COMMISSION DECISION

of 5 June 2002

on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding

C 27/99 (ex NN 69/98)

(notified under document number C(2002) 2006)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/193/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 3 March 1997 the Commission received a complaint concerning alleged State aid granted by Italy in the form of tax exemptions and access to subsidised loans to various public utilities.

(2) On 12 May, 16 June and 21 November 1997 the Commission asked the Italian authorities for initial information concerning the measures in question. By letter of 17 December 1997, registered as received by the Commission on 23 December, the Italian authorities provided some of the information requested. At the request of the Italian authorities, a meeting was held in Rome on 19 January 1998.

(3) By letter dated 17 May 1999, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures referred to in the complaint.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the measures.

(5) The Commission received comments from interested parties. The comments were forwarded to Italy, which replied with its own observations on the followings dates:

— 2 August 1999: first submission,

— 15 October 1999: request for postponement of deadline for presenting observations,

— 28 October 1999: observations on loans from Cassa Depositi e Prestiti (CDDPP),

— 14 December 1999: request for postponement of deadline for presenting observations,

— 3 February 2000: additional observations,

— 8 February 2001: letter stating that Italy would not be adopting the measure referred to in the comments from Federazione Gas Italian (Gas-it),

— 31 July and 3 August 2001: request for postponement of deadline for answering the Commission letter of 25 July 2001,

— 25 October 2001: comments on the 'transfer tax exemption' (see recital 16),

[1] OJ C 220, 31.7.1999, p. 14.

[2] See footnote 1.

— 22 November 2001: comments on CDDPP loans,

— 21 December 2001: comments on CDDPP loans.

(6) The Commission received comments from interested parties as follows:

— 10 September 1999: comments submitted by Azienda Elettrica Municipale SpA (AEM) and ACEA SpA (ACEA),

— 31 August 1999: comments submitted by the Bundesverband der Deutschen Industrie (BDI),

— 21 January 2000: additional comments from AEM and ACEA.

(7) The Commission received further comments from interested third parties on the following dates:

— 16 March 2000: comments from Confservizi Cispel (Cispel),

— 13 March and 7 April 2000: comments from Gas-it concerning a new measure planned by the Italian State which, combined with the measures already under investigation, allegedly involve further aid,

— 11 April 2000: comments from Azienda Mediterranea Gas e Acqua SpA (AMGA).

(8) Lastly, the Commission received other comments from AMGA, ACEA and AEM on 12 June 2000. On 7 July 2000 the same parties sent comments to the Commission concerning the Court of First Instance's judgment in *Alzetta Mauro* ([3]).

(9) The Commission also wrote to the Italian authorities on the following dates:

— 23 August 1999: first letter following the decision to initiate the procedure,

— 1 October 1999: letter forwarding third parties' observations,

— 5 October 1999: reminder following the letter of 23 August 1999,

— 25 October 1999: letter extending the deadline for presenting further observations,

— 4 February 2000: letter forwarding to Italy further observations by third parties,

— 21 January 2000: reminder following the letter of 23 August 1999,

— 11 and 14 April 2000: forwarding to Italy further observations by third parties,

— 25 April 2000: reminder of the obligation to notify new aid measures under Article 87 of the Treaty in connection with the measure referred to by Gas-it,

— 25 July 2001: letter requesting clarification of the 'transfer tax exemption' (see recital 16),

— 17 August 2001: extension of the deadline for presenting further observations.

(10) The Commission also had meetings with representatives from ACEA and AEM on 18 November 1999, 23 March 2000 and 20 June 2000. On 14 April 2000 it also met with representatives from Gas-it.

(11) The Commission met the Italian authorities on 24 October 2001.

2. DESCRIPTION OF THE MEASURES

2.1. National legal background

(12) In Italy municipalities have traditionally provided directly or indirectly ([4]) various services to their local communities (such as distribution and treatment of water, public transport, gas distribution, etc.) through different organisational arrangements. In 1990 Law No 142 of 8 June 1990 (Law No 142/90) reformed the legal arrangements available to municipalities to provide those services. In accordance with Article 22 of this Law, subsequently amended by Article 17(58) of Law No 127 of 15 May 1997, a municipality may provide the services:

([3]) Judgment of the Court of First Instance in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 [2000] ECR II-2319.

([4]) Normally through a separate administrative accounting entity known as a municipal undertaking (azienda municipalizzata).

(a) directly (in economia);

(b) through a separate administrative accounting entity (azienda speciale);

(c) through an institution for non-commercial services;

(d) through licences granted to public or private undertakings (concessione a terzi);

(e) by setting up a joint stock company (società per azioni) or a limited liability company (società a responsabilità limitata) with a majority public shareholding.

(13) A further option for administering such services was introduced by Article 12 of Law No 498 of 1992 (Law No 498/92), namely the possibility of setting up a joint stock company with a minority public shareholding.

(14) As a general rule, in the case of public services provided directly by a municipality or by a separate accounting entity, the service provider cannot operate outside the territory of the municipality itself ([5]). However, joint stock companies set up under Law No 142/90 are not limited by law to a predefined territory or activity and in general they conduct their business as normal commercial entities, subject to the rules of private and commercial law ([6]).

2.2. **Detailed description of the measures**

(15) In its decision initiating the procedure, the Commission explained that it had doubts whether certain national provisions applicable to joint stock companies with a majority public shareholding set up under Law No 142/90 constituted State aid within the meaning of Article 87 of the Treaty and were compatible with the common market. The provisions in question are:

([5]) Although, under Article 5(1) of Decree No 902 of 4 October 1986, a municipality may, with the agreement of other interested municipalities, widen the territorial scope of its undertaking to the territories of those municipalities. However, Italian case-law has imposed strict conditions on this possibility: see, for instance, Council of State No 1291, Session IV of 29 September 1988, No 1159, Session V of 3 August 1995, No 1374, Session V of 14 November 1996.

([6]) See for instance Court of Cassation, Sezioni unite, No 4989, 6.5.1995.

(a) Article 3(69) of Law No 549 of 28 December 1995, read in conjunction with Article 13a of Decree-law No 6 of 12 January 1991 ([7]);

(b) Article 3(70) of Law No 549, read in conjunction with Article 66(14) of Decree-law No 331 of 30 August 1993 ([8]); and

(c) Article 9a of Law No 488 of 9 August 1986 converting and amending Decree-law No 318 of 1 July 1986 in respect of urgent provisions for public financing (hereinafter Article 9a of Decree-law No 318/1986).

(16) Article 3(69) and (70) of Law No 549/95 provides for a special tax regime for joint stock companies with a majority public shareholding set up under Law No 142/90 and in particular:

(a) exemption from all transfer taxes related to the conversion of special and municipal undertakings into joint stock companies (the transfer tax exemption);

(b) a three-year income tax exemption, up to the tax year 1999, for joint stock companies with a majority public shareholding (the 'three-year income tax exemption').

(17) More specifically, Article 3(69) of Law No 549/95, by making reference to Article 13a of Decree-law No 6 of 12 January 1991 (Article 3(69)) provides that the transfer of assets linked to the conversion of special and municipal undertakings into joint stock companies set up under Laws Nos 142/90 and 498/92 is not subject to the following taxes:

(a) registration tax;

(b) stamp tax;

(c) tax on the increase in value of real estate properties (INVIM);

([7]) As converted and amended by Law No 80 of 15 March 1991.

([8]) Converted into Law No 427 of 29 October 1993.

(d) mortgage tax and cadastral duty;

(e) any other transfer taxes.

(18) The tax regime provided for in Article 3(69) was later confirmed in Articles 115(6) and 118(1) and (2) of Decree-law No 267 of 18 August 2000.

(19) Article 3(70) of Law No 549/95, read in conjunction with Article 66(14) of Decree-law No 331 of 30 August 1993 ([9]) (Article 3(70)), provides that joint stock companies set up under Law No 140/90 qualify for exemption from income tax (tax on incomes of legal persons (IRPEG) and local income tax (ILOR)) for three years starting from their incorporation and, in any case, not beyond the tax year ending on 31 December 1999.

(20) Article 9a of Decree-law No 318/1986 allowed joint stock companies with a public majority shareholding which provide public services to contract loans directly with CDDPP. According to information from the Italian authorities, such loans were granted to joint stock companies set up under Law No 142/90 from 1994 to 1998 ([10]). Only loans granted to such companies in accordance with Article 9a of Decree-law No 318/1986 are concerned by this Decision.

3. COMMENTS FROM INTERESTED PARTIES

(21) The Commission received comments from various interested parties.

(22) Several firms (AEM, AMGA and ACEA) commented as follows:

(a) the measures do not constitute State aid. As the sectors in which the joint stock companies in question operate were not open to competition, the measures could not distort competition. Thus an essential requirement for a measure to be regarded as State aid, i.e. that it distorts competition, is missing;

(b) in any event, even if the measures constituted State aid, they should be regarded as existing aid;

(c) furthermore, the aid should be regarded as being compatible under Article 87(3)(c) because, although the measures were temporary, their purpose was to facilitate the transformation and restructuring of the companies with a view to helping them to cope with the transition from a closed to a liberalised market.

(23) As regards point (a) in the preceding recital, the abovementioned firms argued that the joint stock companies provided services on the basis of exclusive rights in the territory of the municipality to which they belonged. At the same time, they did not tender for the provision of the services in the territories of other municipalities. There was apparently only one exception to this, see the tender for the management of the Arezzo municipal waterworks, in which ACEA, AMGA and Compagnie Générale des Eaux took part ([11]). In addition, AMGA and Lyonnaise des Eaux submitted a bid for management of the Alto Valdarno waterworks ([12]). The firms also maintained that the measures in question did not give the joint stock companies an advantage in entering new markets. The tax advantage was not significant when compared with the cost of expanding into new markets (e.g. in the telecoms sector).

(24) With regard to recital 22(b), the firms argued that the classification of the measures in question as existing State aid was based on two sets of considerations. First, it should be stressed that municipalities and municipal undertakings have been exempt from income tax since the beginning of the century. The new joint stock companies under Law No 142/90 are, from an economic viewpoint, the same special undertakings that used to benefit from the exemption. The three-year income tax exemption provided for in Article 3(70) is thus in fact a limitation of a prior tax exemption. As Article 3(70) does not therefore constitute either a new measure or an amendment to an existing one, it must be classified as existing aid.

([9]) The provisions stipulate that the same tax regime applicable to a local authority controlling joint stock companies set up under Law No 142/90 applies to the joint stock company itself for three years after incorporation. As a result, the latter qualifies for the three-year income tax exemption.

([10]) Comments from the Italian authorities of 28 October 1999 and 21 December 2001.

([11]) AEM and ACEA comments of 21 January 2000, paragraph 28.

([12]) AMGA comments of 11 April 2000, paragraph 23. It is not clear whether the comments refer to the same tender mentioned by AEM and ACEA in their comments of 21 January 2000.

(25) Second, and more generally, as they entered into force when the markets in which the joint stock companies operated were closed to competition, all the above measures should now be classified as existing aid (see in particular Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([13]) and the Court of First Instance's judgment in *Alzetta Mauro* ([14]).

(26) With regard to recital 22(c), AEM, AMGA and ACEA explained that the measures were aimed solely at favouring the transition from a monopolistic market structure to a competitive one allowing private capital and private ownership to participate in the management of local services. This being so, the measures should be regarded as being covered by Article 87(3)(c) since they constitute aid facilitating the development of a certain economic activity, i.e. the provision of local public services. The Commission has already decided that aid facilitating the transition from a monopolistic market structure to a competitive one may be compatible under Article 87(3)(c) (see in particular the Commission decisions on the Milk Marketing Board ([15]) and Dutch public transport ([16])).

(27) Finally, the firms argued that the measures were not discriminatory because it was not necessary for possible private competitors of joint stock companies set up under Law No 142/90 to become private companies in order to operate freely on the market and that the State had not forgone any resources to which it was entitled because the loss in tax revenue was offset by higher profits for the municipalities.

(28) Cispel, an association representing such joint stock companies and special undertakings, commented as follows:

(a) at the time the measures in question in the sector concerned were adopted, there was a legal monopoly. Local authorities could either reserve for themselves the provision of certain services on their territory or grant licences to third parties together with exclusive rights. As there is thus no competition, the measure cannot be regarded as constituting State aid under Article 87(1);

(b) the measures were intended to facilitate the conversion of public-sector undertakings governed by public law into firms governed by common law via a transition from a monopolistic situation to a competitive one. They did not discriminate between private- and public-sector undertakings because the latter were in a different position: they did not require any changes in order to operate in the market. The measures should therefore be regarded at least as compatible aid under Article 87(3)(c), which provides for aid aimed at facilitating the development of certain economic activities;

(c) in addition, the measures do not constitute State aid because: (i) the joint stock companies are not undertakings for the purposes of competition law; (ii) the measures simply offset the extra cost of the public service entrusted to them; (iii) they are not financed from State resources as the State forgoes tax revenues at central level but gains at local level; (iv) they are general measures; (v) they are justified by the nature and general scheme of the system: under Italian tax law, the legislator has a wide margin of manoeuvre in determining taxable persons and was therefore able to exempt the joint stock companies for a transitional period; (vi) they did not affect trade between Member States since the goods and services produced by the recipients are not traded between Member States but intended only for the local market; (vii) the transfer tax exemption does not confer any advantage on the joint stock companies as the municipality would have been liable for the taxes in any case.

(29) Cispel also argued that the measures in question were justified by the exemption in Article 87(3)(b) of the Treaty which provides for 'aid to remedy a serious disturbance in the economy of a Member State' and by Article 86(2).

([13]) OJ L 83, 27.3.1989, p. 1.
([14]) See footnote 3.
([15]) Case C 45/93 (N 663/93) (OJ C 100, 9.4.1994, p. 9).
([16]) Case N 199/99 (Dutch local public transport services) (OJ C 379, 31.12.1999, p. 11.)

(30) The Bundesverband der Deutschen Industrie observed that tax exemptions and soft loans for firms controlled by the State would distort competition not only in Italy but also in Germany.

(31) Gas-it, an Italian association of private companies distributing gas on the basis of concessions granted by local authorities, considered that the measures referred to by the Commission constitute State aid. In particular, the three-year exemption from income tax is clearly State aid because private firms engaged in the same activity as the joint stock companies are, unlike the latter, subject to a tax on profits of almost 50 %. Furthermore, Gas-it stressed that Article 87(3)(c) could not be invoked to justify the measures as they were not aimed at facilitating the development of a whole economic sector but rather at granting advantages to certain firms operating in the sector on the basis of their legal status (entity transformed into a joint stock company) and shareholding structure (public majority and private minority). Finally, Gas-it pointed out that the Italian authorities were discussing a draft law that contained other advantages for the joint stock companies. However, on 8 February 2001 the Italian authorities informed the Commission that discussion of the draft law had been blocked.

4. COMMENTS FROM THE ITALIAN AUTHORITIES

(32) The Italian authorities stated that the measures under examination applied only to companies that were almost exclusively involved in providing what they described as local public services, i.e. services on a local scale in the sectors of electricity, gas, water, transport, waste, and pharmaceutical products. The Italian authorities argued that the measures did not constitute State aid for the following reasons:

(a) they did not distort competition because when they were adopted the sectors in which the joint stock companies operate were not open to competition;

(b) they did not affect trade between Member States because the companies operated on a purely local level;

(c) they were not financed from State resources as the State did not forgo resources to which it was entitled. Being part of the public administration, the recipients were already exempt from tax even before they were converted into joint stock companies. Rather, the State earned revenue at the level of the municipalities.

(33) The authorities also argued that, if the measures were regarded as State aid, they should constitute existing aid because the economic sectors concerned were not open to competition when they were adopted. In addition, they would be compatible under Article 87(3)(c) (restructuring aid) or Article 86(2) (service of general economic interest).

(34) As regards the exemption in Article 87(3)(c), the Italian authorities argued that the measures in question enabled the public undertakings providing local services to acquire a more competitive market structure. They also claimed that the Commission had already declared aid to be compatible if it facilitated the transition from a monopoly to a situation of free competition. They added that the requirement in Article 87(3)(c) that aid must not 'adversely affect trading conditions to an extent that is contrary to the common interest' was met because of the very weak degree of competition ([17]) in the sectors concerned.

(35) As regards the exemption in Article 86(2), the Italian authorities claimed that all the firms concerned provided services of general economic interest and that, therefore, the Article should cover the measures, which applied to all public undertakings providing this type of service. Only the three-year income tax exemption applies solely to firms with a majority public shareholding, but this can be explained by the fact that the control of public authorities in this kind of company is greater than in companies where the public authorities have only a minority shareholding.

(36) As to Article 3(69), the Italian authorities also pointed out that (i) as the municipalities would in any case be liable for the taxes, the measure could not be regarded as conferring an advantage on the joint stock companies and (ii) exemption from the transfer tax should be regarded as a measure which is justified by the nature and scheme of the system.

([17]) Italian authorities' observations of 2 August 1999, p. 10.

(37) As regards the latter argument, the Italian authorities stressed first that setting up a joint stock company under Law No 142/90 could not be treated in the same way as the setting-up of a normal commercial firm. Second, the exemption in question is an application of the principle of tax neutrality. This principle is enshrined in Italian tax law and underlies the transformation of the legal status of a firm (i.e. when the legal status of a firm changes but the firm remains the same from an economic viewpoint). According to this principle, simply changing the legal status of a firm is not relevant for tax purposes because it does not confer an economic advantage on the firm.

(38) With particular regard to Article 9a of Decree-law No 318/1986, the Italian authorities claimed that the loans from CDDPP were granted only to allow the joint stock companies to carry out the public service task entrusted to them and that the measure should accordingly be considered compatible under Articles 87(3)(c) or 86(2). Moreover, as from 1999, CDDPP can grant loans to any provider of public services regardless of its legal status ([18]).

(39) As regards the issue of the comparison between the interest rate applied by CDDPP to its loans and the rate that the joint stock companies might have obtained on the market, the Italian authorities claimed in their comments of 2 August 1999 that the interest rate applied by CDDPP was lower than market rate only when 'it was clear beyond any doubt that the activities in question were not subject to competition'. In their comments of 28 October 1999, they argued that the interest rate applied by CDDPP was substantially in line with the market rate. They reached that conclusion by comparing the rate applied by CDDPP with the maximum rate for loans to local authorities, which is fixed by the Treasury.

(40) In their comments of 22 November 2001, the Italian authorities repeated the arguments set out in recitals 38 and 39. The maximum interest rate fixed by the Treasury for loans to local authorities should serve as the reference rate for the Commission's assessment. In any event, the articles of association of the joint stock companies as well as the case-law prohibited them from operating outside the territory of the municipality to which they belonged. However, they also added that CDDPP practice had been not to grant loans to firms when 'it was clear that they would engage in activities outside their own municipalities'.

(41) Lastly, in their comments of 21 December 2001, the Italian authorities added that they could not agree that the interest rate applied by CDDPP conferred an advantage on the companies in question as CDDPP rates were consistently higher than other rates for soft loans, which are fixed according to parameters established by the Treasury Minister.

5. **ASSESSMENT OF THE MEASURES**

(42) As already stated in its decision to initiate the procedure, the Commission 'having regard to the broad and abstract nature of the legislation concerned (…) has instituted the present procedure in relation only to the specific aspects identified in the preceding analysis ([19])'. The Commission's analysis therefore concerns the aid schemes consisting in the measures in question, and not individual grants of aid to particular undertakings ([20]). The schemes are the instruments by which Italy conferred advantages on all firms satisfying the relevant conditions (i.e. joint stock companies set up under Law No 142/90).

(43) Italy did not grant the tax advantages on an individual basis or notify any individual cases to the Commission, together with all the information necessary for the Commission to assess it. Accordingly, the Commission is bound by the nature of the measures to carry out a general and abstract examination to determine both whether they constitute State aid under Article 87(1) of the Treaty and whether such aid is compatible with the common market. Thus, all the elements necessary to assess whether the schemes involve State aid and whether such aid is compatible with the common market are to be found in the schemes themselves. The Treaty, Regulation (EC) No 659/1999 and the case-law

([18]) See Decree-law No 284 of 1 September 1999.

([19]) See section 3.

([20]) In its decision, the Commission had reserved the right to investigate individual grants of aid made under the scheme (section 3).

of the Court ([21]) empower the Commission to conduct such an analysis.

(44) The Commission will therefore not be examining the application of the measures in individual cases. It should also be borne in mind that in the present case Italy has not asked the Commission to analyse the individual applications of the schemes. The Commission does not know the exact number or identity of the beneficiaries of the measures ([22]), does not have all the relevant information and is unaware of the amounts of aid granted in individual cases.

(45) As regards CDDPP loans, both entitlement and the interest rate were provided for in a general way and did not take account of the specific conditions of each beneficiary. The Italian authorities did not notify the Commission of the individual loans granted to the joint stock companies by CDDPP. They simply provided a list of joint stock companies benefiting from CDDPP loans, which, as it does not contain any relevant information on the financial situation of the companies, does not allow the Commission to make an individual assessment. The Commission considers that it would be required to assess individual cases only if the national authorities had requested it to do so and had supplied it with all the information necessary to conduct an assessment, i.e. all the information that would normally have to be provided to the Commission when individual aid under Article 88(3) of the EC Treaty was notified. Since the opening of the procedure, the Italian authorities have been fully aware of the Commission's doubts concerning the scheme. If they considered that some particular cases, because of their specific features, should have been assessed on an individual basis, they should have informed the Commission of the features and provided all the information needed for an individual assessment to be made.

([21]) Judgment in Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraphs 17 and 18; Judgment in Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraphs 20 and 21; Judgment in Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 48; Judgment in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 51.

([22]) In their letter of 2 August 1999, the Italian authorities stated that some 100 joint stock companies were incorporated pursuant to Law No 142/90. In their letter of March 2000, they provided a list of 31 joint stock companies that benefited from the tax measures under examination. As the tax measures at issue are applicable to any joint stock company at the moment of incorporation, it is not even clear how many beneficiaries are involved.

5.1. **Article 87(1)**

(46) A State measure constitutes State aid within the meaning of Article 87(1) of the Treaty if:

(a) it is granted by a Member State or through State resources in any form whatsoever;

(b) it favours certain undertakings or the production of certain goods (grants a selective advantage);

(c) it distorts or threatens to distort competition;

(d) it affects trade between Member States.

(47) The Commission notes that the three-year exemption from income tax and the loans granted under Article 9a of Decree-law No 318/1986 meet all the requirements of Article 87(1). The measures therefore comprised State aid within the meaning of Article 87(1). On the other hand, the Commission is of the opinion that the transfer tax exemption is not State aid within the meaning of Article 87(1) in view of the nature and general scheme of the system.

Aid granted by a Member State or through state resources

(48) Although the three-year income tax exemption does not involve a direct cash outflow for the State, it nevertheless directly affects the public budget as the State forgoes tax revenue to which it is legally entitled and which it would normally have claimed. It is thus clear that the aid is granted through state resources. The Court of Justice has consistently held that 'a measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers, constitutes State aid within the meaning of Article 92(1) of the Treaty' ([23]).

(49) As regards the soft loans granted by CDDPP, the Commission notes that, under the relevant Italian legislation, CDDPP was established and fully controlled

([23]) Case C-6/97 *Italian Republic* v *Commission* [1999] ECR I-2981, paragraph 16.

by the Treasury, now the Ministry of Economic and Financial Affairs, which provides the chairman for its managing board and appoints its members and the Director-General. CDDPP's activities are supervised by Parliament through a specific committee. According to the Court of Justice, in order to determine if a measure can be regarded as constituting State aid within the meaning of Article 87 of the Treaty, 'no distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid' ([24]). The individual CDDPP loans to the joint stock companies were indeed granted under Article 9a of Decree-law No 318/1986. Moreover, under Italian law, CDDPP is explicitly defined as a State administration ([25]). The fact that some of the funds managed by CDDPP are from private sources and must be reimbursed is not relevant in this context. Even if the sums corresponding to the measure in question were not permanently held by the Treasury, the fact that they remain at all times under public control and thus available to the competent national authorities is sufficient for them to be classed as State resources ([26]).

(50) It is clear from a number of elements that, although the loans were granted by CDDPP, they are attributable to the State ([27]). CDDPP is an integral part of the structures of the public administration, it is subject to public law and the public authorities supervise its management. The loans themselves are expressly provided for in Article 9a of Decree-law No 318/1986 and must comply with the conditions (in particular the interest rate) laid down by Treasury decree in accordance with Article 9(3) of the same instrument. All these elements clearly show involvement of the public authorities in the granting of CDDPP loans. Accordingly, loans granted by CDDPP are granted by a Member State or through State resources.

Aid that favours certain undertakings or the production of certain goods

(51) According to settled case-law, State aid should not be limited to capital grants or subsidies but includes all measures which, while not being in the nature of a subsidy, are capable of producing the same economic effects. In particular, this concept is thus wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which have the same effect ([28]).

(52) The three-year income tax exemption has the same effect as a direct subsidy as it eliminates a cost item which otherwise would have been included in the budget of the beneficiary ([29]). The beneficiary's net profit is thus increased compared with that of any other firm in a comparable situation.

(53) In the comments received from the Italian authorities ([30]) and other parties, it is pointed out that, in the relevant period, joint stock companies were subject to income tax amounting to around 50 % of profits. The exemption in question enabled only municipal undertakings that had become joint stock companies under Law No 142/90 to avoid for three years (but not after the tax year 1999) the standard rate of income tax applicable to joint stock companies on condition that at least a majority of the share capital remained public.

(54) The measure therefore favoured certain undertakings within the meaning of Article 87(1) of the Treaty.

(55) According to established case-law ([31]) the granting of a loan by State-controlled entities such as CDDPP to a firm may favour that firm within the meaning of Article 87(1) of the Treaty if the borrower is granted terms that are more favourable than those that it would have obtained in the capital market.

(56) In order to determine whether the CDDPP loans to the joint stock companies favoured them, the CDDPP interest rates must be compared with the interest rate that they would have obtained over the same period on

([24]) Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 13.
([25]) Decree-law No 284/1999.
([26]) See Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50, and Case C-482/99 *France* v *Commission*, judgment of 16 May 2002, not yet reported, paragraph 37. See also Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraphs 65 to 68.
([27]) See Case C-482/99 *France* v *Commission*, *op cit.*, paragraphs 55 and 56.
([28]) Judgment in Case C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13.
([29]) See Case C-387/92 *Banco Exterior*, *op cit.*
([30]) Italian authorities' comments of 2 August 1999, p. 4.
([31]) Case C-142/87 *Belgium* v *Commission* [1986] ECR 231.

the capital market ([32]). In order to carry out the comparison, the Commission must also use a general rate, given the general and abstract nature of the measure in question. It is clear that the Commission cannot accept as reference rates the rates proposed by the Italian authorities. These by definition are not market rates since they are determined according to criteria established by the public authority. Moreover, the maximum rate for loans to local authorities does not even appear to be a rate that should be available to undertakings while the rates for subsidised credit operations are specifically designed to be more favourable than market rates.

(57) The market rate to be used as a reference point for this comparison is therefore the rate laid down for the evaluation of regional State aid schemes ([33]).

(58) The table below compares the CDDPP rate, as communicated to the Commission by the Italian authorities, with the said reference rate.

CDDPP interest rate and Commission reference rate

	CDDPP rate	Reference rate	
1994	9,00	11,9	
1995	9,00	11,35	
1996	8,81	11,35	12,37 (*)
1997	7,48	10,86	8,21 (*)
1998	5,53	8,20	6,95 (**)

(*) Rate applicable as from 1 August to 31 December of the relevant year.
(**) Rate applicable as from 1 June to 31 December of the relevant year.

(59) The table shows that the joint stock companies benefited from a selective advantage. In addition, the Commission notes that CDDPP applied a uniform interest rate each year without taking into account the specific risk associated with each financing operation. In effect, loans at below market rates gave the joint stock companies access to the capital market at a lower cost than that available to other firms.

([32]) Case T-16/96 *Citiflyer* [1998] ECR II-0757.
([33]) Reference rate for the monitoring of State aid as defined by the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3), as amended by Commission notice (OJ C 241, 26.8.1999, p. 9).

(60) The measure therefore favoured certain undertakings within the meaning of Article 87(1) of the Treaty since only joint stock companies under Law No 142/90 (i.e. in which the municipalities retained a majority holding) and not other firms in a similar position were allowed to benefit from CDDPP loans.

Aid that distorts or threatens to distort competition

(61) Competition is distorted when State aid reinforces the competitive position of the recipient firm in relation to its competitors ([34]).

(62) The measures strengthen the competitive position of the joint stock companies in question in relation to other firms intending to provide the same services. Firms that are not joint stock companies and a majority of whose shares are not held by the local authorities find themselves in a disadvantaged position if they intend to compete for the granting of a licence to provide a particular service in a given territory.

(63) The three-year income tax exemption removes a significant cost item from the budget of these firms that they would otherwise have borne. At the same time, the beneficiary's net profit is thus increased in relation to that of another firm in a comparable situation. The profit can be used to distribute higher dividends (therefore making capital investments in such firms particularly profitable, with distorting effects on the capital market) or to make investments without the need to call on the market for the necessary financial resources (and so affect competition on the market where the investment is made). On the other hand, the advantages resulting from the exemption allow the firms to operate under conditions that would not otherwise be possible. The same holds for the financial advantage inherent in the loans granted at below market rate by CDDPP to the joint stock companies in question.

([34]) See Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11 and the opinion of the Advocate General; see also Case 259/85 [1987] ECR 4393, paragraph 24. See also the opinion of the Advocate General in Case C-280/00 *Altmark* not yet published, paragraph 103, where he notes that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition.

(64) The additional financial resources may help the firms to expand into other markets, thus also distorting sectors other than local public services ([35]). They may also make it more difficult for firms in other Member States to enter the Italian markets where the joint stock companies are present.

Effect on trade

(65) 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid' ([36]), even if the recipient firm is not itself involved in exporting ([37]). Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipients themselves to carry on their business outside the Member State for the aid to have an effect on Community trade, especially in the case of firms established close to the frontier between two Member States ([38]).

(66) In the sectors where joint stock companies set up under Law No 142/90 are mainly active (as claimed by the Italian authorities), i.e. local public services, competition often is not related to the sale of a service in the same area as another competitor. Most of the services are in fact provided on the basis of exclusive rights covering part or all of the territory of the municipality ([39]). Competition occurs primarily when companies established in Italy as well as in other Member States bid for concessions or public procurement contracts to provide the service in different municipalities in Italy or in other Member States.

(67) As noted in the decision instituting the procedure ([40]), 'in the case of services, as in the present case, trade does not involve a physical flow of goods from one Member State to another. In this sector, firms compete for the award of concessions to provide services in the various municipalities. Firms benefiting from the measures in question may possibly offer lower prices for concessions in different municipalities, thus reducing the available market for actual or potential competitors' ([41]).

(68) It is worth noting that the market for concessions for local public utilities is open to Community competition and to all Community firms and is subject to the rules of the Treaty ([42]).

(69) The measures under investigation affect trade between Member States in so far as they injure foreign companies bidding for local concessions in Italy, as public firms benefiting from the scheme can bid at more competitive prices than national or foreign competitors not benefiting from it. In addition, the scheme would make it less attractive for companies from other Member States to invest in the utilities sector in Italy (e.g. by acquiring majority holdings) since any companies acquired would not be entitled to (or may lose) the aid because of the nature of their new shareholders.

(70) In general, aid to local service providers may create an obstacle for foreign firms wishing to establish themselves or sell their services in Italy ([43]) and therefore affects trade between Member States. These factors are sufficient, in the Commission's view, to satisfy the requirement in Article 87(1) that the measure affects trade between Member States ([44]).

(71) The Italian authorities argued that very few concessions were awarded by selective procedure during the period

([35]) This risk of distortion of competition is real. It is well known and there is confirmation from information in the Commission's possession that some joint stock companies have entered other markets which do not fall within the definition of local public services given by the Italian authorities.

([36]) See Case 730/79, paragraph 11, and Case 259/85, paragraph 11 (see footnote 34).

([37]) Case C-75/97 *Maribel* bis/ter [1999] ECR I-3671.

([38]) Case C-310/99 *Italy* v *Commission*, judgment of 7 March 2002, not yet reported.

([39]) This, however, does not apply to all the sectors that have been indicated by Italy as the main sectors for the joint stock companies. For instance, it does not apply to the retail sale of pharmaceutical products and services relating to waste.

([40]) Section 3(3).

([41]) It should be borne in mind that the award of a concession to a third undertaking is one of the possibilities under Law No 142/90 that is available to municipalities in organising the provision of local public services.

([42]) See Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 2).

([43]) See Commission Decision of 14 October 1998 *Société Marseillaise de crédit* (OJ L 198, 30.7.1999, p. 1), Case C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 49, and the opinion of the Advocate General in the same case, paragraph 170.

([44]) The Commission does not need to base its appraisal of the effect on trade on evidence of the real effect of the aid on competition or trade between Member States (see Joined Cases T-204/97 and T-270/97 *EPAC* [2000] ECR II-2267, paragraph 85, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro* [2000] ECR II-2319, paragraph 76.

in which the measures were applied. They added that, as the firms in question provided services at a local level, the effect on trade was insignificant. These arguments cannot be accepted. According to well-established case-law, even if trade between Member States in a certain economic sector and at a given point in time is limited, it does not prevent the measure from constituting State aid ([45]), especially where the limited amount of trade might be the result of a breach of Community law. Otherwise, Member States could have an incentive to hamper the development of trade in that sector in order to prevent the application of the rules of the Treaty on State aid. It cannot be ruled out that the very existence of the aid for the joint stock companies encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure. Lastly, it must be noted that, as the Italian authorities carried out few selective procedures over the relevant period, that situation might be also the consequence of an infringement of Community rules and principles on public procurement and concessions. This infringement is currently the matter of infringement proceedings initiated by the Commission against Italy ([46]). Moreover, 'the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected' ([47]). By the same token, the fact that the recipient does not itself export its products to other Member States or operates at a local level does not mean that trade between Member States might not be affected ([48]).

(72) As nothing in the aid schemes ensures that the aid to be granted in each individual case will comply with the *de minimis* criteria, the *de minimis* principle laid down in Commission notices and secondary legislation ([49]) is clearly not applicable as such to the measures under examination. However, it cannot be ruled out that some individual cases might fall below the *de minimis* thresholds. In those particular cases the measures would be deemed to fall outside the scope of Article 87(1) of the Treaty and of this Decision.

(73) It should also be noted that the measures under examination could also affect trade between Member States because some of the sectors referred to by the Italian authorities as the main sectors of activity for the joint stock companies at the time that the measures in question were implemented were certainly already involved in trade between Italy and other Member States (e.g. pharmaceutical products, electricity, waste). Trade was thus not only foreseeable but already existed to a certain extent.

(74) Finally, the joint stock companies in question can choose to operate in markets for other products traded between Member States. As was noted by the Commission when it initiated the procedure and as was later confirmed by some of the firms that submitted comments, several joint stock companies have entered other markets characterised by very intensive trade between Member States ([50]). It was therefore foreseeable that the measures could affect trade in sectors other than utilities.

(75) Accordingly, the Commission concludes that the three-year income tax exemption and the loans granted to the joint stock companies under Article 9a of Decree-law No 318/1986 constitute State aid within the meaning of Article 87(1) of the Treaty ([51]).

([45]) Joined Cases T-132/96 and T-143/96 *Volkswagen* [1999] ECR II-3663, paragraph 211; Joined Cases T-447/93, T-448/93 and T-449/93 *Associazione Italiana Tecnico Economica del Cemento, British Cement Association, Blue Circle Industries plc, Castle Cement Ltd, The Rugby Group plc* and *Titan Cement Company SA* v *Commission* [1995] ECR II-1971, paragraphs 139 and 140.

([46]) Infringement proceedings No 1999/2184, letter of formal notice dated 8 November 2000.

([47]) Case C-142/87 *Tubemeuse* [1990] ECR I-959, paragraphs 42 and 43; Case C-310/99 *Italy* v *Commission*, judgment of 7 March 2002, not yet reported, paragraph 86.

([48]) Case C-142/87 *Kingdom of Belgium* v *Commission* [1990] ECR I-959, paragraph 35; Case 102/87 *French Republic* v *Commission* [1988] ECR 4067, paragraph 19; Case C-75/97 *Kingdom of Belgium* v *Commission* (Maribel bis/ter scheme) [1999] ECR I-3671, paragraph 49; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro* [2000] ECR II-2319, paragraph 91; Case T-55/99 *CETM* [2000] ECR II-3207, paragraph 86.

([49]) See the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2); the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9 and Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 010, 13.1.2001, p. 30).

([50]) For example, ACEA and AEM entered the telecommunications market; AMGA has declared that it is also involved in the supply of network management software and specialised services to other undertakings, e.g. in the water distribution sector.

([51]) In so far as it could be argued that the measures in question are not State aid because they offset the net cost of a service of general economic interest, see the reasoning below concerning compatibility within the meaning of Article 86(2).

5.2. **The transfer tax exemption is not covered by Article 87(1)**

(76) The Italian authorities acknowledge that the transfer tax exemption is a special tax regime applicable only to the conversion of municipal or special undertaking into joint stock companies. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system' ([52]), in which case the measure is not State aid.

(77) In this connection, the Commission notes first that transfer taxes normally apply to the creation of a new economic entity or to the transfer of assets between different economic entities. When a municipal undertaking is converted into a joint stock company under Law No 142/90, it seems, merely because of the technicalities of the Italian legal system, as if a new economic entity has been created. This, however, is in appearance only: the municipal undertaking and the joint stock company are substantially the same economic entity operating under a different legal form.

(78) As indicated in the preparatory work by the Italian Senate ([53]), the Italian legal system makes no provision in its general rules on conversions of the legal form of companies for conversion of a municipal undertaking into a joint stock company. The conversion therefore had to take place by 'technically' winding up the municipal undertaking and setting up a 'new' joint stock company. The upshot is that a new economic entity is apparently created although, as already stated, it is the same economic entity operating under a different legal status. It is thus justifiable that the normal tax rules on transfers of assets for the setting-up of a new economic entity should not apply in this case.

(79) The Italian authorities also claimed that the simple conversion of the legal form of companies is governed by the principle of tax neutrality because the conversion in itself is not an indication of an increase in income or in the capacity to produce income. The transfer tax exemption is therefore a specific application of that principle to this particular case. And indeed, unlike the three-year income tax exemption, the transfer tax exemption applies to any conversion of a special or municipal undertaking into a joint stock company, regardless of the latter's shareholding composition.

(80) At the same time, it is also clear that the conversion of a special or municipal undertaking into a joint stock company cannot be treated like the normal incorporation of a company since it is not a transaction that would be carried out by a private investor but a public authority decision regarding the choice of legal instrument offered by Law No 142/90 for the provision of certain services at local level ([54]).

(81) In the light of the foregoing, the Commission concludes that the reasons for the exemption are consistent with the proper functioning and efficiency of the tax system. The exemption is based on the principle of tax neutrality, which is a basic principle of the tax system. The measure in question is therefore justified by the nature or general scheme of the system and does not constitute State aid within the meaning of Article 87(1) of the Treaty.

5.3. **Nature of the aid: new or existing**

(82) There are two questions to be answered in this connection. The first is based on the argument that, at the time of the entry into force of the measures under consideration, the sectors in which the joint stock companies were operating were not open to competition. As a result, all the measures in question should be regarded as existing aid under Article 1(b)(v) of Regulation (EC) No 659/99 and by virtue of the Court of First Instance's judgment in *Alzetta Mauro* ([55]).

(83) This argument cannot be accepted. The measures under examination must be examined as aid schemes. They are capable of benefiting all joint stock companies set up under Law No 142/90. These are firms that are allowed to operate directly or indirectly in whatever economic

([52]) Case 173/73 *Italy* v *Commission* [1974] ECR 709. Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, point 12).

([53]) Parliamentary acts of the XIIth Legislature, Senate of the Republic, p. 18, No 2157.

([54]) Essentially, the choice facing the municipality is whether to limit the operation of its undertaking to the provision of local public services within its own territory or to set up a company that is entitled to operate in different economic sectors and wherever it can seize business opportunities.

([55]) See footnote 3.

sector they and/or their shareholders choose. There is nothing in these schemes to indicate that the aid was to be restricted exclusively to sectors not open to competition.

(84) Moreover, contrary to the Italian authorities' submissions, the information in the Commission's possession shows that there was indeed some competition in at least some of the sectors indicated by the Italian authorities as being those in which the joint stock companies were mainly operating when the measures were put into effect. Examples of such sectors are pharmaceutical products, waste, gas and water. This analysis was confirmed by the Italian authorities themselves when they claimed that there was a 'very weak degree of competition' in the sectors concerned ([56]). Even if competition in a particular economic sector and at a given point in time is limited, Member States are not free to adopt State aid measures that might prevent the development of competition or reduce existing competition.

(85) In conclusion, the claim that all the sectors in which the joint stock companies were operating at the time of the entry into force of the measures were not subject to any competition is unfounded. The measures under examination cannot therefore be regarded as existing aid on the basis of that argument, except for the possibility that individual aid granted under the schemes in question is regarded as existing aid by virtue of the recipient's special situation.

(86) The second question to be resolved is the claim that the three-year income tax exemption should be regarded as existing aid. The argument runs substantially as follows. Since the beginning of the century, municipal undertakings and then special undertakings ranked as local authorities for tax purposes and, as such, they were not liable for the tax in question. The joint stock companies have taken the place of municipal undertakings. The three-year income tax exemption enjoyed by the joint stock companies is not therefore a new tax measure but the application of an existing one. Rather than introducing new State aid, Article 3(70) of Law No 549/95 had the effect of limiting to three years the tax exemption in question and abolishing a provision that distorted competition.

(87) Leaving aside the question of whether municipal and then special undertakings were really exempt from all income tax, the Commission concludes that the concept of existing aid does not cover the three-year income tax exemption in question.

(88) The leading case-law on the concept of existing aid is the *Namur Ducroire* case ([57]), where the Court answered the question whether a decision authorising the enlargement of the field of activity of a public undertaking (OND in this case) implies that aid granted to such an undertaking becomes new aid. The Court noted that legislation predating the entry into force of the Treaty defined (i) the purpose and areas of operation of OND in very general terms (provision of export guarantees), (ii) provided for some advantages, and (iii) contained no restriction in terms of subject matter or geographical area on OND's activity ([58]). In these circumstances OND, which for many years limited its activity to the insurance of certain export risks, decided (with the necessary consent of the Belgian Government) to provide insurance also for export to western European countries.

(89) The Court observed that the question of whether aid is new or existing aid must be answered by reference to the provisions laying down the measure. It held that the decision to expand the export risks covered by OND (which did not go beyond the original description of the scope of OND's activity) did not amend the legislation granting those advantages either in regard to the nature of those advantages or in regard to the activities of the public undertaking. Accordingly, the aid was existing aid.

(90) None of the requirements referred to in the abovementioned ruling for a measure to be regarded as existing aid are met in the present case.

(91) There was no statutory provision for the three-year income tax exemption for the joint stock companies

([56]) Italian authorities' observations of 2 August 1999, p. 10. At the same time, the Italian authorities suggested that the joint stock companies also engage in activities open to competition.
In addition, AMGA, one of the firms that submitted comments, after denying the existence of any competition, acknowledges that, in reality, there was some competition. Indeed, in point 35 of its observations of 11 April 2000, it argued the three-year income tax exemption was aimed at removing a distortion of competition.

([57]) Case C-44/93 [1994] ECR I-3829.

([58]) *Op. cit.*, paragraphs 23 and 24.

prior to the entry into force of the Treaty. The exemption is provided for in Article 66(14) of Decree-law No 331 of 30 August 1993 and Article 3(70) of Law No 549/95. In 1990, when Law No 142/90 enabled municipalities to set up joint stock companies with public majority shareholdings to manage local public utilities, no exemption from income tax was envisaged for the joint stock companies. Any joint stock companies set up between 1990 and the entry into force in 1993 of Article 66(14) of Decree-law No 331 was liable for income tax. This is clearly confirmed by the preparatory work carried out by the Italian Senate ([59]), which reports that the tax exemption in question was granted on the basis that, without it, joint stock companies set up under Law No 142/90 would be liable for income tax ([60]). Hence, in order to extend to the joint stock companies the same tax treatment as that for local authorities, Italy had to enact new legislation several decades after the entry into force of the Treaty.

(92) In addition, neither the purposes nor the areas of operation of the municipal undertakings were defined in general terms. Municipal and special undertakings are limited to the provision of certain public services to the local community. They are thus subject to statutory and case-law limitations as to object or geographical area. The law does not impose similar limitations on joint stock companies set up under Law No 142/90, which may engage in any kind of economic activity in any territory ([61]). Unlike in the case of OND, therefore, the extension of the purposes and areas of operation resulted directly from Law No 142/90 and from the subsequent conversion of municipal and then special undertakings into joint stock companies.

(93) In conclusion, the three-year tax exemption for joint stock companies set up under Law No 142/90 constitutes new State aid.

5.4. **Compatibility with the common market**

(94) Having concluded that the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1996 constitute State aid within the meaning of Article 87(1) of the Treaty for the joint stock companies, the Commission must assess whether the aid is compatible with the common market. The assessment covers the two measures, unless otherwise stated.

(95) The aid is not compatible under Article 87(2) since it is not aid having a social character, granted to individual consumers, or aid to make good the damage caused by natural disasters or exceptional occurrences, or aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. Nor is the aid compatible under Article 87(3)(d) (aid to promote culture and heritage conservation) or (e) (such other categories of aid as may be specified by decision of the Council). The Member State has not invoked any of these exceptions. Furthermore, the aid is not compatible under Article 87(3)(b). The reorganisation of the Italian public utilities sector cannot be considered a 'project of common European interest' since it will essentially benefit the economic operators of one Member State and not the Community as a whole and since it will not promote a specific and well-defined project. The aid does not 'remedy a serious disturbance in the economy of a Member State' either, since there is no evidence that the Italian local public services sector was suffering from a systemic crisis.

(96) The aid extends throughout Italy and therefore cannot be regarded as compatible under Article 87(3)(a) and (c) (development of certain areas).

([59]) Parliamentary acts of the XIIth Legislature, Senate of the Republic, p. 18, No 2157. The relevant part reads as follows: 'on the ground that "new" subjects would not have benefited from the not inconsiderable tax concessions granted to the local bodies (exemption from income tax (IRPEG) and local income tax (ILOR)) (...) a "moratorium" is provided for (...) which is intended to remove the disincentives connected with the sudden loss of all tax concessions'.

([60]) AMGA, ACEA and AEM, by acknowledging that the measure constitutes existing aid, recognise that, in the absence of the new legislation, the simple conversion of municipal undertakings would have entailed the application of income tax to the joint stock companies (see AMGA observations of 11 April 2000, paragraph 11, and ACEA and AEM observations of 21 January 2000, point 7).

([61]) As the Italian Court of Cassation (meeting in plenary session) has stated, 'Le SpA a prevalente capitale pubblico locale sono da considerarsi a tutti gli effetti soggetti societari privati …' (joint stock companies with public majority shareholding must be regarded as private companies for all purposes); judgment of 6 May 1995, No 4989. Indeed, joint stock companies set up under Law No 142/90 were and are operating outside the territory of the controlling municipality even outside Italy or have entered markets that are not markets in local public services.

Article 87(3)(c)

(97) As for compatibility under Article 87(3)(c) (development of certain economic activities), the measures in question, by reducing the charges normally included in a firm's budget, may in practice have helped some firms to reorganise, increase their efficiency and become more competitive ([62]). However, the conditions for applying the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([63]) are not met. The aid was not notified individually to the Commission and no restructuring plan was submitted, although the measures also concerned large firms. The aid is not designed to benefit only firms in difficulty nor has it been demonstrated that all recipients were in difficulty. Moreover, the aid is not intended to restore the firms' long-term viability. The guidelines require that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. There is no trace of any such measure.

(98) The measures are not limited to SMEs. As far as aid to SMEs is concerned, the Commission notes that the scheme can apply to firms other than SMEs and that the advantages do not qualify as investment aid or as aid in respect of expenditure that can otherwise be regarded as compatible under the rules on aid to SMEs.

(99) It is not quite clear what is meant by the argument that the three-year income tax exemption is compatible under Article 87(3)(c) because it was aimed at favouring the restructuring of the undertakings in question and the transition from a monopolistic to a competitive market structure.

(100) If this argument is interpreted literally, then it is unfounded. All the joint stock companies benefit in their municipality from the same exclusive rights previously enjoyed by the municipal or special undertakings that they replaced. This was confirmed repeatedly by the Italian authorities, which stated that every municipality that set up a joint stock company under Law No 142/90 directly entrusted it with the tasks previously carried out by the municipal undertakings. Similarly, the firms that submitted comments also stressed that the joint stock companies are responsible for exactly the same local monopolies previously entrusted to the municipal or special undertakings ([64]). In addition, the advantages granted to the joint stock companies go beyond the conversion of their legal form and last for three years thereafter.

(101) Accordingly, the fact that the Commission has decided in respect of measures of a different kind that aid facilitating the transition from a monopolistic market structure to a competitive one may be regarded as being compatible under Article 87(3)(c) is completely irrelevant for the purpose of assessing the measure in question ([65]).

(102) On the other hand, this argument may be construed as meaning that the measure in question was aimed at assisting the privatisation of the undertakings controlled by the local authorities with a view to promoting greater liberalisation and participation of private capital in the provision of local services.

(103) The reasons set out above are already sufficient for the Commission to reject this argument. It can also be added that, if the aim of the aid in question was really to help the transition towards a more liberalised market and the participation of private capital, then this measure should have been applied to all forms of privatisation or applied with greater intensity where the privatisation was more extensive (e.g. where a municipality retained a minority stake in a joint stock company). On the contrary, the measure was not applied uniformly, but only to the joint stock companies in question (i.e. with a majority public shareholding). In any event, in accordance with the principle of equal treatment of public and private firms, the fact that the aid is granted in order to assist privatisation of a firm is not, as a rule, a ground for declaring the aid to be compatible.

([62]) See AEM and ACEA comments of 21 January 2000, point 42.

([63]) OJ C 288, 9.10.1999, p. 2. The previous Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12) and the rules set out in 1979 in the Eighth Competition Report (points 177, 227 and 228) apply to aid granted before publication of the new guidelines in the Official Journal. For the purposes of this case, the content of all these rules is identical and the application of any set of rules has no impact on the assessment.

([64]) See comments of 21 January 2000, recital 6.

([65]) See recital 26.

(104) The Italian authorities argued that without the three-year income tax exemption it would have been extremely costly for municipalities to convert their special undertakings into private-law firms. However, it is normal for an undertaking that changes its legal form (in this case from special undertaking to joint stock company) to enjoy the rights and advantages of the new legal form (freedom to operate outside the territory of the municipality and in any economic sector) and to assume the responsibilities linked to the new legal form, including different tax treatment. It is also logical that such consequences are passed on to the owner of the undertaking. In any case, it has not been demonstrated that, without the measure, the conversion would not have taken place or the advantage was commensurate with the objective pursued. Finally, as already stated, the aid was not accompanied by any measure to reduce the inherent distortion of competition.

(105) This assessment is not at odds with Commission policy, in particular its decision on Dutch local transport ([66]), as claimed by the Italian authorities. In the latter case, unlike the present one:

— the recipients were prohibited from participating in tenders throughout the duration of the aid measure until such time as their home markets were exposed to open, transparent, and non-discriminatory procedures,

— the aid was granted on condition that the firm produced a detailed business plan.

(106) The Commission therefore concludes that the aid in the form of the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1986 cannot be considered compatible with the Treaty under Article 87(3)(c), which also stipulates that the aid must 'not adversely affect trading conditions to an extent contrary to the common interest', a requirement which, in view of the foregoing, the Commission considers has not been satisfied in the present case. The main effect of the measures in question is not to make the Italian market more competitive but to strengthen certain Italian firms (i.e. those still controlled by local authorities) in comparison with their competitors in other Member States and to impede the latter's access to the Italian market.

([66]) See footnote 16.

Article 86(2) of the Treaty

(107) The Italian authorities stated that the three-year income tax exemption and the loans under Article 9a should be regarded as compatible State aid under Article 86(2) of the Treaty. They argued that most of the activities of the joint stock companies are services of general economic interest and that, without the measures in question, it would have been impossible for them to fulfil the general interest task entrusted to them.

(108) The Commission does not agree that Article 86(2) covers the aid in question as it cannot accept that the measures represent a system of compensation for a general interest task entrusted to the joint stock companies. In its Communication on services of general interest in Europe ([67]), the Commission stressed that three principles underlie the application of Article 86(2) and the question of compensation for obligations of general economic interest:

(a) neutrality;

(b) Member States' freedom to define what they regard as public services; and

(c) proportionality.

(109) Neutrality means that the Commission does not question whether the undertaking responsible for providing the general interest service should be public or private. On the other hand, the rules of the Treaty apply regardless of the ownership of an undertaking.

(110) Member States' freedom to define services of general economic interest is limited only by Commission control of abuse or manifest error. 'However, in every case, for the exception provided for by Article 86(2) to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts)'. This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment ([68]).

(111) Proportionality implies that the means used to fulfil the general interest mission do not create unnecessary

([67]) OJ C 17, 19.1.2001, p. 4.
([68]) Point 22 of the Communication.

distortions of trade or exceed what is necessary to guarantee fulfilment of the mission. Performance of the service of general interest must be ensured. As the undertaking concerned must be able to carry the specific burden, the State may therefore cover the net extra cost of the particular task assigned to that undertaking.

(112) The Italian authorities' reference to Article 86(2) must be rejected, first because the measures discriminate between private and public firms and are therefore incompatible with the principle of neutrality enshrined in Article 295 of the Treaty and with the principle of equal treatment and non-discrimination, which is a general principle of Community law.

(113) The aid was not in fact granted because of the imposition of general service obligations but only on the basis of the shareholding composition of certain firms. Soft loans from CDDPP and the three-year income tax exemption apply only to undertakings converted into joint stock companies under Law No 142/90 (i.e. where the municipalities retain at least the majority of the capital). Firms in which the municipality has only a minority share and fully private-sector firms are not entitled to those advantages, even if they provide the same service.

(114) The fact that the measures are not linked to any public service obligations and their discriminatory nature are evident if it is borne in mind that a joint stock company set up under Law No 142/90 would have lost its entitlement to the three-year income tax exemption and the CDDPP loans if, during the period of application of the aid measures, the municipality had reduced its stake to below the majority threshold.

(115) Second, the Commission notes that the principles of definition and mission allocation have not been complied with in the present case.

(116) As stated by the Italian authorities, the joint stock companies engage in certain activities that may qualify, in principle, for exemption under Article 86(2). Article 22 of Law No 142/90 allows municipalities to provide public services via joint stock companies. However, the Law does not specify which services should be regarded as public services and to what extent. Nor does it list any specific public service obligations. It cannot therefore be regarded as an act that clearly defines the public service mission and specifically entrusts certain firms with carrying out that mission. The Italian authorities have not submitted any other evidence, legislation or information relating either to the definition or to the allocation of the public service mission.

(117) Third, there is also a failure to respect the proportionality principle. The Italian Government has not indicated the general service obligations imposed on the firms, the net extra costs deriving from these obligations or even the amount of public funds granted to the joint stock companies by these measures or through other instruments. As a consequence, it is impossible for the Commission to check proportionality. In addition, the advantage deriving from the three-year exemption is related to the amount of the company's taxable income and not to the net cost resulting from any public service obligation. As to the CDDPP loans, the Italian authorities failed to prove that they were always justified because of the costs resulting from specific public service obligations.

(118) It is therefore clear that the measures have nothing to do with the reimbursement of the extra net cost arising from the fulfilment of a general service mission: had this been true, the reimbursement could not be linked to the shareholding composition but rather to the imposition of specific obligations. On the contrary, the measures are linked solely to the shareholding composition and there is no evidence of any general service obligation that applies only to joint stock companies set up under Law No 142/90 because of their legal status and not to other firms providing the same kind of services.

(119) Lastly, it is clear from the foregoing that the Italian authorities have not set out in detail their reasons why, if the measures objected to are abolished, the performance of the task of general economic interest under acceptable economic conditions would be jeopardised. They have not therefore complied with the principle established by the Court of Justice according to which 'it is incumbent on the Member State which invokes Article 86(2), as a derogation from the fundamental rules of the Treaty, to show that the

conditions for the application of that provision are fulfilled' ([69]).

(120) The Commission concludes that the aid in the form of the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1986 cannot be regarded as compatible with the common market pursuant to Article 86(2) and that the measures do not constitute a form of compensation for a possible general service mission entrusted to the firms.

Compatibility with other provisions of the Treaty

(121) Lastly, the Commission finds that the State aid is also incompatible with the common market for an additional reason. The measures apply to different economic sectors (water, gas, electricity, etc.) but not to all firms operating in such sectors. The eligibility of a firm for the scheme depends only on its legal form (former public entity transformed into a joint stock company) and on the nature of its shareholders (public-sector majority).

(122) Firms operating in the same sectors but in which, for example, private investors hold a majority or all of the share capital are not entitled to the aid measures. In particular, the conditions for benefiting from these measures can never be fulfilled by firms from other Member States with a secondary establishment in Italy. The aid therefore discriminates between firms operating in the same sector on the sole basis of their shareholding structure and, in effect, of the country in which their headquarters are established, without this different treatment being justified by any objective reason. The measure is thus contrary to the principle of non-discrimination on grounds of nationality, which is a general principle of EC law, and to that of freedom of establishment provided for in Article 43 of the EC Treaty. It is established case-law that 'State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market' ([70]).

6. **CONCLUSION**

(123) The Commission finds that the transfer tax exemption provided for in Article 3(69) of Law No 549 of 28 December 1995 does not constitute State aid as it accords with the nature and general scheme of the system.

(124) It further finds that Italy has, in breach of Article 88(3) of the Treaty, unlawfully implemented the State aid schemes provided for in Article 3(70) of Law No 549 and Article 9a of Decree-law No 318/1986. It concludes that the State aid is incompatible with the common market.

(125) In accordance with established case-law and with Article 14 of Regulation (EC) No 659/1999, the Commission concludes that the Member State concerned should take all necessary measures to recover the aid from the recipients. In the present case, the Italian authorities have not argued that the recovery of the aid would be contrary to a general principle of Community law and the Commission would point out that no such principle prevents the recovery of the aid.

(126) This Decision concerns the two aid schemes in question and must be implemented immediately, in particular as regards the recovery of all individual aid granted under the schemes. The Commission also notes that a decision on aid schemes is without prejudice to the possibility that individual aid may be deemed, wholly or partially, compatible with the common market on its own merits (for instance, because the individual grant of aid is covered by the *de minimis* rules or in the context of a future Commission decision or by virtue of an exemption regulation).

(127) The aid to be recovered includes interest which, in accordance with the Commission's practice, is calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

The exemption from transfer tax provided for in Article 3(69) of Law No 549 of 28 December 1995 does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

The three-year exemption from income tax provided for by Article 3(70) of Law No 549 of 28 December 1995 and by

([69]) Case C-159/94 *GDF* [1997] ECR I-5815, paragraphs 94 and 101.
([70]) Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78.

Article 66(14) of Decree-law No 331 of 30 August 1993, converted into Law No 427 of 29 October 1993, and the advantages resulting from loans granted under Article 9a of Decree-law No 318 of 1 July 1986, as converted and amended by Law No 488 of 9 August 1986, to joint stock companies with majority public shareholdings set up in accordance with Law No 142 of 8 June 1990, constitute State aid within the meaning of Article 87(1) of the Treaty.

Such aid is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

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

The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

Italy shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 5 June 2002.

For the Commission

Mario MONTI

Member of the Commission