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WORKING LANGUAGE

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Subject: **State aid C 26/2010 (ex NN 43/2010 (ex CP 71/2006)) – Italy**
Scheme concerning the municipal real estate tax exemption granted to real estate used by non commercial entities for specific purposes.

Sir,

The Commission wishes to inform Italy that, having examined the information supplied by its authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU")[1].

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

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1. PROCEDURE

(1) In 2006 the Commission received a number of complaints drawing its attention essentially to the following two schemes:

a) a tax exemption from the municipal tax on real estate ("*imposta comunale sugli immobili*", hereafter "ICI") for real estate property used by non-commercial entities, which perform exclusively social assistance, welfare, health, cultural, educational, recreational, accommodation, sport, religious and cult activities [Article 7, lett. i) of Legislative Decree n. 504/92] and,

b) a 50% company tax reduction for the entities listed in Article 6 of Presidential Decree n. 601/73, which are mainly entities having as their scope social assistance, education and research on non-lucrative basis, as well as charity and education (including ecclesiastic institutions). The provision also includes social housing entities, foundations and associations having exclusively a cultural scope.

(2) Acting upon the complaints received concerning the above mentioned ICI exemption, on 5 May 2006, the Commission sent a request for information to the Italian authorities. By letter dated 7 June 2006, Italy provided information on the scheme in issue.

(3) By letter of 8 August 2006, following the entry into force of some amendments to the ICI legislation, the Commission services informed the complainants that, on the basis of a preliminary analysis, there were no grounds for proceeding further with the investigation.

(4) On 5 September 2006, the Italian authorities submitted further information concerning the ICI, underlining the modifications to the ICI legislation which entered into force in July 2006.

(5) By letter dated 25 October 2006 the complainants argued again that the ICI exemption for non commercial entities was contrary to Article 107 (1) TFEU. By letter of 14 November 2006, the Commission services informed them again that, on the basis of the information available, there were no grounds for investigating further the ICI exemption.

(6) By letter dated 25 January 2007, the Commission also asked further information to the Italian authorities on the 50% corporate tax reduction applicable to certain entities. By letter of 2 July 2007, the Italian authorities provided the requested information.

(7) In January and September 2007, respectively, the complainants wrote to the Commission in relation to the ICI exemption. In their letter, dated 12 September 2007, they drew the Commission's attention on Article 149 of the Unified Law on Income Tax approved by Presidential Decree n. 917 of 22nd December 1986 ("*Testo Unico delle Imposte sui Redditi"*, hereinafter "TUIR"), which according to them would provide a favourable tax treatment for ecclesiastic institutions and amateur sports club only.

(8) On 5 November 2007 the Commission invited the Italian authorities to provide further information on all the alleged preferential law provisions indicated by the complainants. On the same date, the Commission also asked the complainants to

substantiate the effects of the measures complained of on competition and trade, and to submit information as to the prejudice allegedly suffered as a result of these provisions.

(9) The Italian authorities provided the requested information by letters dated 3 December 2007 and 30 April 2008, respectively.

(10) On 21 May 2008 the complainants submitted further documentation allegedly concerning the application of the ICI exemption granted to non commercial entities and the 50% corporate tax reduction, focusing mainly on the alleged aid granted to ecclesiastic institutions.

(11) On 20 October 2008, the complainants sent a letter of formal notice (Art. 265 TFEU), asking the Commission to open the formal investigation procedure and to adopt a formal decision on their complaints.

(12) On 24 November 2008 the Commission sent another request for information to the Italian authorities, to which the latter replied by letter of 8 December 2008.

(13) By letter dated 19 December 2008, the Commission services informed the complainants that, upon a preliminary analysis, they considered that the measures complained of did not appear to constitute state aid and accordingly there was no need to pursue further the investigation.

(14) On 26 January 2009, the Italian authorities issued a Circular administrative letter, clarifying further the scope of application of the ICI exemption for non commercial entities. On 2 March 2009, the complainants wrote to the Commission expressing their dissatisfaction with the legislation in force, and criticising the abovementioned Circular administrative letter.

(15) On 18 June 2009, the complainants sent an e-mail to the Commission services enquiring about the state of the investigation. By email of 11 January 2010 the complainants asked again the Commission to open the formal investigation procedure. On 15 February 2010, the Commission services sent a letter to the complainants, confirming the reasoning contained in the previous letter of 19 December 2008 and indicating that there were no grounds for proceeding further with the investigation.

(16) On 26 April 2010, two of the complainants introduced each an action for annulment before the General Court against the Commission's letter of 15 February 2010[2].

(17) In the light of further new elements and on the basis of all the information presently at its disposal, the Commission has come to the conclusion that at this stage it cannot exclude that the measures in question may constitute state aid schemes. Therefore, the Commission has decided to investigate them further.

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[2] See cases T-192/10, *Ferracci v. Commission* (OJ C 179 of 3.7.2010 p. 45) and T-193/10, *Scuola Elementare Maria Montessori v. Commission* (OJ C 179 of 3.7.2010 p. 46).

2. DESCRIPTION OF THE MEASURES

2.1. Preliminary remarks. The 50% corporate tax reduction: existing aid

(18) As far as the 50% corporate tax reduction is concerned (see paragraph (1), b), the Commission has come to the conclusion that such measure could entail existing aid.. In fact, the special tax treatment for the entities listed in Article 6 of Presidential Decree n. 601/73 dates back at least to Law n. 603 of 6 August 1954. More precisely, Article 3 of such Law provided for a total exemption from the corporate tax for a number of entities, including the entities now listed in Article 6 of Presidential Decree n. 601/73[3]. It appears then that the preferential treatment for the entities concerned existed before the entry into force of the Treaty and that the alterations occurred from that date have merely reduced the size of the fiscal advantage provided by this measure. The Commission considers therefore that the measure at issue could entail existing aid[4] and will be dealt with within the context of the existing aid procedure.

(19) This said, the present procedure will concern only the ICI exemption granted to non commercial entities and Article 149 (4) TUIR, which are described in more detail below. Both measures were never notified to the Commission.

2.2. The tax exemption from the municipal tax on real estate

(20) The current system of the "*imposta comunale sugli immobili*" ("ICI"), is a municipal tax on real estate introduced in 1992 by Legislative Decree n. 504/92. The tax is due by every physical and legal person that is in possession of a real estate (for reasons of ownership, right of usufruct, use, housing or emphyteusis). The tax is paid both by residents and non residents, independently of the use which is made of the real estate.

(21) The amount to be paid is calculated on the basis of the cadastral value of the real estate.

(22) According to Article 7, (i) of Legislative Decree n. 504/92, ("hereinafter "Article 7, (i)") the following categories of real estate benefit from a complete tax exemption: real estate property used by non-commercial entities which perform exclusively social assistance, welfare, health, educational, accommodation, cultural, recreational, sport, religious and cult (worship) activities:

(23) According to Article 7, paragraph 2 *bis* of Law Decree n. 203/2005, as converted by Law n. 248 of 2.12.2005, and Article 39 of Law Decree n. 223/2006, the exemption provided for by Article 7, (i) of Legislative Decree n. 504/92 is applicable to the activities listed therein even if they have a commercial nature, provided only that they are not exclusively commercial in nature.

(24) The Italian authorities clarified that the municipal real estate tax exemption provided for by Article 7, (i) applies if two cumulative conditions are met:

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[3] As outlined by the Court, "*dans une situation où la modification d'un régime existant a pour effet de diminuer le montant des aides pouvant ou devant être versées, elle n'a pas le même effet qu'une aide nouvelle, cette dernière impliquant, par définition, l'augmentation des charges assumées par l'État*" (judgement of 4.3.2009, case T-265/04, *Tirrenia*, point 127).

[4] Joined cases T-265/04, T-292/04 and T-504/04, *Tirrenia di navigazione v Commission*, judgment of 4.3.2009, para 127

- the buildings must be used by non-commercial entities[5]. The law defines non-commercial entities as public and private entities, which cannot assume the form of a company (the so-called "*società*"), and whose activities are not exclusively or mainly commercial in nature;
- the buildings must be used exclusively for performing the activities listed in Article 7, (i) .

(25) By Circular administrative letter n. 2/DF of the Finance Ministry, dated 26 January 2009 (hereinafter the "*Circolare*"), the Italian authorities clarified which entities can be considered as non commercial entities and the features that the activities performed by non commercial entities must present in order for non-commercial entities to benefit from the exemption at issue.

(26) This *Circolare* recalls that non commercial entities can be both public and private. According to such letter, the following entities can be considered as public non commercial entities[6]: State, Regions, Districts, Municipalities, chambers of commerce, public hospitals (more precisely the so-called "*aziende sanitarie*"), public entities instituted exclusively for social assistance purposes, non economic public entities, social-security entities, Universities and research institutes, special entities known as "*aziende pubbliche di servizi alla persona*" (the former "*IPAB*"). Examples given by the same Circular letter of private non commercial entities include the following entities: associations, foundations, committees, Non Governmental Organisations (NGO), amateur sports clubs, voluntary service organizations, fiscally recognized non-for profit organizations (the so-called "*ONLUS*") and ecclesiastic institutions, belonging to the Catholic church and to other religions.

(27) The *Circolare* also clarifies that the activities exercised in the buildings which are exempted from the ICI, *de facto* should not be provided by the market[7] or should be activities which are meant to satisfy social needs, which are not always catered for by public operators nor by private commercial operators.

(28) The *Circolare* develops a number of criteria for each of the activities listed in Article 7, (i), in order to establish when each of them must be considered as non-exclusively commercial in nature. For instance, in the areas of health and social activities, it is required that the beneficiaries have concluded an agreement or a contract with the public authorities, which is a necessary condition to provide services that are at least partially financed or reimbursed by the National Health Service or by the competent public bodies. In the area of education, the school must comply with learning standards, be accessible to handicapped pupils, apply collective working agreements, not discriminate when enrolling pupils, and profits must be reinvested in the learning activity. For movie theatres, it is required that they show films of cultural interest, or with a quality certificate, or for the youth. As regards accommodation activities, and more in particular with regard to services for tourists, it is required that the activity in not addressed to the public at large but to predefined categories and that the service is

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5 More precisely, Article 7, letter i) of Legislative Decree n. 504/92 refers to buildings used by the entities defined in Article 87 [now Article 73], paragraph 1, letter c) of Presidential Decree n. 917/86. The definition contained in this last provision is that one of non-commercial entities.

6 It is not clear if the list contained in the *Circolare* is exhaustive or not.

7 See Circular administrative letter n. 2/DF of 29 January 2010, point 5.

not provide all year round. The service supplier should apply prices lower than the market and should not behave as a normal hotel owner.

2.3. Article 149 TUIR

(29) Article 149 TUIR is included in Title II, Chapter III of the Unified Law on Income Tax (TUIR). Chapter III lays down the tax rules applicable to non-commercial entities, such as the rules for the calculation of the taxable base and for their taxation[8]. Article 149 identifies which are the conditions that can trigger the loss of the "non commercial status" of an entity.

(30) In particular, Article 149 (1) TUIR provides that if a non commercial entity carries out prevalently commercial activities during a given fiscal year, it shall loose its "non commercial status".

(31) Article 149 (2) TUIR defines the "commercial status" in terms of prevalence of yearly revenues deriving from commercial activities versus revenues deriving from institutional activities and in terms of prevalence of the value of assets related to commercial activities versus the other activities. The business form adopted by the entities concerned does not have any influence on the loss of "non commercial status".

(32) Article 149 (4) TUIR provides that the above mentioned rules (i.e. Article 149 (1) and (2)) shall not apply to ecclesiastic institutions that have been granted a civil status, and to amateur sport clubs.

3. POSITION OF THE ITALIAN AUTHORITIES

(33) As regards the ICI exemption for non commercial entities in relation to the activities listed in Article 7,(i), the Italian authorities first pointed out that, as a general rule, non-commercial use of real estate is normally exempt from taxation, whereas commercial use is fully taxed. Second, the Italian authorities argued that this measure is justified by the "logic of the tax system". In particular, a differentiated treatment for lucrative activities, on one hand, and activities which present a social nature, like assistance, charity and religious activities, on the other hand, would be in line with the logic of the Italian tax system. Such preferential tax treatment has been established at the moment of the entry into force of the ICI legislation. Moreover, the preferential tax treatment reserved for the category of real estate mentioned in Article 7, (i) would concern a large number of real estate, identified on the basis of objective criteria, according to principles of social utility and social benefits.

(34) As regards Article 149 (4) TUIR, the Italian authorities explained that the measure is aimed at preserving the exclusive competence of the Interior Ministry, which is the sole authority competent for the revocation of the civil status of the ecclesiastic institutions. Thus the granting of the civil status to an entity, and therefore indirectly the recognition of its non-commercial status, together with its revocation, would be an exclusive prerogative of the Italian Interior Ministry. This may explain the content of Article 149(4) TUIR and would be the reason, according to the Italian authorities, for taking into account the control exercised by the Ministry of Interior for the purposes of the State-aid assessment. The Italian authorities explained that the term "ecclesiastic

[8] See Article 143 and following of the TUIR.

institutions" is not limited to Catholic institutions only, but covers other religions as well.

4. ASSESSMENT

4.1. Existence of aid

(35) According to Article 107 (1) TFEU, *" save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

(36) According to a settled case-law, "*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*"[9]. Likewise, the fact that an entity does not seek to make profit is not decisive to establish if it is an undertaking or not[10].

(37) As regards the ICI exemption granted to non commercial entities, the Commission considers, at this stage of the procedure, that certain undertakings could benefit from it, since the law provision refers to activities which appear, at least partially, to be economic under European competition law[11]. Similarly, as regards Article 149 (4) TUIR, the Commission considers that beneficiaries of this provision may perform economic activities and thus classify as undertaking as far as those activities are concerned.

(38) At this stage of the procedure, the Commission also considers that the criteria used by the *Circolare* in order to exclude the commercial nature (under Italian law) of the activities listed in Article 7 (i) cannot exclude the economic nature (under European competition law) of these activities. For instance, in the areas of health and social activities, the *Circolare* requires an agreement with the public authorities. This, however, appears to be simply the necessary condition to obtain at least partial reimbursement by the National Health Service. As regards education, the *Circolare* on the one hand seems to require compliance with basic principles which are mandatory in order for the educational service provided to be considered at par with the public education system, and on the other it requires to reinvest profits in the didactic activity itself. These requirements do not seem to be such as to exclude the economic nature of the activity. With regard to movie theatres, the requirements of the *Circolare*, rather than excluding the economic nature of the service provided, seem to impose to those operators to be active in particular market segments (quality, cultural, youth movies) if

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9 Judgement of the Court of justice of 23 April 1991, *Höfner c. Macroton GmbH*, case C-41/90, ECR 1991, I-1979, point 21.

10 Case C-49/07, MOTOE, [2008], ECR I-4863, paragraphs 27 and 28.

11 For instance, the *Commissione ministeriale* makes reference to four judgements of the *Corte di Cassazione* (Italian highest civil court) n. 4573, 4642, 4644 and 4645 of 8 March 2004 in which an ecclesiastic institution run a hospital and a "*pensionato*" according to commercial modalities (paragraph 1.3). Contrary to the interpretation given by the Corte di Cassazione, which was based on the original version of Article 7 (i) of Legislative Decree n. 504/92, the *Commissione ministeriale* states that, based on the provisions of Article 7, paragraph 2 *bis* of Law Decree n. 203/2005, as converted by Law n. 248 of 2.12.2005, and of Article 39 of Law Decree n. 223/2006, such situations should be covered by the ICI exemption.

they wish to obtain the tax exemption. The same seems to hold true with respect to accommodation services, while the requirements to apply prices lower than the market and not behave as a normal hotel do not seem to exclude the economic nature of the activity, either, as argued also by the complainants.

4.1.1. State resources

(39) The Commission observes that the measure implies the use of State resources by foregoing tax revenues by the Italian Treasury for the amount corresponding to the reduced tax liability.

(40) Indeed, a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. By allowing entities, which can be classified as undertakings, to reduce their tax burden through tax exemptions, the Italian authorities are foregoing revenue to which they would be entitled in the absence of the tax exemption.. Hence, the ICI exemption, to the extent that it provides for a tax exemption from the payment of the ICI, implies a loss of State resources. In the same vein, Article 149 (4) TUIR implies a loss of State resources and involves State resources to the extent that it provides for the non application to ecclesiastic institutions and to amateur sports clubs of the rules concerning the loss of non commercial status and the fiscal advantages linked to that status (see next section), in case these entities perform mainly commercial activities.

4.1.2. Advantage

(41) According to the case-law, the concept of aid embraces not only positive benefits, but also measures which in various forms mitigate the charges which are normally included in the budget of an undertaking[12].

(42) Therefore, since the ICI tax exemption reduces the charges that are normally included in the operating costs of any undertaking owing real estate in Italy, it seems to provide an economic advantage to the entities concerned in comparison to other undertakings which cannot benefit of such tax advantages although they may be performing similar economic activities.

(43) As regards Article 149 (4) TUIR, by allowing ecclesiastic institutions and amateur sport clubs to benefit from the tax rules applicable to non commercial entities and notably the possibility for the ecclesiastic institutions to opt for the system based on simplified taxation and for amateur sports clubs to be subject to the special taxation provided by law n. 398/91[13], it allows the entities in question to benefit of a more advantageous tax treatment. This possibility is maintained even when they could no longer be considered as non-commercial entities. Therefore, Article 149 (4) TUIR appears to provide an economic advantage in comparison to other undertakings which cannot benefit from such advantageous tax treatment, although they may be performing similar activities.

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12 Case C-143/99, Adria-Wien Pipeline, ECR 2001, I-8365, point 38.

13 See Article 145 TUIR

4.1.3. Selectivity

(44) The Commission Notice on the application of the State aid rules to measures relating to direct business taxation[14] (hereinafter "the Commission Notice") states that "[*t*]*he main criterion in applying Article 92(1)* [now Article 107 (1) TFEU] *to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned.*"

(45) In other words, in order to determine whether a measure is selective it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. The determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation[15].

(46) However, as clarified also by the Court, "*a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives*"[16].

(47) The Court has also held on numerous occasions that Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects[17]. The concept of State aid does not apply however to State measures, which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part. As explained in the Commission Notice, *'some conditions may be justified by objective differences between taxpayers'*.

(48) Therefore, in line with the case-law, the Commission will assess the selectivity of these tax measures following three steps. First, the common or "normal" regime under the tax system applicable constituting the system of reference will be defined. Second, it

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[14] OJ C 384, 10.12.1998, p. 3.

[15] Judgement of the Court of Justice of 6.9.2006, case C-88/03, *Portugal v. Commission* [2006] ECR I-7115, paragraph 56.

[16] Judgement of the Court of Justice of 6.9.2006, case C-88/03, *Portugal v. Commission* [2006] ECR I-7115, paragraph 81. See also judgement of the Court of Justice of 29.4.2004, case C-308/01, *GIL Insurance* [2004] ECR I-4777, paragraph 68.

[17] See for instance judgement of the Court of Justice of 29.2.1996, case C-56/93, *Belgium v Commission* [1996] ECR I-723, paragraph 79; judgement of the Court of Justice of 26.9.1996, case C-241/94, *France v Commission*, [1996] ECR I-4551, paragraph 20; judgement of the Court of Justice of 17.6.1999, case C-75/97, *Belgium v Commission*, [1999] ECR I-3671, paragraph 25; and judgement of the Court of Justice of 13.2.2003, case C-409/00, *Spain v Commission*, [2003] ECR I-10901, paragraph 46.

will be necessary to assess and determine whether any advantage granted by the tax measure at issue derogates from the system of reference in as much as the measure differentiates between economic operators that, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Third, if such a derogation exists, it will be necessary to examine whether it results from the nature or general scheme of the tax system of which it forms part and could hence be justified by the nature or logic of the system. In this context, in line with the case law, a Member State has to show whether the differentiations derive directly from the basic or guiding principles of that system.

a) System of reference

(49) The ICI was introduced in 1992, and it is an autonomous tax, due to the municipalities. Therefore, the Commission considers that the system of reference for the assessment of this measure is the municipal real estate tax itself.

(50) As regards Article 149 (4) TUIR, which is included in the section concerning the tax treatment of non commercial entities, as described above (see par (29) s.), the Commission considers that the reference system for the assessment of this measure is the tax treatment of other non commercial entities.

b) Derogation from the system of reference

i. ICI exemption

(51) According to Articles 1 and 3 of Legislative Decree n. 504/92, all legal persons that are in possession of a real estate, independently from the use which is made of it, shall pay the said tax. Article 7 indicates which categories of real estate are exempted from paying this tax[18].

(52) Hence, at this stage it must be considered that the ICI exemption for the real estate listed in Article 7, (i) of Legislative Decree n. 504/92 derogates from the system of reference, according to which each legal person, and therefore any undertaking, that has the possession of a real estate, independently from the use which is made of the real estate, shall pay the municipal tax on real estate.

(53) The Commission has asked the Italian authorities to provide further information with regard to the entities and activities listed in Article 7, (i) of the Decree on ICI, which were the object of the complaints received. The Italian authorities have argued that such an exemption could be justified by reference to the objective differences among taxpayers. As a general rule, the non-commercial use of real estate is exempt from ICI, whereas the commercial use is fully taxed.

(54) However, at this stage, the Commission considers that non-commercial entities may perform, in certain cases economic activities. If this is the case, then they could be placed in the same legal and factual situation as any other company performing an economic activity. For instance, the Commission received from the complainants information concerning the alleged provision by ecclesiastic institutions of health care or accommodation services. The services offered by these institutions are in

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[18] As indicated in point (37) above, at this stage of the procedure, it cannot be excluded that the real estate listed in Article 7 (i) could be used for the exercise of economic activities.

competition with similar services offered by other economic operators. In this respect, the Italian authorities informed the Commission that if an ecclesiastic institution performs an economic activity, which is neither marginal nor directly related to the cult activity, this entity should be treated like any other economic operator performing the same activity. Moreover, the Italian authorities clarified that the ecclesiastic institutions are subject to administrative controls by the competent authorities, like any other entity and taxpayer. However, as outlined above, it appears that non commercial entities can perform commercial activities, which are necessarily economic under European competition law. For instance, the final report of the "*Commissione ministeriale di studi sulle problematiche applicative dell'esenzione dall'ICI disposta dall'art. 7, c. 1, lett. i) del D.Lgs. 504/1992*", in the version sent from the complainants to the Commission, clarifies that health care and didactic activities are necessarily commercial in nature as they are provided in an organised way against remuneration (paragraph 3.2). Activities of such nature classify as economic under European competition law. However, if such activities are provided by a non-commercial entity (and they are not prevalent[19]), that entity will enjoy the ICI exemption for the real estate used in the performance of those activities, provided that the minimum criteria required in the *Circolare* are met. If a commercial entity provides the same activity it will not benefit of the tax exemption, even if it meets the requirements of the *Circolare.*

(55) Hence, at this stage of the procedure, the Commission considers that the exemption from the municipal real estate tax foreseen for the categories listed in Article 7, (i) of Legislative Decree n. 504/92 constitutes *prima facie* a selective measure within the meaning of the case-law.

ii. Article 149(4) TUIR

(56) As regards Article 149 (4) TUIR, at this stage the Commission considers that the provision constitutes *prima facie* a selective measure, since the possibility to maintain the non-commercial status even when they would otherwise no longer be considered as non-commercial entities is granted only to ecclesiastic institutions and to amateur sport clubs.

c) Justification by the logic of the tax system

(57) A measure can be justified by the nature and general scheme of the tax system if it derives directly from the basic principles of the tax system. As constantly held by the Court, it is for the Member State to provide such a justification.

(58) In their submissions, the Italian authorities have argued that the measures in question do not derogate from the inherent logic of the Italian tax system (see above, section 3). However, at this stage of the procedure, the Italian authorities have not provided enough evidence to enable the Commission to consider that the measures at issue could be justified by reference to the inherent principles of the Italian tax system.

(59) In particular, as regards the ICI exemption, at this stage the Commission cannot share the view of the Italian authorities according to which the social value of an activity constitutes a valid ground for justifying a measure according to the logic of the tax

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[19] If those activities were prevalent normally the entity would not be considered as non-commercial (see Commissione ministeriale, paragraph 2.2.1.).

system. Indeed, the notion of State aid does not depend on the objective pursued by the measure and in any case the ICI exemption does not apply to all undertakings providing those activities with high social value, but only to some of them (those carried out by non-commercial entities). In summary, the approach of the Italian authorities appears to be at odds with findings of the Court of Justice in Case *Cassa di Risparmio di Firenze*[20], which also concerned a tax advantage for non-profit-making legal persons that pursued exclusively socially beneficial aims. The Court held that

"*... the tax advantage concerned is accorded on account of the undertaking's legal form, a legal per son governed by public law or a foundation, and of the sectors in which that undertaking carries on its activities.*

It derogates from the ordinary tax regime without being justified by the nature or scheme of the tax system of which it forms part. The derogation is not based on the measure's logic or the technique of taxation, but results from the national legislature's objective of financially favouring organisations regarded as socially deserving.

Such an advantage is therefore selective"

(60) As regards Article 149 (4) TUIR, the Italian authorities explained that the measure is aimed at preserving the exclusive competence of the Interior Ministry. In this respect, without prejudice to the assessment of such an explanation, at this stage the Commission considers that the measure at issue is in any event not justified by reference to the inherent principles of the Italian tax system, but possibly by other considerations that do not concern such a system.

4.1.4. Effect on trade between Member States and distortion of competition

(61) According to Article 107 (1) TFEU, the measure must affect trade between Member States and distort, or threaten to distort competition. In the present case at least some of the sectors benefitting of the ICI exemption, like the sectors relating to the offer of accommodation and health services, are exposed to competition and trade within the European Union. Some other sectors, like education, could also be exposed to competition and trade within the European Union. Hence, at this stage the Commission considers that both the ICI measure and the provision related to non commercial entities, which are potentially applicable to many sectors of the economy, affect trade between Member States and distort or threaten to distort competition.

4.1.5. New aid

(62) Both measures can be classified as new aid. In fact, ICI was introduced in 1992 and the tax exemption at issue has neither been notified nor otherwise approved by the Commission. This exemption applies to a wide range of activities that were not closed to competition when ICI was introduced and has a yearly nature. Therefore, any derogation to the normal rules of this tax regime classifies necessarily as new aid to the extent that the requirements provided by Article 107 (1) TFEU are met. Likewise, Article 149 TUIR (former Article 111 bis TUIR) has been introduced in 1998. This provision has neither been notified nor otherwise approved by the Commission. For this reason, the derogation provided for by Article 149 (4) TUIR can be classified as new aid, to the extent that the requirements provided by Article 107 (1) TFEU are met.

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20 Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR1-289, paras 136-138.

4.1.6. Conclusion

(63) As all the requirements laid down in Article 107(1) TFEU appear to be met, the Commission at this stage of the procedure considers the measure providing for the exemption from the municipal real estate tax for real estate property used by non commercial entities for specific purposes (Article 7, (i) of Legislative Decree n. 504/92), and Article 149 (4) TUIR, to entail State aid which can be classified as new aid.

4.2. Compatibility

(64) State aid measures can be considered compatible on the basis of the exceptions laid down in Article 107(2) and 107(3) TFEU.

(65) So far, the Commission has doubts as to whether the measures in question can be considered compatible with the internal market. The Italian authorities did not present any argument to indicate that any of the exceptions provided for in Article 107 (2) and 107 (3) TFEU, under which State aid may be considered compatible with the internal market, applies in the present case.

(66) The exceptions provided for in Article 107 (2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.

(67) Nor does the exception provided for in Article 107 (3) (a) TFEU apply, which provided for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. In the same vein, it seems that the measures in question cannot be considered to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Italy, as provided for by Article 107 (3) (b) TFEU.

(68) Article 107 (3) (d) TFEU provides that aid to promote culture and heritage conservation, where such aid does not affect trading conditions and competition in the union to an extent that is contrary to the common interest, may be considered compatible with the internal market. The Commission considers that for some entities, like non commercial entities which perform exclusively educational, cultural and recreational activities, it cannot be excluded that their object is the promotion of culture and heritage conservation and can thus be covered by Article 107 (3) (d) TFEU.

(69) Aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest, according to Article 107 (3) (c) TFEU. At this stage however, the Commission has no elements in order to assess whether the tax advantages granted by the measures under examination are related to specific investments eligible to receive aid under the Community rules and guidelines, to job creation or to specific projects. The Commission considers on the contrary, that the measures in issue seem to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission

practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

(70) Finally, the Commission cannot exclude at this stage that some of the activities benefiting from the measures at issue may classify under the Italian law as services of general economic interest ex art. 106, paragraph 2 TFEU and the *Altmark* jurisprudence. However, the Italian authorities have not provided any information enabling the Commission to assess whether this could be the case and eventually take a position on the possible qualification of aid of such measures and their compatibility with the internal market.

5. CONCLUSION

(71) In the light of the foregoing considerations, the Commission has decided to open the formal investigation procedure pursuant to Article 108 (2) TFEU with respect to the scheme provided for by Article 7, (i) of Legislative Decree n. 504/92 and in relation to the provision laid down by Article 149 (4) TUIR.

Decision

(72) The Commission requests Italy to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter.

(73) It requests your authorities to forward immediately a copy of this letter to the potential recipients of the aid.

(74) The Commission wishes to remind Italy that Article 108 (3) TFEU has suspensory effect, and would like to draw your attention to Article 14 of Council Regulation (EC) n. 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(75) The Commission warns Italy that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories of the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested partiers will be invited to submit their comments within one month of the date of such publication.

(76) If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate General for Competition
State Aid Greffe
B-1049 Brussels
Fax No: +32-2-296.1242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission