty*?". The ECJ rendered its judgment on 14 April 2005[14].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[14] Joined Cases C-128/03 and C-129/03, AEM S.p.A., AEM Torino S.p.A. v Autorità per l'energia elettrica e per il gas.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 10 October 2002, No. 5449, Pincieri Umberto v Ministero dell'Economia e delle Finanze et a.

II- Brief description of the facts and legal issues

In 2000, Mr Pincieri won a public bid and qualified for an aid under an Italian aid scheme for agriculture authorised by a Commission decision of 6 September 1999. However, whereas the costs of Mr Pincieri's project were equal to ITL 3.186 billion (approximately EUR 1.5 million), only ITL 2.7909 billion (approximately EUR 1.3 million) had been granted in aid.
On 1 October 2001, Mr Pincieri lodged a claim before the Administrative Court of Molise ("*TAR Molise*"), which dismissed the claim. Mr Pincieri then appealed to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court dismissed the appeal on the grounds that the Commission decision of 6 September 1999, approving the scheme, granted a high degree of discretion to the administrative authorities when calculating the eligible amount.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 27 September 2002, No. 4946, Ministero delle Attività Produttive v DIANO S.p.A.

II- Brief description of the facts and legal issues

By means of Decree No. 119 of 2 August 1995, the Ministry of Industry ("*Ministero dell'Industria*") admitted Diano S.p.A. ("Diano") to an investment program. By notice of 31 October 1995, the Ministry of Productive Activities ("*Ministero delle Attività Produttive*") rejected Diano's application for State aid on the basis of Commission decisions No. 2320/81/CECA and No. 3484/85/CECA. Diano appealed against the notice claiming that the Ministry had failed to give reasons for the rejection and the Regional Administrative Court ("*tribunale amministrativo regionale*") upheld the claim. The Ministry then appealed to the Administrative Supreme Court on the grounds that Diano failed to meet the requirements set out in the Commission decisions.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the Ministry's appeal holding that, without specific authorisation by the Commission, the aid could not be granted and that the notice from the Ministry of Productive Activities was, thus, in accordance with Commission decisions No. 2320/81/CECA and No. 2484/85, which were both directly applicable.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 29 January 2002, No. 465, Del Verde S.p.A. v Ministero dell'Industria, del Commercio e dell'Artigianato et a.

The Administrative Supreme Court dismissed an appeal brought against a judgment of the Regional Administrative Court of Abruzzo ("*Tribunale Amministrativo Regionale dell'Abruzzo*") upholding an act, which did not grant certain benefits provided for by a law on investment plans in Southern Italy, since that law had been declared incompatible with EC rules on State aid by the Commission.

II- Brief description of the facts and legal issues

The Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") did not assign certain benefits for investments in Southern Italy provided for by Law No. 120/1987 to Del Verde S.p.A., a pasta manufacturer. Del Verde petitioned to the Administrative Court of Abruzzo asserting its legal right to receive the aid and claiming that, even though the Commission had declared such aid incompatible with EC rules on State aid, a national entity could not disregard an Italian law on the basis of a decision by the Commission since that Italian law was still in force.

III- Summary of the Court's findings

The Administrative Supreme Court dismissed the petition, expressly departing from its findings in its previous Judgment No. 30/1989. The Administrative Supreme Court noted that, under Article 249 EC, Commission decisions "*shall be binding in* [their] *entirety upon those to whom* [they are] *addressed*" and that these decisions are directly effective without having to be implemented by an act of Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provided for a beneficiary's right to appeal Commission decisions. Finally, the Administrative Supreme Court noted that it would be inconsistent for a State to grant aid that is to be recovered under EC law.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 22 January 2002, No. 360, Acciaierie Ferriere Lombarde Falck S.p.A. v Ministero dell'industria, del commercio e dell'artigianato and others

In January 2002, the Administrative Supreme Court dismissed an appeal brought by Acciaierie Ferriere Lombarde Falck S.p.A. ("Falck") against a decision of the Regional Administrative Court of Lazio, in which that Court refused to quash a notice from the Italian government addressed to the ECSC of 28 May 1985 ("the Notice") and the consequential denial of access to an aid scheme for steel industries.

II- Brief description of the facts and legal issues

In its Decision No. 2320 of 1981[15], the ECSC laid down general rules for aid granted within the framework of restructuring programmes concerning the steel industry, requiring that such programmes be notified to the Commission by the Member States. Pursuant to later decisions, 31 May 1985 was indicated to be the ultimate deadline for such notification.

On 28 May 1985, the Italian government notified the aid schemes which it intended to implement for the restructuring of the Italian steel industry. In doing so, it provided for a relatively small aid in favour of privately owned steel industries, including Falck. Upon Falck's complaint, the Italian government notified an amended aid scheme providing for an increased aid package to privately owned steel industries on 22 July 1985. The ECSC dismissed the request as it was time-barred, and the Italian State refused to grant the increased aid package.

Falck brought an action before the ECJ, which confirmed the ECSC's decision not to authorise the amended aid scheme, and, also, an action before the Regional Administrative Court of Lazio ("*TAR Lazio*"), which upheld the Ministry's decision not to grant the increased aid package.

III- Summary of the Court's findings

The Administrative Supreme Court, to which the judgment by the Regional Administrative Court of Lazio was appealed by Falck, upheld the previous judgment.

The Administrative Supreme Court stated that the Italian government's discretion in granting the aid depended on political choices and was not an act due by law. It was therefore not possible to claim that any rights would be violated if the State did not exercise its discretion or exercised it in an unsatisfactory manner. Hence, the State's denial of further aid could not be challenged before the Court.

[15] Commission Decision No. 2320/81/ECSC of 7 August 1981 establishing Community rules for aid to the steel industry, OJ (1981) L 228/14.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 1 April 2000, No. 1885, S.E.A. Aeroporti di Milano S.p.A. v Presidenza del Consiglio dei Ministri and others

In April 2000, the Administrative Supreme Court dismissed an appeal brought by S.E.A. Aeroporti di Milano S.p.A. ("SEA") against the decision of the Regional Administrative Court of Lazio not to quash part of the Decree of the President of the Council of Ministers ("*Decreto del Presidente del Consiglio dei Ministri*") of 25 February 1999 ("the Decree"), concerning the State's divestment of its shareholding in the company Aeroporti di Roma S.p.A. ("ADR"). Among other grounds of appeal, SEA argued that there was an infringement of Article 88 EC.

II- Brief description of the facts and legal issues

SEA is the company that runs Milan Airport. The President of the Council of Ministers ("*Presidente del Consiglio dei Ministri*") is the head of the Italian government. ADR is the company holding the exclusive concession to run Fiumicino Airport and Ciampino Airport, in Rome. At the time of the case, a shareholding equal to 54.2% in ADR's capital was held by I.R.I. S.p.A., a company that was wholly owned by the Italian Ministry of the Treasury ("*Ministero del Tesoro*"). ADR was therefore indirectly controlled by the Italian State.

Under the Decree, a public invitation to tender for the sale of the 54.2% shareholding was launched. Among other provisions, the Decree provided that companies whose publicly owned shares represented more than 2% of the company's total share capital were not eligible as purchasers of shares in ADR. SEA brought an unsuccessful appeal for the annulment of such provision before the Regional Administrative Court of Lazio ("*TAR Lazio*"). SEA then filed an appeal with the Administrative Supreme Court against the judgment of the Regional Administrative Court of Lazio.

Among other grounds of appeal, SEA claimed that when a privatisation is implemented other than through an open tender procedure it may be found that State aid has been granted for the benefit of the purchaser. The procedure should, therefore, be preliminarily notified to the Commission under EC rules on State aid and, pending its assessment, the procedure should be suspended.

III- Summary of the Court's findings

The Administrative Supreme Court dismissed the appeal, since, *inter alia*, it found that the procedure for the privatisation of the public ADR shareholding did not give rise to State aid issues.

In this respect the Administrative Supreme Court acknowledged that the Commission, in its decision in the *Italstrade* case[16], had clarified that - as a general rule - the privatisation of public companies may result in a State aid being granted to (i) the acquirer if the purchase price is lower than the shares' market value, or (ii) to the privatised company if particular burdens are imposed on the acquirer in respect of the continuation of non-profitable activities.

The Administrative Supreme Court also noted that, on another occasion[17], the Commission had clarified that the privatisation of a publicly owned company does not involve State aid within the meaning of Article 87 (1) EC where (i) the company is sold by a competitive tender that is transparent and unconditional or an equivalent procedure; (ii) the company is sold to the highest

16 Decision of 16 September 1998, OJ (1999) L 109/1.
17 Decision of 11 April 2000, OJ (2000) L 265/15.

bidder; and (iii) bidders have enough time and information to carry out a proper valuation of the assets on which to base their bids. In that case, however, the Commission also specified that it is not mandatory to use the open procedure for privatisations. Therefore, the possibility that the imposition of a restriction on the eligibility of a purchaser amounts to State aid should be demonstrated by showing that the price paid by the purchaser was lower than the market value of the company. The Administrative Supreme Court deemed that this had not been demonstrated nor did it seem likely in the case at issue.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 31 July 1991, No. 1074, Industria Farmaceutica Lucana et a. v. U.S.L. No. 11 of Pordenone

In this judgment, the Administrative Supreme Court upheld an appeal brought against Judgment No. 394 of the Administrative Court of Friuli Venezia Giulia of 31 December 1987 (see section 0) and affirmed that EC rules, including their interpretation by the ECJ, were immediately applicable in the Member States when sufficiently clear and precise.

II- Brief description of the facts and legal issues

According to Law No. 64/1986, 30% of the supplies contracted under public procurement procedures were to be awarded to companies based in Southern Italy. U.S.L. No. 11 of Pordenone ("USL"), a local administrative unit of the Department of Health, did not apply Law No. 64/1986 to a public tender it had called. USL had deemed Law No. 64/1986 unlawful as it conflicted with Articles 30, 31, 92, 93 and 94 EEC (28, 87, 88 and 89 EC; Article 31 EEC was repealed by the Amsterdam Treaty).

The pharmaceutical company Industria Farmaceutica Lucana, based in Southern Italy, sued USL in the Regional Administrative Court of Friuli Venezia Giulia claiming that it was not within USL's powers to disregard the national law. Since the claim was upheld by the Regional Administrative Court of Friuli Venezia Giulia, USL filed an appeal against the judgment with the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court quashed the judgment of the Regional Administrative Court of Friuli Venezia Giulia, clarifying that any national law that conflicts with EC law could not be applied by national judges. Furthermore, USL had correctly disregarded the national law in order to comply with EC rules (i.e. in particular, Article 30 EC). The judgment's reasoning is that national legislation in breach of Article 30 EC could not be justified on the grounds that it granted State aid under Article 92 EC.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), judgment of 24 January 1989, No. 30, Società cooperativa carrettieri La Rinascita et al. v. Ministero dei trasporti and others

In January 1989, the Administrative Supreme Court upheld an appeal brought by Coop. Carettieri La Rinascita against the decision of the Ministry of Transport ("*Ministero dei Trasporti*") to repeal two previous notices ("the Notices") by which it had implemented Law No. 815 of 27 November 1980 ("the Law No. 815") introducing an aid scheme (i.e. subsidised loans) for the period 1980-1983 in favour of hauling companies.

II- Brief description of the facts and legal issues

Under Law No. 815, the Italian State provided for a subsidised loans programme for hauling companies. Law No. 815 was implemented by the Ministry of Transport by issuing the Notices. On the legal basis of the Notices, Coop. Carettieri la Rinascita was granted subsidised loans.

On 20 July 1983, the Commission decided that the subsidised loans programme introduced by Law No. 815 qualified as State aid and should have been notified to it prior to implementation. The Commission, having also noted that the subsidised loans scheme was capable of distorting competition and thus infringed Article 92 (1) EC, ordered that Italy revoke the aid scheme within three months.

Further to the Commission's decision, the Ministry of Transport annulled the Notices by means of a further notice of 23 February 1984. The appellant appealed to the Regional Administrative Court of Lazio ("*TAR Lazio*") claiming that the Ministry of Transport was not entitled to depart from Law No. 815, which provided for the subsidised loans that had been declared unlawful by the Commission.

On the grounds of the principle of supremacy of Community law over national law, the Regional Administrative Court of Lazio dismissed the appeal. The appellant therefore appealed the decision of the Regional Administrative Court of Lazio to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the appeal and quashed the judgment of the Regional Administrative Court of Lazio.

The Administrative Supreme Court specified that Commission decisions on State aid are not directly applicable. The Commission decision at issue was addressed to the Republic of Italy and provided for, impliedly, the abrogation of the Law. The Ministry could not, prior to the abrogation of the Law, retrospectively annul the Notices, whereby it would comply with the Commission decision but infringe the Law.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment 16 July 2004, No. 6998, Liquidatore di Eurofood Ifsc Ltd and Bank of America N.A.

In July 2004, the Regional Administrative Court of Lazio dismissed an action filed by the Irish liquidator of Eurofood Ifsc Ltd, an Irish company belonging to the Parmalat group, and Bank of America N.A, requesting annulment of a decree of the Ministry for Productive Activities which made Eurofood Ifsc subject to the special administration regime provided for by Article 3 of Legislative Decree ("*Decreto legislativo*") No. 347 of 23 December 2003 ("Decree No. 347").

II- Brief description of the facts and legal issues

The appellants appealed to the Regional Administrative Court of Lazio on the grounds that, *inter alia*, Decree No. 347/03 was in breach of Regulation (EC) No. 1346/2000 and the Community provisions on State aid.

III- Summary of the Court's findings

The Administrative Court at Lazio dismissed the appeal, including the above-mentioned ground of appeal, and stated, in particular, that Decree No. 347/03 did not conflict with the Community provisions on State aid for the following reasons:

(i) first, because (as stated by the Italian Supreme Court in its Judgment No. 5561 of 19 March 2004) the special administration regime may not be applied, should authorisation to operate the undertaking have the specific effect of treating it differently from the way it would be treated under an ordinary insolvency procedure, granting benefits to that undertaking that had been considered unlawful under EC Treaty provisions (as clarified by the ECJ in *Ecotrade*[18]);

(ii) secondly, since the procedural amendments provided for by Decree No. 347/03 were not per se in conflict with EC rules on State aid, provided that the grant of guarantees to the undertaking subject to the special administration regime was notified to the Commission, as already laid down by Article 55 of Decree No. 270/99.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[18] Case C-200/97, Ecotrade v Altiforni Ferrieri di Servola [1998] ECR I-7907.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 8 February 2003, No. 805, Fondazione Monte dei Paschi di Siena v. Ministero dell'Economia e delle Finanze

In February 2003, the Regional Administrative Court of Lazio delivered this judgment that confirmed that the taxation regime provided for by the Italian law on banking foundations ("Fondazioni bancarie") is compatible with EC rules on State aid.

II- Brief description of the facts and legal issues

The Fondazione Monte dei Paschi di Siena claimed that Ministerial Decree ("*Decreto Ministeriale*") No. 217 of 2 August 2002 ("the Decree No. 217"), regulating banking foundations was void. The claim was based on the alleged constitutional illegality of Article 11 of Law No. 448 of 28 December 2001, on the basis of which the Decree had been adopted. In particular, Fondazione Monte dei Paschi based its claim on the fact that banking foundations did not constitute commercial undertakings.

III- Summary of the Court's findings

Having analysed the specific claims raised against Decree No. 217, the Regional Administrative Court of Lazio held that one of the contested provisions had been introduced by the Italian government in order to comply with a Commission decision of 11 December 2001. In that decision, the Commission declared the beneficial taxation regime for restructurings and mergers between banks incompatible with EC legislation. The Regional Administrative Court of Lazio recalled that, whereas the Italian government had suspended the beneficial taxation regime for banks, it had maintained an analogous beneficial taxation regime introduced for banking foundations. According to the Regional Administrative Court of Lazio, this solution was in accordance with the Commission decision, given that banking foundations were non-commercial undertakings and unable, as a result, to distort competition within the Common Market.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 2786 of 23 September 1999, Iris Biomedica V. Ministero dell'Industria Commercio e Artigianato

The Administrative Court of Lazio stated that national public authorities must comply with a Commission decision declaring a State aid incompatible with the Common Market, even if the aid is granted pursuant to a law that has not yet been repealed.

II- Brief description of the facts and legal issues

Iris Biomedica appealed to the Administrative Court of Lazio against a decision of the Ministry of Industry pursuant to which the Ministry refused to grant Iris Biomedica aid provided for by Article 6 of Law Decree No. 8 of 26 January 1987 (which became Law No. 120 of 27 March 1987). The Ministry's refusal was based on the grounds that the Commission and the ECJ had declared the aid incompatible with the Common Market.

III- Summary of the Court's findings

The Administrative Court of Lazio rejected the claim. It pointed out that the Ministry had correctly refused to grant the aid and to apply Article 6 of Law Decree No. 8 of 26 January 1987. The Administrative Court of Lazio stated that, although the legislative measure granting the aid was still in force, the Ministry was bound by Commission No. 91/175/EEC of 25 July 1990 that had been upheld by the ECJ[19], since negative Commission decisions had direct effect.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[19] Case C-364/1990, Italian Republic v Commission [1993] ECR I-02097, judgment of 28 April 1993.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 2155 of 14 July 1999, Aeroporti di Milano v. Presidenza del Consiglio dei Ministri

The Administrative Court of Lazio refused to assess a possible violation by the State of Article 88 (3) EC, considering that the grounds of appeal were inadmissible as they were time-barred.

II- Brief description of the facts and legal issues

The appellant appealed to the Administrative Court of Lazio. In the course of the proceedings, the appellant alleged that the Decree of the President of the Council of Ministers of 25 February 1999 on the Privatisation of Aeroporti di Roma S.p.A. breached Articles 87 and 88 EC.

III- Summary of the Court's findings

The Administrative Court of Lazio dismissed the appeal. It observed that the appellant had not alleged a violation of Article 88 (3) EC in its opening submissions of the claim, but only in its final statement. This allegation as well as the request to make a reference to the ECJ for a preliminary ruling were therefore declared inadmissible.

I- Information on the judgment

Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio, Roma"), Judgment of 11 June 1990, No. 1071, Società Fonderia A. v. Ministero dell'Industria et a.

The Administrative Court of Lazio dismissed the claimant's petition concerning the right to receive State aid notwithstanding a Commission decision declaring such aid incompatible with Article 92 EC.

II- Brief description of the facts and legal issues

The Ministry of Industry ("*Ministero dell'Industria*") refused to grant Società Fondiaria A. ("SFA") a reimbursement of electricity costs pursuant to Law No. 627/1981, which had been declared incompatible with the Common Market by the Commission in Decision No. 396/1983. SFA then appealed to the Administrative Court of Lazio asserting its legal right to receive the reimbursement.

III- Summary of the Court's findings

The Administrative Court of Lazio dismissed SFA's petition. It declared that the Administration could set aside an internal act that was in conflict with a Commission decision, notwithstanding the existence of conflicting internal regulations that had not yet been repealed. An individual could benefit from State aid only if the aid was authorised by the Commission. In the absence of authorisation, SFA's claim for reimbursement could not be upheld[20].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[20] For the appeal, see Administrative Supreme Court, Judgment of 16 March 1992, No. 167, *Società Fondiaria Assicurazioni v. Cassa Conguaglio Settore Elettrico* on appeal to the Administrative Court of Lazio ("*T.A.R. Lazio*"), Sec. III, Decision of 11 June 1990, No. 1071, asking for a preliminary ruling from the ECJ. For similar conclusions, see also Administrative Supreme Court, Judgment of 16 March 1992, No. 168, *Società Terni et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court, Sec. Vl, *Società Terni v. Società Italsider and Cassa Conguaglio Settore Elettrico.* See also Administrative Supreme Court, Sec.: VI, Judgment of 29 March 1995, No. 312, *Società Terni Spa et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court; Sec. VI; Judgment of 20 May 1995, No. 483, *Fonderia S.p.a. v. Cassa Conguaglio Settore Elettrico.*

I- Information on the judgment

Regional Administrative Court of Veneto ("Tribunale Amministrativo Regionale del Veneto"), Judgment of 26 July 1989, No. 1102, Compagnia Oasi di Malcesine v. Region of Veneto et a.
The Administrative Court of Veneto ruled that loans guaranteed by the State constituted regional aid that was compatible with the Common Market if the grant of the loans was justified by certain regional characteristics, and therefore did not conflict with Article 92 EC.

II- Brief description of the facts and legal issues

Compagnia OASI di Malcesine ("COM"), an Italian hotel chain, was granted an ITL 2.2 billion loan by the Council of Europe which had been guaranteed by the Italian State against risks of alteration. The Veneto Region then refused to grant regional aid to COM claiming that granting aid twice (i.e. aid from the region and the State) violated (i) a regional law of Veneto (i.e. Law No. 28/1997); and (ii) Article 92 EC. COM appealed the decision refusing to grant regional aid to the Regional Administrative Court of Veneto.

III- Summary of the Court's findings

The Regional Administrative Court of Veneto held that
(i) the regional aid is compatible with the Common Market; and
(ii) the regional aid to a hotel was justified because "*it refer* [red] *to services offered in a given place, strictly connected to a particular regional area*".

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 1746 of 6 December 1988, TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. v. Cassa Conguaglio per il Settore Elettrico

The Administrative Court of Lazio correctly stated that national public authorities (i) must comply with a Commission decision declaring an aid incompatible with the Common Market and (ii) correctly sought to recover an unlawful aid, although the aid had been granted pursuant to a law that had not yet been repealed.

II- Brief description of the facts and legal issues

Cassa Conguaglio per il Settore Elettrico ("Cassa") refused to grant TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. ("Terni") a reimbursement relating to the consumption of electric energy, as provided for by a ministerial decree of 26 January 1982 and Law No. 617 of 4 November 1981 converting Law Decree No. 495 of 4 September 1981. Cassa also asked Terni to repay any reimbursements previously made. Cassa observed that ECSC Decision No. 87/396 of 29 June 1983 clarified that (i) these reimbursements amounted to State aid; and (ii) only reimbursements granted to privately owned companies could be considered compatible with the Common Market. Terni appealed Cassa's decision to the Administrative Court of Lazio.

III- Summary of the Court's findings

The Administrative Court of Lazio rejected the claim. It pointed out that, first, Terni must be regarded as a public undertaking in this case and recalled ECSC Decision No. 2320 of 7 May 1981 establishing Community rules for aid to the steel industry and ECSC Decision No. 87/396 of 29 June 1983. The Administrative Court of Lazio held that Cassa had correctly asked for repayment of the aid unlawfully granted, specifying that public authorities were bound by negative Commission decisions although the aid had been granted pursuant to a national legislative measure that was still in force.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 17 November 1988, No. 1582, Soc. Laboratori Bruneau v. Unità Sanitaria Locale RM/24

II- Brief description of the facts and legal issues

Unità Sanitaria Locale RM/24 ("USL") announced a public tender procedure under Article 17 of Law No. 64/1986, according to which the supply of products was reserved to companies based in Southern Italy. Laboratori Bruneau, a company that was not based in Southern Italy, appealed to the Administrative Court of Lazio, claiming that the public tender procedure reserved to companies from Southern Italy was unlawful, *inter alia*, on the basis of Articles 92 and 93 EC.

III- Summary of the Court's findings

The Administrative Court of Lazio filed a request for a preliminary ruling from the ECJ in order to ascertain whether the said measures amounted to State aid or whether these were "measures having equivalent effect" under Article 30 EC.

I- Information on the judgment

Regional Administrative Court of Puglia, Bari ("Tribunale Amministrativo Regionale della Puglia, Bari"), Judgment of 26 October 1988, No. 255, Società Roussel Maestretti v. U.S.L. No. 12 di Bari et a.

The Administrative Court of Puglia rejected the claimant's claim and confirmed the lawfulness of the public tender procedure reserving 30% of the supply of goods under the contract to companies based in Southern Italy which had been announced prior to a Commission communication denying its compatibility with the Common Market.

II- Brief description of the facts and legal issues

Roussel Maestretti ("RM") is a pharmaceutical company based in Northern Italy and U.S.L., No. 12 di Bari ("USL") is a local administrative unit of the Department of Health.
USL announced two separate public tender procedures under Article 17 of Law No. 64/1986. The first procedure concerned 70% of the supply of goods and was open to all companies, whereas the second procedure reserved the remaining 30% of the supply of goods to companies based in Southern Italy. RM appealed to the Regional Administrative Court of Puglia, claiming that the public tender procedure reserved to companies from Southern Italy was unlawful, *inter alia*, on the basis of Articles 92 and 93 EC.

III- Summary of the Court's findings

The Administrative Court of Puglia referred to a principle already established by the Administrative Court of Veneto, confirming the compatibility of Article 17 of Law No. 64/86 with the Common Market[21]. However, the Administrative Court of Puglia acknowledged that the Commission had taken a different view, considering the aid granted pursuant to Law No. 64/86 incompatible with Community legislation. In 1987, the Commission had published a Commission communication declaring Article 17 of Law No. 64/86 incompatible with Article 93 (3) EC and had initiated the procedure under Article 93 (2) EC in relation to the aid granted in the area of the city of L'Aquila.

The Administrative Court of Puglia based its decision on the principles of *tempus regit actum* and non-retroactivity and ruled that public tender procedures reserving 30% of the supply to companies based in Southern Italy were compatible with the Common Market, if announced prior to the Commission communication declaring them incompatible with the Common Market under Article 93 (2) EC.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[21] See Administrative Court of Veneto ("*T.A.R. del Veneto*"), Judgment of 10 June 1987, No. 616, according to which Article 17 of Law No. 64/86 "*is a regulation which, although granting privileges, is aimed at promoting Constitutional social goals. For the same reason, it cannot be deemed in violation of the EC Treaty, as it considers as compatible with the Common Market those aids which "promote the economic development of areas where the standard of living is much lower than the national average or where there is a high rate of unemployment"*.

I- Information on the judgment

Regional Administrative Court of Friuli Venezia Giulia ("Tribunale Amministrativo Regionale del Friuli-Venezia-Giulia"), Judgment of 31 December 1987, No. 394, Industria farmaceutica lucana et a. v. U.S.L. No. 11 of Pordenone

The Regional Administrative Court of Friuli Venezia Giulia affirmed that public bodies are under the obligation to comply with the requirements of Law No. 64/1986, namely to reserve 30% of their supplies contracted within the framework of public procurement procedures for companies based in Southern Italy.

II- Brief description of the facts and legal issues

U.S.L. No. 11 of Pordenone ("USL"), a local administrative unit of the Department of Health, did not apply Law No. 64/1986 to its public tender and, consequently, did not reserve the stipulated share of contracted supply for companies based in Southern Italy. Industria farmaceutica lucana ("IFL"), a pharmaceutical company based in Southern Italy, therefore brought an action before the Administrative Court of Friuli Venezia Giulia.
USL claimed that Law No. 64/1986 was unlawful as it conflicted with Articles 30, 31, 92, 93 and 94 EEC.

III- Summary of the Court's findings

The Administrative Court of Friuli Venezia Giulia rejected USL's claims, clarifying that
(i) according to Article 92 (3) EC "*aids to promote the economic development of areas where the standard of living is much lower than the national average or where there is a high rate of unemployment*" were considered to be compatible with the Common Market;
(ii) only Member States were obliged to inform the Commission of their plans to grant or alter aid pursuant to Article 93 (3) EC, whereas, according to established case law of the ECJ[22], individuals could not request the national courts to ascertain the compatibility of State aid with Community law (with some exceptions which are not relevant to this case); and
(iii) no evidence had been filed in support of the alleged violation of Article 92 (3) EC[23].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[22] See ECJ, Case C-77/72, Carmine Capdango v. Azienda Agricole Maya [1973] ECR 611, and Case C-73/76, Iannelli & Volpi SpA v Ditta Paolo Merani [1977] ECR 557 and Case C-78/76, Steinike & Weinlig v Federal Republic of Germany [1977] ECR 595.

[23] A similar reasoning is also used in relation to the aids provided for by Article 10 of Law No. 60/1963, which reserved 70% of the contracts for areas of Southern Italy. See Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), Sec. III, Ordinance of 23 October 1992, No. 1329, *Lombardia v. C.I.P.E. et a.*

I- Information on the judgment

Regional Administrative Court of Tuscany ("Tribunale Amministrativo Regionale della Toscana"), Judgment of 23 October 1987, No. 1166 and Ordinance No. 1167 of 23 October 1987, Società Du Pont de Nemours Italiana v. U.S.L. No. 2 of Carrara et a.

II- Brief description of the facts and legal issues

In 1986, U.S.L. No. 2 of Carrara ("USL"), a local administrative unit of the Department of Health, issued a decision regulating a public procurement procedure, stating that 30% of the contracted supplies must be reserved to industries based in Southern Italy. USL's decision was issued in compliance with Law No. 64/1986, which made it compulsory for public bodies, such as USL, to obtain a part of their supplies of goods from industrial, agricultural and handicraft businesses based in Southern Italy.

Società Du Pont de Nemours Italiana ("SDPNI"), an Italian company producing medical equipment, participated in the tender but was excluded because it did not meet the requirements specified under Law No. 64/1986. SDPNI appealed to the Administrative Court of Tuscany, alleging unlawful application of the supply limit, as it conflicted with the EEC rules on the free movement of goods and services within the Community. As a result, it filed a petition in order to obtain a preliminary ruling from the ECJ[24].

III- Summary of the Court's findings

The Regional Administrative Court of Tuscany applied for a preliminary ruling pursuant to Article 177 (now Article 234) EC to the ECJ.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[24] Similarly, Regional Administrative Court of Lombardia, Brescia ("*Tribunale Amministrativo Regionale della Lombardia, Brescia*"), Judgment of 12 August 1988, No. 634, *Istituto Behring v. U.S.L. No. 34 of Chiari et a.*; Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), Sec. I, Judgment of 17 November 1988, No. 1582, *Laboratori Bruneau v. U.S.L. RM-24*. To the contrary, Regional Administrative Court of Campania, Naples ("*Tribunale Amministrativo Regionale della Campania*", *Napoli*), Judgment of 22 October 1990, No. 545, *B. Braun v. U.S.L. No. 40 of Naples*, according to which "*the national judge is entitled to ascertain if domestic law provisions are in contrast with Community regulations* […]*; furthermore the Regional Administrative Court is entitled to provide its interpretation of Community regulation, as* […] *the request for a preliminary ruling from the Court of Justice is mandatory only for the Courts of last instance*". According to this judgment, "*pursuant to Art.*[88 (3)] *EC Treaty, States are under the obligation not to carry out plans to grant or alter aids timely notified to the Commission only if the Commission has started the procedure set forth in Art.*[88 (2)]*; if the Commission has not yet started the procedure, the Member States can implement their plans if a two-month time-span has expired. The two-month time-span is set forth by Articles 173 and 175 EC Treaty and is applicable by analogy to the cases of the* [ECJ]".

I- Information on the judgment

Regional Administrative Court of Lombardia, Milan ("Tribunale Amministrativo Regionale della Lombardia, Milano"), Judgment of 2 December 1986, No. 949, Bozzi et a. v. Ente Ferrovie dello Stato - FF.SS. et a.

The Administrative Court of Lombardia ruled that it was not competent to annul a law allowing FF.SS. (i.e. the Italian Railways) to be represented in court by the State Attorney, on the grounds that representation in court by the State Attorney amounted to State aid.

II- Brief description of the facts and legal issues

FF.SS. claimed that the appeal should be dismissed. In particular, the claimant claimed that FF.SS's representation in court by the State Attorney was illegal because it amounted to State aid prohibited under Article 92 EEC.

III- Summary of the Court's findings

The Administrative Court of Lombardia rejected the claimant's claim on the grounds that:

(i) the rules on State aid were not legally binding and directly applicable; and

(ii) the competence of the Administrative Court of Lombardia was limited to ruling on the non-application of national laws that conflict with legally binding Community laws, and consequently, the Lombardia Court could not set aside national laws that conflict with EEC rules on State aid.

I- Information on the judgment

Regional Administrative Court of Sicily, Palermo ("Tribunale Amministrativo Regionale della Sicilia, Palermo"), Judgment of 18 November 1986, No. 875, Società Enosicilia et. a. v. Istituto regionale Vite e Vino et a.

The Administrative Court of Sicily dismissed the appeal brought by Società Enosicilia ("SE") and Consorzio Produttori Vini Siciliani Cooperativa ("CPVSC"), requesting the annulment of an administrative order issued by Istituto Regionale Vite e Vino ("IRVV") that withdrew a regional aid for wine producers.

II- Brief description of the facts and legal issues

SE and CPVSC were both producers and marketers of wine. IRVV was a regional administrative body responsible for the wine industry in Sicily, and the Assessore Agricoltura e Foreste Regione Siciliana ("AAFRS") was a member of the Sicilian Regional Assembly for forestry and agriculture. In 1973, the Region of Sicily enacted Regional Law No. 28/1973, granting State aid to IRVV for the marketing of Sicilian wine in Italy and abroad. However, in June 1982, the Commission delivered a reasoned opinion pursuant to Article 169 EEC (now Article 226 EC) stating that the Italian government had infringed Regulation No. 816/70 as amended, inviting Italy to comply with the provisions of the opinion.

As a result, the Region of Sicily enacted Regional Law No. 58/1983, repealing Regional Law No. 28/1973 and limiting the amount of State aid. IRVV then issued Regional Decree No. 3210/1983 ("*Circolare No. 3210/1983*") declaring that it had ceased to pay out the aid already approved for the years 1982 and 1983 to promote the wine sector. AAFRS then sent a facsimile to IRVV requesting immediate suspension of the aid to CPVSC.

SE and CPVSC appealed to the Administrative Court of Sicily asking for:

(i) the annulment of IRVV's Regional Decree;

(ii) the annulment of AAFRS's facsimile request; and

(iii) payment of aid for the years preceding the enactment of Law No. 58/1983 on the basis of the rule *tempus regit actum*.

III- Summary of the Court's findings

The Administrative Court of Sicily dismissed the appeal. In particular, the Administrative Court of Sicily held that both IRVV 's regional decree and AAFRS's facsimile request were valid.

In addition, the Administrative Court of Sicily concluded that SE and CPVSC were not entitled to State aid for the years preceding the enactment of Law No. 58/1983 (with particular reference to aid for 1982 that had yet to be paid), as it was in breach of Regulation No. 337/1979 regulating the European wine industry.

I- Information on the judgment

Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio, Roma"), Judgment of 22 January 1985, No 103, Società Cooperativa Trasporto Latte et a. v. Banca Nazionale del Lavoro.

The Administrative Court of Lazio dismissed the action filed by Società Cooperativa Trasporto Latte ("SCTL"), a milk transporting company requesting the annulment of a ministerial decree enacted by the Ministry of Transport ("the Decree"). By means of the Decree, two previous ministerial decrees enacted in 1981 granting aid were revoked. Banca Nazionale del Lavoro ("BNL") was the bank that had granted loans to SCTL and the other appellants.

II- Brief description of the facts and legal issues

In 1981, the Ministry of Transport enacted two decrees in order to implement Law No. 815/1980, granting aid to companies for the purchase of vehicles. The aid was granted by means of government-assisted loans. However, the Commission found that Law No. 815/1980 was incompatible with the Common Market. Therefore, the Ministry of Transport repealed these two decrees and declared that SCTL and other companies were not entitled to the aid.
SCTL appealed to the Administrative Court of Lazio, requesting the annulment of the Decree according to which the aid had been withdrawn on the grounds that:
(i) having legitimately relied on the Decree, it had begun to renovate its fleet of vehicles and had therefore suffered serious loss; and
(ii) it had obtained significant bank loans which it intended to repay using the aid.

III- Summary of the Court's findings

The Administrative Court of Lazio ruled that the Decree was lawful. Furthermore, the Administrative Court of Lazio stated that, when the Commission decided that aid was not compatible with the Common Market and requested annulment by the State within a given period of time, the Administration could have decided to annul the relevant ministerial decree immediately, without having to commence a formal procedure to revoke the legislative instrument[25].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[25] On appeal, however, the Administrative Supreme Court expressed a slightly different opinion. According to the Administrative Supreme Court the decisions taken by the Commission pursuant to Article 93 [now 88] EC have the same effect as Community Directives and, therefore, are not directly applicable. Consequently, when the Commission issued a decision requesting the annulment of State aid that was declared incompatible with the Common Market, the State must, first, modify its legislation and, then, repeal the administrative acts adopted to implement such legislation. See Administrative supreme Court, Sec.: VI, Judgment of 2 December 1988, *Società Cooperativa Trasporto Latte v. Ministry of Transportation*. See also Administrative Supreme Court, Sec.: VI, Judgment of 24 January 1989, *Cooperativa Carrettieri "La Rinascita" et alia v. Ministero dei Trasporti et a.*.

I- Information on the judgment

Court of Auditors (Corte dei Conti), Sec. controllo, Decision of 23 March 1994, No. 18, Ministero del Tesoro

The Court of Auditors confirmed that it had jurisdiction to request a preliminary ruling from the ECJ based on Article 177 (now Article 234) EC.

II- Brief description of the facts and legal issues

The Court of Auditors was asked to assess whether it was possible to amend a decree in order to finance a revenue-producing State monopoly ("Azienda Tabacchi Italiani S.p.A.").

III- Summary of the Court's findings

However, the Court of Auditors held that, in this particular case, a preliminary ruling was not necessary because the undertaking came within the scope of Article 90 EC, concerning undertakings providing services of general economic interest or that are of a revenue-producing monopoly nature[26].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[26] For similar conclusions, see Court of Auditors, Sec. Contributi Stato, 14 June 1996, No. 88, Department of Treasury. According to this decision "*derogations from competition allowed in the Treaty of Rome concerning revenue-producing monopolies or administrations of 'general economic interest' (Articles* [86 and 87] *EC), apply not only to absolute monopolies but a/so to 'mixed ownership' businesses, that is businesses in which both monopolies or general economic interest companies and profit-earning private companies operate.*"

I- Information on the judgment

Court of Auditors ("Corte dei Conti"), Sec. controllo, Decision of 16 March 1993, No. 3, Ministry of the Treasury, Unione Nazionale Incremento Razze Equine (UNIRE) ed Enti Ippici

II- Brief description of the facts and legal issues

-

III- Summary of the Court's findings

The Court of Auditors issued a report to the Italian parliament on the management of UNIRE, a public body. The Court of Auditors stated that "*the cut in State aid due to Community legislation makes it necessary to completely revise aid policies and adopt distribution criteria based on effective selection and quality systems*".

I- Information on the judgment

Court of Auditors ("Corte dei Conti"), Sec. controllo, Decision of 5 November 1991, No. 105, Ministry of Defence

II- Brief description of the facts and legal issues

-

III- Summary of the Court's findings

The Court of Auditors issued this decision concerning public tender procedures reserved by law to undertakings based in Southern Italy and ruled that "*a declarative judgment of the ECJ concerning rules [having] direct effect has the same legal status as the rules subject to interpretation*". In March 1990, the ECJ ruled that public tender procedures reserved exclusively for businesses located in areas of central or Southern Italy, such as those provided for under Article 17 of Law No. 64/1986, were in breach of Articles 30, 92 and 93 EEC[27]

The Court of Auditors therefore declared that the public tender procedures were invalid.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[27] See ECJ, Case C-21/88 D, Du Pont de Nemours Italiana v Unità Sanitaria Locale No 2 di Carrara [1990] ECR 889.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 16 September 2003, No. 5250, Ministero dell'Industria v. Società Siderurgica Lucchini

The Administrative Supreme Court recalled its previous case law (i.e. Judgment No. 465 of 29 January 2002), confirming that Commission decisions declaring State aid incompatible with the Common Market are directly applicable and that all subsequent national measures must therefore comply with them.

II- Brief description of the facts and legal issues

The Ministry of Industry failed to implement an aid scheme for the benefit of the steel industry established by Law No. 183/1976 and the Decree of the President of the Republic No. 902/1976 since the aid scheme was incompatible with the Community rules concerning aid to the steel industry established by Commission Decisions No. 2320/81/ECSC of 7 August 1981 and No. 3484/85/ECSC of 27 November 1985. Società Siderurgica Lucchini appealed to the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*") that upheld its request to be granted the aid. The Ministry of Industry appealed to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the appeal brought by the Ministry of Industry and quashed the decision of the Regional Administrative Court of Lazio. The Administrative Supreme Court stated that, since Commission decisions declaring State aid incompatible with the Common Market are directly applicable, national authorities must comply with them. National legislation that is incompatible with a Commission decision cannot be enforced, even if it has not yet been abrogated and is therefore still in force. In addition, allowing a company to benefit from the aid would be in breach of the recovery obligation imposed on Member States. The Administrative Supreme Court also specified that the only way to appeal Commission decisions is to bring an action for annulment before the ECJ under Article 230 EC, or, at most, to request a preliminary ruling under Article 234 EC.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 9 May 2003, Ministero dell'Industria, del Commercio e dell'Artigianato v. Società Industrie Cantieri Metallurgici Italiani S.p.A.

The Administrative Supreme Court upheld an appeal against a judgment of the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*") according to which the Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") had unlawfully suspended a procedure granting aid provided for by Italian law on the grounds of ECSC decisions declaring such aid incompatible with the Common Market.

II- Brief description of the facts and legal issues

The Ministry of Industry, Commerce and Craftsmanship failed to implement an aid scheme provided for by an Italian law in favour of Società Industrie Cantieri Metallurgici Italiani S.p.A., a company. The aid at issue had been declared incompatible with the Common Market by the Commission. However, the Italian law providing for the aid was not officially repealed. The company successfully appealed to the Regional Administrative Court of Lazio claiming that the Ministry was not competent to disregard an Italian law in order to enforce an ECSC decision.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the Ministry's appeal against the decision of the Regional Administrative Court of Lazio, affirming that, under Article 249 EC, Commission decisions "*shall be binding in* [their] *entirety upon those to whom* [they are] *addressed*" and that these decisions are directly effective without having to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provided for a beneficiary's right to appeal Commission decisions.

I- Information on the judgment

Supreme Court ("Corte di Cassazione"), Judgment of 10 December 2002, No. 17564, Ministero delle Finanze v. Torrefazione Caffè Mattioni S.r.l.

In December 2002, the Supreme Court ("*Corte di Cassazione*") rendered this groundbreaking judgment, in which it considered a number of issues concerning the relationship between EC law and national law. In its judgment, the Supreme Court expressly recognised for the first time that a negative Commission decision under Article 88 (2) EC had direct effect.

II- Brief description of the facts and legal issues

Torrefazione Caffè Mattioni S.r.l. sued a local tax authority and the Italian Ministry of Finance in the Tax Court of Gorizia for the Court to officially uphold its right to certain tax benefits provided for by Law No. 26 of 29 January 1986. The request was upheld by both the competent local and regional tax court. The Italian Ministry of Finance and the local tax authority concerned appealed to the Supreme Court, alleging that the Commission had declared the aid granted pursuant to Law No. 26/1986 incompatible with the Common Market. On these grounds, the Supreme Court quashed the decision of the competent regional tax court.

III- Summary of the Court's findings

The Supreme Court noted, first, that (i) the Italian government was under an obligation to enforce negative Commission decisions under Article 88 (2) EC by adopting all necessary measures to abrogate the legislative measures declared incompatible with the Common Market by the Commission; (ii) the national authorities, including judicial bodies, are bound by Commission decisions adopted under Article 88 (2) EC; and (iii) the decision of the Commission had become definitive given that it had not been challenged under Article 230 EC within the prescribed time limit.

The Supreme Court stated that, in the absence of measures by the Italian government to abrogate the legislative measure providing for the aid, which had been declared incompatible with the Common Market by the Commission, the decision of the Commission under Article 88 (2) EC had direct effect, since it was sufficiently clear and precise, unconditional, and did not give discretionary powers to the Italian government for its implementation. The Supreme Court also specified that (i) it is not necessary for the decision to be final to have direct effect, since, should the decision not be final and should a national court doubt its validity, that national court could refer this matter to the ECJ under Article 234 EC; and (ii) the compatibility of a measure with EC law may be assessed *ex officio* by the national courts.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 27 September 2002, No. 4946, Ministero delle Attività Produttive v. Diano S.p.A.

II- Brief description of the facts and legal issues

By means of Decree No. 119 of 2 August 1995, the Ministry of Industry ("*Ministero dell'Industria*") admitted Diano S.p.A. ("Diano") to an investment program. By notice of 31 October 1995, the Ministry of Productive Activities ("*Ministero delle Attività Produttive*") rejected Diano's application for the State aid on the basis of Commission Decisions No. 2320/81/ECSC and No. 3484/85/ECSC. Diano appealed against the notice, alleging that the Ministry had failed to give reasons for rejecting its application and the Regional Administrative Court ("*Tribunale Amministrativo Regionale*") upheld the claim. The Ministry then appealed to the Administrative Supreme Court on the grounds that Diano failed to meet the requirements set out in the Commission decisions.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the Ministry's appeal and held that the aid could not be granted in the absence of specific authorisation from the Commission and that the notice from the Ministry of Productive Activities was therefore in compliance with Commission Decisions No. 2320/81/ECSC and No. 2484/85/ECSC, which were both directly applicable.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 29 January 2002, No. 465, Del Verde S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato et a.

The Administrative Supreme Court dismissed an appeal brought against a judgment of the Regional Administrative Court of Abruzzo ("*Tribunale Amministrativo Regionale dell'Abruzzo*") upholding an act which refused to grant certain benefits provided for under a law in favour of investment plans that are to be implemented in Southern Italy, since the Commission had declared that law incompatible with EC State aid rules.

II- Brief description of the facts and legal issues

The Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") did not assign certain benefits to Del Verde S.p.A., a pasta manufacturer, in favour of investments in Southern Italy granted by Law No. 120/1987. Del Verde petitioned to the Administrative Court of Abruzzo asserting its legal right to receive the aid and claiming that, although the Commission had declared the aid incompatible with EC rules on State aid, a national entity could not disregard an Italian law on the basis of a decision by the Commission when that law was still in force.

III- Summary of the Court's findings

The Administrative Supreme Court dismissed the appeal, expressly departing from its findings in its previous Judgment No. 30/1989 (see section 7.7.3.10 below). The Administrative Supreme Court noted that under Article 249 EC, Commission decisions "*shall be binding in* [their] *entirety upon those to whom* [they are] *addressed*" and that these decisions are directly applicable without having to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provided for the beneficiary's right to appeal Commission decisions. Moreover, the Administrative Supreme Court emphasised that it was unnecessary to implement the Commission decision. Finally, the Administrative Supreme Court noted that it would be inconsistent for a State to grant an aid that should be recovered under EC law.

I- Information on the judgment

Supreme Administrative Court ("Consiglio di Stato"), Judgment of 22 January 2002, No. 360, Acciaierie Ferriere Lombarde Falck S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato and others

In January 2002, the Administrative Supreme Court dismissed an appeal brought by Acciaierie Ferriere Lombarde Falck S.p.A. ("Falck") against the decision of the Regional Administrative Court of Lazio not to quash a notice, in part, from the Italian government addressed to the ECSC of 28 May 1985 ("the Notice") and the consequential denial of access to an aid scheme for steel industries.

II- Brief description of the facts and legal issues

In Commission Decision No. 2320/81/ECSC of 7 August 1981 establishing Community rules for aid to the steel industry[28] the ECSC laid down general rules for aid granted within the framework of restructuring programmes concerning the steel industry, requiring notification to the Commission of these programmes by the Member States. Pursuant to later decisions, 31 May 1985 was the ultimate notification deadline.

On 28 May 1985, the Italian government notified aid schemes it intended to implement to restructure the Italian steel industry. In doing so, it provided a relatively small aid package in favour of privately owned steel industries, including Falck. Later on, upon Falck's complaint, the Italian government notified an amended aid scheme that provided an increased aid package to privately owned steel industries on 22 July 1985. The ECSC dismissed the request since it was time-barred. The Italian State therefore denied to grant the increased aid.

Falck brought actions before the ECJ, which upheld the ECSC decision not to authorise the amended aid scheme, and the decision of the Regional Administrative Court of Lazio ("TAR Lazio") which had upheld the Ministry's decision not to grant the increased aid.

III- Summary of the Court's findings

the judgment of the Regional Administrative Court of Lazio was appealed by Falck to the Administrative Supreme Court which upheld the judgment.

The Administrative Supreme Court stated that the exercise by the Italian government of its discretion to grant the aid depended on political choices and was not an act due by law. It was not possible, therefore, to claim that rights would be violated if the State failed to exercise this discretion or exercised it in an unsatisfactory manner. Hence, the State's denial to grant further aid could not be challenged before the Court.

[28] OJ (1981) L 228/14.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 23 September 1999, No. 2876, Iris Biomedica v. Ministero dell'Industria Commercio e Artigianato

The Administrative Court of Lazio stated that national public authorities must comply with a Commission decision declaring an aid incompatible with the Common Market, even if that aid had been granted pursuant to a law that had not yet been repealed.

II- Brief description of the facts and legal issues

Iris Biomedica appealed to the Administrative Court of Lazio against a decision of the Ministry of Industry in which it denied to grant aid provided for under Article 6 of Law Decree No. 8 of 26 January 1987, which later became Law No. 120 of 27 March 1987, to Iris Biomedica. The Ministry's refusal was based on the grounds that such aid had been declared incompatible with the Common Market by the Commission and the ECJ.

III- Summary of the Court's findings

The Administrative Court of Lazio rejected the claim. It pointed out that the Ministry had correctly refused to grant the aid and to apply Article 6 of Law Decree No. 8/1997. The Administrative Court of Lazio stated that, although the legislative measure granting the aid was still in force, the Ministry was bound by the negative Commission Decision No. 91/175/EEC of 25 July 1990, upheld by the ECJ[29], due to the direct effect of negative Commission decisions.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[29] Case C-364/1990, Italian Republic v Commission [1993] ECR I-02097, 28 April 1993.

I- Information on the judgment

Court of First Instance of Cagliari ("Tribunale di Cagliari"), Judgment of 14 April 1992, Nuova Cartiera di Arbatax S.p.A.

The Court of First Instance of Cagliari declared Nuova Cartiera di Arbatax S.p.A. ("NCA") insolvent and ordered that its decision be notified to the Ministry of Industry and Commerce for the Ministry to take subsequent measures.

II- Brief description of the facts and legal issues

NCA filed a petition with the Court of First Instance of Cagliari to be admitted to the special administration regime established by Law No. 95/1979 ("Prodi law"). The request was based, *inter alia*, on the assumption that NCA was required to repay ITL 67.529 billion received as State aid after the Commission had declared the aid illegal by decision of 27 November 1991. Since NCA's capital amounted to ITL 100 billion, the amount due represented more than 51% of its capital (i.e. compliance with the percentage set by the Prodi law as one of the conditions for admission to the special administration procedure).

III- Summary of the Court's findings

The Court of First Instance of Cagliari upheld NCA's request to be admitted to the special administration regime.

I- Information on the judgment

Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 11 June 1990, No. 1071, Società Fonderia A. v. Ministero dell'Industria et a.
The Administrative Court of Lazio dismissed the claimant's petition concerning the right to receive State aid notwithstanding a Commission decision declaring such State aid incompatible with Article 92 EC.

II- Brief description of the facts and legal issues

The Ministry of Industry ("*Ministero dell'Industria*") refused to grant Società Fondiaria A. ("SFA") a reimbursement relating to electricity costs pursuant to Law No. 627/1981, which had been declared incompatible with the Common Market by the Commission in its Decision No. 396/1983. SFA then petitioned to the Regional Administrative Court of Lazio asserting its legal right to receive the reimbursement.

III- Summary of the Court's findings

The Regional Administrative Court of Lazio dismissed SFA's petition. It declared that the Administration could set aside an internal act that was in conflict with a Commission decision, notwithstanding the existence of conflicting internal regulations that had not yet been repealed. An individual could benefit from a State aid only if this had been authorised by the Commission. In the absence of authorisation, SFA's claim for reimbursement could not be upheld[30].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[30] For the appeal, see Administrative Supreme Court, Judgment No. 167 of 16 March 1992, *Società Fondiaria Assicurazioni v. Cassa Conguaglio Settore Elettrico* (on appeal to Administrative Court of Lazio, Sec. III, Decision No. 1071 of 11 June 1990 asking for a preliminary ruling from the ECJ). For similar conclusions, see also Administrative Supreme Court, Judgment No. 168 of 16 March 1992, *Società Terni et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court, Sec. Vl, *Società Terni v. Società Italsider and Cassa Conguaglio Settore Elettrico*. See also Administrative Supreme Court, Sec.: VI, Judgment No. 312 of 29 March 1995, *Società Terni Spa et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court; Sec. VI; Judgment No. 483 of 20 May 1995, *Fonderia S.p.a. v. Cassa Conguaglio Settore Elettrico*.

I- Information on the judgment

Administrative Supreme Court ("Consiglio di Stato"), Judgment of 24 January 1989, No. 30, Società Cooperativa Carrettieri La Rinascita et al. v. Ministero dei Trasporti and others

In January 1989, the Administrative Supreme Court upheld an appeal brought by Coop. Carettieri la Rinascita against the decision of the Ministry of Transport ("*Ministero dei Trasporti*") to repeal two previous notices ("the Notices") implementing Law No. 815 of 27 November 1980 ("the Law") introducing an aid scheme (i.e. subsidised loans) for the period 1980-1983 in favour of hauling companies.

II- Brief description of the facts and legal issues

Under Law No. 815, the Italian State provided for a subsidised loans programme for hauling companies. Law No. 815 was implemented by the Ministry of Transport by issuing the Notices. On the legal basis of the notices, Coop. Carettieri la Rinascita was granted subsidised loans.

On 20 July 1983, the Commission decided that the subsidised loans programme introduced by Law No 815 qualified as State aid and should have been notified to it prior to implementation. The Commission, having also noted that the subsidised loans scheme was capable of distorting competition and thus infringed Article 92 (1) EC, ordered Italy to repeal the aid scheme within three months.

Further to the Commission's decision, the Ministry of Transport annulled the Notices by means of a further notice of 23 February 1984. The appellant appealed to the Regional Administrative Court of Lazio ("TAR Lazio") claiming that the Ministry of Transport was not entitled to depart from Law No. 815, which provided for the subsidised loans that had been declared unlawful by the Commission.
On the grounds of the principle of the supremacy of Community law over national law, the Regional Administrative Court of Lazio dismissed the appeal. The appellant therefore appealed the decision of the Regional Administrative Court of Lazio to the Administrative Supreme Court.

III- Summary of the Court's findings

The Administrative Supreme Court upheld the appeal and quashed the judgment of the Regional Administrative Court of Lazio.
The Administrative Supreme Court specified that Commission decisions on State aids are not directly applicable. The Commission decision was addressed to the Republic of Italy and provided for, impliedly, the abrogation of the Law. The Ministry could not, prior to the abrogation of the Law, retrospectively annul its Notices, whereby it would comply with the Commission decision but infringe the Law.
As anticipated in Part I, in its more recent case law (for example, Judgments No. 465/2002 and No. 5250/2003, respectively under sections 3.3.7 and 3.3.2) the Administrative Supreme Court departed from the principle in this decision and expressly recognised the direct effect of Commission decisions.

I- Information on the judgment

Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 6 December 1988, No. 1746, TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. v. Cassa Conguaglio per il Settore Elettrico

The Administrative Court of Lazio correctly stated that national public authorities (i) must comply with a Commission decision declaring an aid incompatible with the Common Market; and (ii) correctly sought to recover an unlawful aid, notwithstanding the fact that the aid had been granted pursuant to a law that had not yet been repealed.

II- Brief description of the facts and legal issues

Cassa Conguaglio per il Settore Elettrico ("Cassa") refused to grant TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. ("Terni") a reimbursement relating to the consumption of electric energy, as provided for by a ministerial decree of 26 January 1982 and Law No. 617 of 4 November 1981, which converted Law Decree of 4 September 1981, No. 495. Cassa also asked Terni to repay any reimbursements previously granted to it. Cassa observed that ECSC Decision No. 87/396 of 29 June 1983 clarified that (i) the reimbursements amounted to State aid; and (ii) only reimbursements granted to privately owned companies could be considered compatible with the Common Market. Terni appealed Cassa's decision to the Administrative Court of Lazio.

III- Summary of the Court's findings

The Administrative Court of Lazio rejected the claim. It pointed out that, first, Terni must be considered as a public undertaking for the purposes of this case and recalled ECSC Decision No. 2320 of the Commission of 7 May 1981 establishing Community rules for aids to the steel industry and ECSC Decision No. 87/396 of 29 June 1983. It stated that Cassa had correctly asked for the repayment of the aid unlawfully granted, specifying that public authorites were bound by negative Commission decisions although the aid had been granted pursuant to a national legislative measure which was still in force.

I- Information on the judgment

Regional Administrative Court of Sicily, Palermo ("Tribunale Amministrativo Regionale della Sicilia", Palermo), Judgment of 18 November 1986, No. 875, Società Enosicilia et. a. v. Istituto regionale Vite e Vino et a.

The Administrative Court of Sicily dismissed the appeal brought by Società Enosicilia ("SE") and Consorzio Produttori Vini Siciliani Cooperativa ("CPVSC"), requesting annulment of an administrative order issued by the Istituto Regionale Vite e Vino ("IRVV") withdrawing a regional aid for wine producers.

II- Brief description of the facts and legal issues

Both SE and CPVSC were producers and marketers of wine. IRVV was a regional administrative body responsible for the wine industry in Sicily and the *Assessore Agricoltura e Foreste Regione Siciliana* ("AAFRS") was a member of the Sicilian Regional Assembly for forestry and agriculture. In 1973, the Region of Sicily enacted Regional Law No. 28/1973, granting financial aid to IRVV for the marketing of Sicilian wine in Italy and abroad. However, in June 1982, the Commission delivered a reasoned opinion pursuant to Article 169 EEC (now Article 226 EC) stating that the Italian government had infringed Regulation No. 816/70 as amended, and inviting Italy to comply with the provisions of such opinion.

As a result, the Region of Sicily enacted Regional Law No. 58/1983, repealing Regional Law No. 28/1973 and limiting the amount of economic aid. IRVV then issued Regional Decree No. 3210/1983 ("*Circolare No. 3210/1983*") declaring that it had ceased to pay out the aid already approved for the years 1982 and 1983 to promote the wine sector. AAFRS then sent a facsimile to IRVV requesting immediate suspension of any aid to CPVSC.

SE and CPVSC appealed to the Administrative Court of Sicily asking for:
(i) the annulment of IRVV's Regional Decree;
(ii) the annulment of AAFRS's facsimile request; and
(iii) payment of aid for the years preceding the enactment of Law No. 58/1983 on the basis of the rule *tempus regit actum* rule.

III- Summary of the Court's findings

The Administrative Court of Sicily dismissed the appeal. In particular, the Administrative Court of Sicily held that both IRVV 's Regional Decree and AAFRS's facsimile request were valid.

In addition, the Administrative Court of Sicily concluded that SE and CPVSC were not entitled to State aid for the years preceding the enactment of Law No. 58/1983 (with particular reference to aid for 1982 that had yet to be paid), as it was in breach of Regulation No. 337/1979 regulating the European wine industry.

I- Information on the judgment

Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 22 January 1985, No. 103, Società Cooperativa Trasporto Latte et a. v. Banca Nazionale del Lavoro

The Administrative Court of Lazio dismissed the action filed by Societa Cooperativa Trasporto Latte ("SCTL"), a milk transporting company requesting the annulment of a ministerial decree enacted by the Ministry of Transport ("the Decree"). By means of the Decree, two previous ministerial decrees enacted in 1981 granting aid were revoked. Banca Nazionale del Lavoro ("BNL") was the bank that had granted loans to SCTL and the other appellants.

II- Brief description of the facts and legal issues

In 1981, the Ministry of Transport enacted two decrees in order to implement Law No. 815/1980, granting aid to companies for the purchase of vehicles. The aid was granted by means of government-assisted loans. However, the Commission found that Law No. 815/1980 was incompatible with the Common Market. Therefore, the Ministry of Transport repealed these two decrees and declared that SCTL and other companies were not entitled to the aid.

SCTL appealed to the Administrative Court of Lazio, requesting the annulment of the Decree according to which the aid had been withdrawn on the grounds that:

(i) having legitimately relied on the Decree, it had begun to renovate its fleet of vehicles and had therefore suffered a serious loss;

(ii) it had obtained significant bank loans which it intended to repay using the State's aid.

III- Summary of the Court's findings

The Administrative Court of Lazio ruled that the Decree was lawful. Furthermore, the Administrative Court of Lazio stated that, if the Commission decided that aid was not compatible with the Common Market and requested annulment by the State within a given period of time, the Administration could decide to annul the relevant ministerial decree immediately, without having to commence a formal procedure to revoke the legislative instrument[31].

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[31] On appeal, however, the Administrative Supreme Court expressed a slightly different opinion. According to the Administrative Supreme Court, the decisions taken by the Commission pursuant to Article 93 EC have the same effect as Community directives and, therefore, are not directly applicable. Consequently, when the Commission issues a decision requesting the annulment of State aid that is declared incompatible with the Common Market, the State must, first, modify its legislation and, then, repeal the administrative acts adopted to implement such legislation. See Administrative Supreme Court, Sec.: VI, Judgment of 2 December 1988, *Società Cooperativa Trasporto Latte v. Ministry of Transportation*. See also Administrative Supreme Court, Sec.: VI, Judgment of 24 January 1989, *Cooperativa Carrettieri "La Rinascita" et alia v. Ministero dei Trasporti et a.*.