JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

12 September 2007 *

In Joined Cases T-239/04 and T-323/04,

Italian Republic, represented by D. Del Gaizo, acting as Agent,

applicant in Case T-239/04,

Brandt Italia SpA, established in Verolanuova (Italy), represented by M. van Empel, C. Visco and S. Lamarca, lawyers,

applicant in Case T-323/04,

v

Commission of the European Communities, represented by V. Di Bucci, C. Giolito and E. Righini, acting as Agents,

defendant,

* Language of the case: Italian.

ACTION for annulment of Commission Decision 2004/800/EC of 30 March 2004 on the State aid scheme put into effect by Italy providing for urgent measures to assist employment (OJ 2004 L 352, p. 10),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2006,

gives the following

Judgment

Background to the dispute

The Italian legislation

1 Article 1(1) of Decree-Law No 23 of 14 February 2003 laying down emergency employment measures (GURI No 39 of 17 February 2003), which was converted after amendment into Law No 81 of 17 April 2003 (GURI No 91 of 18 April 2003), provides as follows:

'In order to respond to the serious employment crisis which has struck undertakings under special administration, in the cases provided for in Article 63(4) of Legislative Decree No 270 of 8 July 1999, as regards undertakings under that procedure which have more than 1 000 employees, the Minister for Labour and Social Affairs may, in respect of an overall maximum of 550 workers, grant purchaser-employers the benefits referred to in Articles 8(4) and 25(9) of Law No 223 of 23 July 1991, provided that the following conditions are satisfied:

(a) the purchasing undertaking does not possess the characteristics specified in Article 8(4a) of Law No 223 of 23 July 1991;

(b) the transfer of the workers is provided for under a collective agreement concluded with the Ministry of Labour and Social Affairs by 30 April 2003, which allows workers to be re-employed.'

2 In respect of the sale of all or part of a business operated by large undertakings and under special administration, Article 63(4) of Legislative Decree No 270 of 8 July 1999 on the new rules for the special administration of large undertakings in insolvency (GURI No 185 of 9 August 1999) provides as follows:

'In the context of the negotiations — provided for in Article 47 of Law No 428 of 29 December 1990 — concerning the transfer of a business, the Special Administrator, the purchaser and the workers' representatives may agree to the purchaser employing only some of the workers, as well as to other changes to the terms and conditions of employment in accordance with the relevant provisions in force.'

3 Law No 223 of 23 July 1991 on the rules relating to the lay-off fund, laid-off workers' mobility, unemployment benefits, the implementation of European Community directives, job placement and other provisions relating to the labour market (GURI No 175 of 27 July 1991, Ordinary Supplement; 'Law No 223/91'), which governs the special lay-off fund [for supplementing earnings] (*Cassa integrazione guadagni straordinaria (CIGS)*, 'the CIGS'), supplemented by Article 2 of Decree-Law No 148 of 20 May 1993 (GURI No 116 of 20 May 1993), includes — in Article 8 thereof — a number of provisions designed to facilitate the placement of workers covered by the special laid-off workers' mobility scheme (*Collocamento in mobilità*; 'the mobility scheme'). In particular, it provides:

'1. In the case of workers covered by the mobility scheme, for the purposes of placement, priority rights to employment shall apply ...

4. An employer who, without being required to do so under paragraph 1, employs, on a full-time basis and for an indeterminate period, workers registered under the mobility scheme, shall receive, in respect of each monthly salary paid to the worker, a monthly allocation equal to 50% of the mobility scheme allowance which would otherwise have been paid to the worker. That allocation may not be paid for more than 12 months and, in the case of workers above the age of 50, it may not be paid for more than 24 months ...

4a. There shall be no entitlement to the economic benefits provided for in the preceding paragraphs in respect of workers placed under the mobility scheme during the previous six months by an undertaking in the same sector of activity, or in another sector, which, at the date of laying off, had essentially the same ownership as the undertaking which engages the workers, or which is linked to or controlled by the latter. When making its request to engage the workers, the undertaking so doing shall declare, in such a way as to engage its own liability, that such a bar to entitlement does not apply to it.'

4 Under Article 25(9) of Law No 223/91:

'In respect of every worker registered under the mobility scheme who is employed for an indeterminate period, that part of the social security contributions for which the employer is liable shall, for the first 18 months, be the same as that for trainees as provided for by Law No 25 of 19 January 1955, as subsequently amended.'

5 Moreover, Article 1(1) of Law No 223/91 provides as follows:

'The [CIGS] rules shall apply only to undertakings which have employed on average more than 15 workers in the six-month period preceding the date of submitting the request referred to in paragraph 2. Where requests are submitted before six months have elapsed from the date of the transfer of the business, that condition shall apply to the new employer during the period following the date of that transfer ...'

6 Under Article 1(2) of Law No 223/91, the request to take advantage of the CIGS scheme must contain the programme, drawn up in accordance with a set model, that the undertaking intends to implement and must indicate any measures provided for with a view to dealing with the social impact. Article 2 of Law No 223/91 states, moreover, that the right to benefit under the CIGS scheme is granted by decree of the Italian Minister for Labour and Social Affairs, after the programme has been approved by the *Comitato interministeriale per il coordinamento della politica industriale* (Inter-ministerial committee for the coordination of industrial policy), and that the grant of the allocation is dependent on the correct implementation of that programme.

7 In addition, Article 4 of Law No 223/91 provides, in particular, as follows:

'1. Where an undertaking which has been accepted under [the CIGS scheme] decides, during the implementation of the programme referred to in Article 1, that it is not in a position to guarantee re-employment for all the laid-off workers and that it is unable to resort to alternative measures, it may activate the mobility procedures for the purposes of the present Article.

2. Undertakings wishing to make use of the possibility provided for in paragraph 1 shall be required to send prior written notification to that effect to the representatives of the relevant trade unions ...

3. The notification referred to in paragraph 2 shall contain information concerning (i) the reasons for the surplus; (ii) the technical, organisational or production-related reasons for the undertaking's view that it is unable to adopt measures capable of remedying the abovementioned situation thereby avoiding, in whole or in part, activation of the mobility scheme; (iii) the number of surplus workers, and of staff ordinarily employed, as well as the positions they hold in the undertaking and their occupational profiles; (iv) the timetable for implementation of the mobility programme; (v) any measures planned to deal with the social impact of implementing that programme; (vi) the method for calculating all payments other than those already provided for under the legislation in force and as a result of the negotiations between the two sides of industry. The notification shall be accompanied by a copy of receipt for payment to the [*Istituto Nazionale della Previdenza Sociale (INPS)*], by way of an advance on the sum referred to in Article 5(4), of an amount equal to the maximum monthly [CIGS] allowance multiplied by the number of workers considered to be surplus ...'

8 Article 4 of Law No 223/91 also provides:

'5. Within seven days of the date of receipt of the notification referred to in paragraph 2, at the request of the relevant trade unions and related associations, a joint review shall be carried out by the parties for the purposes of examining the causes which have contributed to the worker surplus, as well as the possibilities of alternative employment within the same undertaking for all or some of those workers, including by means of contracts to ensure job security and flexible arrangements as regards working time. ...

...

7. Failing agreement, the Director of the *Ufficio provinciale del lavoro e della massima occupazione* (Provincial office for labour and full employment) shall call a meeting between the parties to re-examine the issues referred to in paragraph 5, where appropriate formulating proposals so that an agreement can be reached. The examination must, in any event, be completed within 30 days of the receipt, by the *Ufficio provinciale del lavoro e della massima occupazione*, of the undertaking's notification provided for in paragraph 6.

...

9. Following trade union agreement or on completion of the procedure laid down in paragraphs 6, 7 and 8, the undertaking may activate the mobility scheme in respect of the surplus employees, manual workers and junior managers, by sending each of them a written redundancy notice in compliance with the notice periods. ...

...

13. Workers who have been accepted under [the CIGS scheme] shall be re-employed at the end of the period during which they benefit from earnings supplementation thereunder.

...'

9 Finally, Articles 5(4) and 5(5) of Law No 223/91 provide:

'4. For each worker covered by the mobility scheme, the undertaking shall be required to pay to the fund for the assistance and support of the social security bodies ..., in 30 monthly instalments, a sum equal to six times the initial monthly salary paid to the worker. Where the declaration of surplus personnel provided for in Article 4(9) is the subject of trade union agreement, that sum shall be reduced by half.

5. An undertaking which, in accordance with the procedures laid down by the *Commissione regionale per l'impiego* (Regional Commission for Employment), procures offers of employment for an indefinite period which have the characteristics specified in Article 9(1)(b) shall not be required to pay the remaining instalments in the case of workers who lose their entitlement to benefit under the mobility scheme because they have turned down those offers, or throughout the period during which, on accepting the offers procured by the undertaking, workers have been employed. That benefit shall not be available to undertakings which are related, in the manner specified in Article 8(4a), to the undertaking willing to take on the workers.'

The measure at issue and the administrative procedure

10 By letter of 12 February 2003, the Italian authorities notified the Commission of the aid scheme introduced by Decree-Law No 23/2003 ('the measure at issue').

11 The measure at issue entered into force on 18 February 2003, before the Commission had determined whether it was compatible with the common market. It was accordingly entered in the register of non-notified aid, under reference NN 7/2003.

12 By letter of 12 March 2003, the Commission asked the Italian Republic for further information regarding the measure at issue. The Commission requested the Italian Republic, inter alia, to specify the large undertakings to be taken over in accordance with that measure, as well as the purchasers and the criteria on the basis of which the latter had been selected. Having requested and obtained an extension of the time-limits for its reply, the Italian Republic communicated the information requested to the Commission by letter of 20 May 2003.

13 By letter of 15 October 2003, the Commission informed the Italian Republic of its decision to open the formal investigation procedure referred to in Article 88(2) EC. That decision was published in the *Official Journal of the European Union* on 18 December 2003 (OJ 2003 C 308, p. 5). By letter of 22 December 2003, the Italian Republic submitted its comments to the Commission. In that letter, the Italian authorities essentially stated, first, that, throughout the period during which the measure at issue was in force, only one undertaking had been taken over in

accordance with the rules laid down therein, namely, Ocean SpA of Verolanuova (Brescia), which was taken over by Brandt Italia SpA ('Brandt'). Second, according to the Italian Republic, Brandt purchased Ocean at market price without receiving any direct economic advantage as a result of the measure at issue.

14 However, by letter of 19 January 2004, the Commission requested further information from the Italian Republic, in particular to confirm that the only undertaking which had actually benefited from the measure at issue was Brandt, as well as to establish various other items of information concerning the volume of the aid paid in that context. The Italian Republic provided the Commission with the information requested on 11 February 2004.

15 On 30 March 2004, the Commission adopted Decision 2004/800/EC on the State aid scheme put into effect by Italy providing for urgent measures to assist employment (OJ 2004 L 352, p. 10, 'the contested decision'), which was notified to the Italian Republic on 1 April 2004.

The contested decision

16 By the contested decision, the Commission finds, first, that the measure at issue constitutes State aid within the meaning of Article 87(1) EC.

17 According to the Commission, first, the measure at issue favours specific categories of undertaking, namely: (i) purchasers of undertakings in financial difficulty and under special administration, which have at least 1000 employees, where the purchaser has concluded, by 30 April 2003 at the latest, a collective agreement with the Italian Ministry of Labour and Social Affairs approving the transfer of workers;

and (ii) undertakings in financial difficulty and under special administration, which have at least 1000 employees, and which are the subject of a transfer of ownership. That measure confers an economic advantage on such undertakings by reducing the costs they would otherwise have to bear and strengthening their financial position as compared with that of competitors who do not benefit from the same scheme. The selective nature of the measure at issue is, moreover, confirmed by the fact that it has only been applied in one case.

18 Secondly, the measure at issue is implemented by means of State resources, first, because it is financed by non-repayable public funding and, second, because the State foregoes a portion of the social contributions ordinarily due.

19 Thirdly, the measure at issue threatens to affect trade between Member States and to distort competition by reinforcing the financial position of some undertakings as compared with that of their competitors.

20 According to the Commission, the measure at issue is therefore in principle caught by the general prohibition laid down in Article 87(1) EC, and can be considered compatible with the common market only if it can benefit from one of the exceptions provided for in the Treaty.

21 Further, the Commission regrets that the Italian authorities, by putting the measure at issue into effect before it was authorised by the Commission, have failed to fulfil their obligation under Article 88(3) EC.

22 In addition, regarding the compatibility of the measure at issue with the common market, the Commission rules out the possibility that it could fall within the exceptions provided for in the Treaty.

23 Finally, the Commission assesses whether the measure at issue is compatible in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2), Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 [EC] and 88 [EC] to State aid for employment (OJ 2002 L 337, p. 3) and the Guidelines on national regional aid (OJ 1998 C 74, p. 9).

24 First, as regards the assessment of the compatibility of the measure at issue with the common market in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission maintains that the measure at issue cannot be compatible, because it applies to undertakings employing more than 1000 people, in other words, to large undertakings, whilst those guidelines only allow aid schemes for the rescue and restructuring of small and medium-sized enterprises.

25 Second, in the context of Regulation No 2204/2002, the Commission rejects, inter alia, the Italian Republic's argument that the advantages conferred under the measure at issue are the same as those obtained under the general lay-off scheme, which has never been regarded as State aid.

26 Third, although the Italian Republic argued that even if the measure at issue constitutes State aid, it would be compatible with the common market for the purposes of Article 4(4)(c) of Regulation No 2204/2002, since it is for the creation of new jobs, the Commission maintains that aid towards the creation of new jobs in

non-assisted areas is allowed only where it favours small and medium-sized enterprises, whilst the measure at issue applies to large undertakings.

27 Regarding the assessment of the compatibility of the measure at issue with the common market in the light of the guidelines on national regional aid, the Commission takes the view that the measure at issue does not fall within the scope of those guidelines, since it is applicable countrywide, and above all because the only case in which the measure at issue is known to have been applied is that of an undertaking located in a region which does not benefit from the exceptions provided for in Article 87(3)(a) and (c) EC.

28 In view of the foregoing, the Commission finds that the measure at issue constitutes State aid within the meaning of Article 87(1) EC, which has been put into effect unlawfully, in breach of Article 88(3) EC. From that it concludes that that measure is incompatible with the common market and requires the immediate implementation of its decision, which involves the recovery of the incompatible aid. The Commission states, however, that the contested decision is without prejudice to the possibility that individual aid granted under the measure at issue may subsequently, by Commission decision, be considered — in whole or in part — compatible on its own merits with the common market.

Procedure and forms of order sought

29 By applications lodged at the Registry of the Court of First Instance on 11 June 2004 and 4 August 2004, registered as Cases T-239/04 and T-323/04 respectively, the Italian Republic and Brandt brought the present actions.

30 By order of the President of the First Chamber of the Court of First Instance of 19 July 2006, after hearing the parties, the two cases were joined for the purposes of the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

31 The parties presented oral argument and answered the questions put by the Court at the hearing on 19 September 2006.

32 In Case T-239/04, the Italian Republic claims that the Court of First Instance should:

— declare the contested decision null and void;

— order the Commission to pay the costs.

33 In Case T-323/04, Brandt claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, if the Court of First Instance holds that the measure at issue is incompatible with Articles 87 EC and 88 EC, declare, with effect in respect of Brandt, the partial nullity of the contested decision, limited to Article 3 thereof, or the nullity of that part in which the Italian Republic is ordered to recover the aid unlawfully granted;

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

34 In Case T-239/04, the Commission contends that the Court of First Instance should:

— dismiss the action;

— order the Italian Republic to pay the costs.

35 In Case T-323/04, the Commission contends that the Court of First Instance should:

— dismiss the action as inadmissible, or, in the alternative, as unfounded;

— order Brandt to pay the costs.

Admissibility

Arguments of the parties

36 The question whether the action brought by Brandt against the contested decision is admissible was raised by the Commission in Case T-323/04. Although, in view in

particular of the Italian Republic's challenge of the same decision before the Court of First Instance in Case T-239/04, the Commission finally, by separate document, abandoned its plea alleging the inadmissibility of that action, it continues to contend that Brandt is unable to rely on any individual interest in the annulment of the contested decision and contends that the Court of First Instance should dismiss Brandt's action as inadmissible.

37 Referring in particular to the Opinion of Advocate General Jacobs in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, I-10741, points 138 to 142, the Commission contends that the case-law on admissibility of actions brought by competitors against decisions adopted in relation to Article 88(3) EC is far from settled and that exactly the same considerations apply to actions brought by beneficiaries of aid granted under an aid scheme against a decision declaring that scheme incompatible with the common market and ordering recovery of the aid paid. The Commission adds that, despite those fluctuations in the case-law, there is no reason to hold that all beneficiaries of aid granted under an aid scheme are individually concerned within the meaning of the fourth paragraph of Article 230 EC by the Commission decision declaring that that scheme is incompatible with the common market, since in that context the Commission evaluates general and abstract national legislation, without examining individual cases.

38 The Commission contends, moreover, that, since the Italian Republic devised and notified a general and abstract scheme to it, it was entitled to examine the measure at issue as such, regardless of whether that measure was in fact intended to apply to a single undertaking only, namely Brandt. The Commission adds that it is precisely for that reason that the contested decision concerns the measure at issue itself, without examining Brandt's particular situation, and that Brandt's action must accordingly be declared inadmissible.

39 Brandt submits that it is entitled to seek annulment of the contested decision. Whilst conceding that the contested decision was, in formal terms, addressed to the Italian Republic, Brandt submits that it — Brandt — is directly and individually concerned by that decision. First, the contested decision directly affects Brandt's situation, since the obligation imposed by that decision on the Italian Republic to recover the aid will cause Brandt clear economic loss (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43). Second, Brandt is individually concerned by the contested decision, since, according to the Commission, it is the beneficiary of the aid in question and required, pursuant to Article 3 of the contested decision, to repay the amount of aid granted.

Findings of the Court

40 First, the Court of First Instance points out that, in Case T-239/04, in which the contested decision is challenged by the Italian Republic, the Commission maintains that the measure at issue is not of a general nature, but rather a measure limited to a specific case, which procures advantages for one undertaking only — Brandt — in derogation from the conditions laid down in the general legislation.

41 In addition, in Case T-323/04, Brandt has interests of its own which are different from those of the Italian Republic, for the purposes of of the criteria applied by the Court of Justice in Case 282/85 *DEFI* v *Commission* [1986] ECR 2469, paragraph 16. In adopting the measure at issue, which gave rise to the contested decision — and, accordingly, to the two actions examined in the present joined cases — the Italian Republic sought to prevent a social crisis, something which the sacking of a great number of workers from undertakings in difficulty was liable to provoke, by facilitating the transfer of those workers from Ocean to Brandt. From Brandt's point of view, that transfer was a commercial choice, made easier by the measure at issue.

42 Moreover, even if the measure at issue does not identify the undertakings in favour of which the aid is to be paid, Brandt was mentioned in the parliamentary debates preceding the adoption of the measure at issue, which are cited by the Commission. Finally, the Commission concedes several times in the contested decision that, throughout the period during which the measure at issue applied, only one undertaking was taken over in accordance with the rules it laid down, namely Ocean, taken over by Brandt.

43 Secondly, the Court of First Instance points out that, in accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only if that person can show an interest in bringing proceedings (see Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 32 and the case-law cited). In the present case, if the contested decision were to be annulled, Brandt's legal situation would undeniably change, in that the repayment of the aid as required under Article 3 of that decision would no longer have a legal basis. It follows that Brandt has an interest in bringing proceedings seeking annulment of the contested decision (see, to that effect, the order of the President of the Court of First Instance in Case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, paragraph 17).

44 Thirdly, as regards the question whether Brandt is directly and individually concerned by the contested decision, the Court points out that, inasmuch as Article 3 of that decision requires the Italian Republic to recover from the beneficiaries the aid granted on the basis of the measure at issue, Brandt must be considered to be directly and individually concerned by that decision (see, to that effect, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraphs 35 and 36). Moreover, the Court observes that the Italian social security services have ordered the payment of aid worth approximately EUR 500 000 to be suspended.

45 In the light of the foregoing, Brandt's action is admissible.

Substance

46 In respect of the three pleas in law raised in Case T-239/04, the Italian Republic puts forward the following heads of claim:

— infringement of Article 87(1) EC and breach of essential procedural requirements;

— in the alternative, failure to state reasons in the contested decision regarding the infringement of Article 87(1) EC and the breach of essential procedural requirements;

— in the further alternative, infringement of Article 88(3) EC, the Community guidelines on State aid for rescuing and restructuring firms in difficulty and of Regulation No 2204/2002, and breach of essential procedural requirements, consisting in various procedural irregularities and failure to state sufficient reasons in a number of respects.

47 In Case T-323/04, Brandt raises the following five pleas in law:

— infringement of the Treaty, in particular Article 87 EC, and breach of an essential procedural requirement, specifically, infringement of Article 253 EC;

— misuse of powers by the Commission;

— infringement of Article 88 EC and breach of an essential procedural requirement;

— infringement of the Treaty, in particular Articles 88 EC and 89 EC, infringement of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [87 EC] and [88 EC] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), and of Regulation No 2204/2002, and breach of essential procedural requirements, in particular, infringement of Article 253 EC;

— the unlawfulness of Article 3 of the contested decision owing to the infringement of Article 88 EC and of general principles of law, in particular, the principle of protection of legitimate expectations, and infringement of mandatory provisions of a procedural nature, in particular Article 253 EC.

48 Since many of the pleas in law and arguments raised by the applicants in Case T-239/04 and Case T-323/04, respectively, thus overlap considerably, the Court of First Instance considers it appropriate to examine them together, in the following order:

— classification of the measure at issue as State aid;

— classification of the measure at issue as existing aid;

— compliance of the contested decision with Article 88(3) EC, Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty;

— breach of essential procedural requirements, in particular, infringement of Article 253 EC;

— failure to state reasons in the contested decision regarding the application of the condition of selectivity;

— failure to state reasons in the contested decision regarding the identification of the beneficiary of the aid granted on the basis of the measure at issue;

— failure to state reasons in the contested decision regarding the adverse effects of the measure at issue on Community trade and competition;

— failure to state sufficient reasons in the contested decision regarding the assessment of the compatibility of the measure at issue with the common market in the light of Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty;

— failure to state reasons in the contested decision regarding the recovery of the aid.

— the recovery of the aid:

— infringement of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1);

— breach of the principle of protection of legitimate expectations.

49 In view of the nature of the arguments raised by Brandt in support of its allegation that the Commission misused its powers, the Court of First Instance considers that that plea in law must be treated as a plea alleging that the reasons stated in the contested decision were, on certain issues, insufficient and contradictory. It must therefore be dealt with in connection with the assessment of the reasons stated in that decision.

Classification of the measure at issue as State aid

Arguments of the parties

50 The Italian Republic submits that the measure at issue is a measure of a general nature which seeks to promote employment. As such, it neither distorts nor risks distorting competition by favouring certain undertakings or the production of certain goods and, consequently, it is not State aid. That measure extended the scope of the CIGS scheme and the mobility scheme, which already existed beforehand, to cover various specific situations, by according, subject to certain conditions, the same advantages to employer-purchasers of undertakings which are under special administration. The true beneficiaries of the scheme established by the measure at issue are the workers and the Commission has itself recognised that the two schemes mentioned above are not in themselves State aid.

51 The Italian Republic claims the Commission did not address that issue in the preliminary examination of the existence of State aid and only broached it in its assessment of the measure at issue on the basis of Regulation No 2204/2002.

52 Brandt maintains that, for it, the economic effects of the measure at issue are completely neutral. That is clear from a comparative examination of the measure at issue and Law No 223/91 (an examination which the Commission should have carried out). If the measure at issue had not existed, Brandt could have obtained the same result in economic terms by agreeing with Ocean for some of the workers to be transferred to the Verolanuova site in accordance with the existing general legislation. Consequently, Brandt submits that the measure at issue supports the workers of undertakings under special administration (in the present case, the workers at Ocean), by assisting their transfer to the purchaser without being placed under the CIGS scheme or registered on the mobility lists. Brandt concludes that, if the Court of First Instance confirms the contested decision and, in particular, the obligation it imposes on the Italian Republic to recover the aid already paid, it — Brandt — will find itself in a situation which is decidedly less favourable that that in which it would have been if the measure at issue had never been adopted.

53 In addition, Brandt submits that, in order for Article 87 EC to apply, the beneficiary of a measure must have derived an economic or financial advantage from it. Brandt states in that respect that it acquired Ocean following competitive bids with other potential purchasers and that the price it paid was therefore the market price. Moreover, that purchase covered not only the industrial activities of the commercial division in question, but also all of that division's debts. Brandt insists that it derived no advantage from the measure at issue, in particular because no advantage — whether indirect or partial, or already resulting from the existing general legislation — could have made up for the additional costs that Brandt had to bear as a result of that measure.

54 Furthermore, referring to recital 31 of the contested decision, Brandt alleges that a clear contradiction exists between, on the one hand, the Commission's assertion that the benefits conferred by the measure at issue are identical to those already provided under the CIGS scheme and the mobility scheme and, on the other, its refusal to recognise the measure at issue as an integral part of those schemes. Brandt maintains that the measure at issue did not introduce any new advantage and has the same effects as the measures already provided for under the existing general legislation, namely Law No 223/91. In that respect, the measure is fully consistent with the spirit and broad logic of the Italian social security system. Brandt states in that connection that, according to the case-law of the Court of Justice, a partial reduction of social security contributions borne by undertakings of a particular industrial sector constitutes aid within the meaning of Article 87(1) EC if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for that exemption on the basis of the nature or broad logic of that system (see Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 36 and the case-law cited).

55 In a general sense, the Commission states that it examined the measure at issue in the course of its assessment, in recitals 30 and 31 of the contested decision, as to whether State aid exists.

56 Generally developing the same arguments in the two cases, the Commission contends that the measure at issue is not general in nature, a finding confirmed not only by the extracts from the *travaux préparatoires* and parliamentary debates which preceded the adoption of the measure at issue, but also by the fact that the measure has been only applied in one case. In addition, the Commission states that, as is clear from the letter of the Minister for Labour and Social Affairs, dated 7 February 2003, communicated to the Commission by letter of 12 February 2003, the Italian authorities had initially notified the measure at issue as State aid, even though in the following letter, they ultimately claimed that it was not.

57 The Commission states that the fact that the measure at issue seeks to promote employment has no bearing on its classification as State aid, since, according to extensive case-law, Article 87(1) EC defines national measures by reference to their effects as opposed to their causes or aims.

58 Moreover, it is of little importance that Brandt could, under other procedures and at a later date, have been granted different advantages provided for under other provisions of Italian law, whether or not they constitute State aid. According to the Commission, the only thing which is relevant is that the measure at issue granted Brandt specific advantages.

59 Furthermore, the fact that Brandt provided consideration for the aid received in no way changes its classification (*France* v *Commission*). According to the Commission, the net aid argument put forward by Brandt, according to which the existence of consideration negates the advantage and therefore the aid, is irreconcilable with the logic underlying the control of State aid. In any event, the calculations submitted by Brandt at the stage of the written procedure were never relied on in the course of the administrative procedure and cannot, as a result, according to settled case-law, be taken into account for the purposes of determining the lawfulness of the contested decision.

60 Nor, in the present case, is there any basis for Brandt's reference to the case-law under which the existence of a specific advantage, hence of any aid, is ruled out where the exemption of mandatory contributions is justified by the nature or broad logic of the tax and contributions system. The Commission contends, in that respect, that it is for the Member State to demonstrate that this is the case (Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 43) and observes that the Italian Republic has never relied on such an argument. As to the substance, the measure thus justified must be consistent with the internal logic of

the tax system in general (see Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 164, and Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 60 and the case-law cited), which is unlikely in the case of a temporary exemption.

61 According to the Commission, the benefit brought about by the measure at issue resides in the fact that the social security advantages, rather than being granted on completion of complex procedures — such as those laid down for the application of the CIGS scheme or the mobility scheme — are granted immediately to the employer who purchases the undertaking. Moreover, the system established by the measure at issue ensured operational continuity as between Ocean and Brandt, by enabling the latter to employ Ocean's workers even before they were made redundant. Since only the undertakings meeting the criteria laid down in the measure at issue are entitled to benefit from the social security advantages, to the exclusion of all other undertakings, that is enough, in itself, to justify the conclusion that the measure is a selective one.

62 Finally, the Commission contends that, contrary to the applicants' assertion, the CIGS scheme and the mobility scheme have never been assessed by the Commission in the light of the rules on State aid. The possibility cannot, therefore, be ruled out that they themselves constitute State aid, and that applies a fortiori to their selective extension.

Findings of the Court

63 The Court of First Instance notes, at the outset, that, contrary to the Italian Republic's assertion, the question of the existence of State aid in the present case was analysed by the Commission in section 5 of the contested decision, and, as regards Regulation No 2204/2002, in recitals 30 and 31 of that decision.

64 The Court considers, next, that it is appropriate to accept the Commission's line of argument to the effect that the benefit brought about by the measure at issue resides in the fact that the social security advantages, rather than being granted on completion of complex procedures — such as those laid down for the application of the CIGS scheme or the mobility scheme — are granted immediately to the employer who purchases the undertaking under special administration. Brandt's argument that it is not the purchaser who is required to follow any of the procedures for the placement of workers under the mobility scheme cannot be upheld. Even if those procedures are activated by the seller, their aim is the conclusion of a contract governed by civil law which is beneficial, in theory, for both parties. According to the system introduced, it is the purchaser who benefits from the allowances and from the right to pay reduced social contributions. Undeniably, therefore, the purchaser has an interest in obtaining, quickly and easily, the advantages provided for.

65 Moreover, the measure at issue enabled operational continuity between Ocean and Brandt to be ensured, giving Brandt the opportunity to engage workers even before they were made redundant, which in itself represents a competitive advantage.

66 Regarding the selective nature of the measure at issue, the Court points out that the measure at issue was adopted on 14 February 2003 under an emergency procedure. The advantages provided for by the measure at issue were conditional on the existence of a collective agreement which had to have been concluded by 30 April 2003. They were therefore available for a period of 2 months 17 days. The advantages provided for by the measure at issue are those provided for under the existing general legislation. However, the measure at issue obviates the need to complete the complex procedures required in order to obtain advantages under the existing general legislation and the scope of that general scheme is significantly reduced, notably because the benefit of the measure at issue is limited to undertakings which employ more than 1 000 people, as opposed to those employing a minimum of 15 workers, which is the requirement under the general scheme. As a

result, the measure at issue has only been applied in a single case. In addition, shorthand reports of the parliamentary debates preceding the adoption of the measure at issue, submitted by the Commission during the written procedure, expressly indicate that it was the takeover of Ocean that prompted the adoption of the measure at issue. Consequently, the Court considers that the selective nature of the measure at issue is established.

67 The Court notes, moreover, that the parties agree that the advantage which the measure at issue contains is granted by means of State resources.

68 Regarding the effect of the measure at issue on Community trade and competition, the Court finds that the Commission was justified in noting in recital 20 of the contested decision that the measure at issue threatens to distort competition because it reinforces the financial position of some undertakings as compared with that of their competitors and, in particular, threatens to distort competition and affect trade in cases where the beneficiaries compete with products coming from other Member States, even if they do not export their own products themselves (Case 730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 47 and 48). The Court points out, in addition, that the beneficiary of the measure at issue, Brandt, belongs to the ElcoBrandt group, which is the fifth largest in the electrical household appliances industry in Europe, a sector which is marked by a particular degree of exposure to competition, which supports the conclusion that the measure at issue is liable to affect trade between Member States and to distort or threaten to distort competition in that sector (see, to that effect, Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 87).

69 The Court considers in addition that the fact that the measure at issue is designed to safeguard employment has no bearing on its classification as State aid, since Article 87(1) EC does not distinguish between measures of State intervention by reference

to their causes or their aims but defines them in relation to their effects (see Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2003] ECR II-2957, paragraph 112 and the case-law cited). Moreover, the argument that Brandt could, under other procedures and at a later date, be granted the same advantages pursuant to other provisions of Italian law is not relevant either, since the decisive factor in the present case is the fact that the measure at issue amounts to a selective extension of those general schemes, granting specific advantages to certain undertakings and thereby reinforcing their financial position as compared with that of their competitors.

70 In view of the foregoing, the Court of First Instance finds that the measure at issue constitutes State aid within the meaning of Article 87(1) EC.

Classification of the measure at issue as existing aid

Arguments of the parties

71 Brandt submits that the Commission was wrong to find that the measure at issue was existing aid because, according to Brandt, the measure at issue falls within the scope of Regulation No 2204/2002. Brandt maintains in that respect that the Commission merely asserted that the measure at issue does not fall within the scope of Regulation No 2204/2002. In that way, despite the fact that Regulation No 2204/2002 does not confer on it any specific power in that respect, the Commission arrogated to itself the power to withdraw the benefit of the existing aid scheme provided for by that Regulation. In so doing, the Commission moreover failed to show how it had the power to withdraw, by an individual decision, such a benefit and thus at the very least failed to fulfil its obligation to state sufficient reasons.

72 The Commission contends that Brandt put forward a certain number of propositions without checking their substance, by failing to demonstrate that the conditions for the application of Regulation No 2204/2002 were met or to refute the reasoning set out by Commission in recitals 29 to 33 of the contested decision, which establish precisely the opposite.

73 As regards the challenge to its power in this field, the Commission contends that, if (as appears from paragraph 99 et seq of its application) Brandt is of the view that the Commission is not empowered to apply Regulation No 2204/2002 — or, more generally, the exemption regulations — to the individual decisions which it adopts, then its argument is manifestly wrong. First, recital 4 of Regulation No 2204/2002 reserves to Member States the right to notify aid for employment and obliges the Commission to assess those notifications, inter alia in the light of the criteria set out in Regulation No 2204/2002 and Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 [EC] and 88 [EC] to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33), or in accordance with the applicable Community guidelines or frameworks. Secondly, it is more than evident that, for the purposes of assessing the compatibility of aid, the Commission is required to apply all the texts which may be relevant, whether they be guidelines, frameworks or regulations. According to the Commission, if that were not the case, the Commission would never be able to adopt a negative decision, because it would never have the power to rule out the possibility that the aid might be compatible with the common market under an exempting regulation.

74 The Commission adds that, if, on the contrary, Brandt is claiming that the Commission erred in finding that the measure at issue did not fall within the scope of Regulation No 2204/2002, then pursuant to Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, it must develop that plea in law.

Findings of the Court

75 First, the Court of First Instance points out that Articles 1(1)(a)(iv) and 1(1)(b) of Regulation No 994/98 provide that the Commission may, by way of regulations adopted in accordance with the procedures laid down in Article 8 thereof and in accordance with Article 87 EC, declare that aid in favour of employment and training, as well as aid that complies with the map approved by the Commission for each Member State for the grant of regional aid, is compatible with the common market and is not subject to the notification requirements under Article 88(3) EC.

76 The Commission exercised that power by adopting Regulation No 2204/2002. In order to benefit from the exemption provided for in that Regulation, aid must fulfil the conditions for that regulation to apply, which, as stated at paragraphs 93 to 96 below, is not the position in the present case.

77 Next, regarding the argument put forward by Brandt that the measure at issue is only a minor variant of the CIGS scheme and the mobility scheme — which, according to Brandt, are themselves existing State aid schemes — the Court considers that that argument cannot be upheld either. Under Article 1 of Regulation No 659/1999, existing aid can cover a number of situations. Under that provision, existing aid includes:

— first, all aid which existed prior to the entry into force of the Treaty in the respective Member States;

— secondly, all authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

— thirdly, all aid deemed to have been authorised without the Commission adopting a decision within a period of two months, in principle beginning on the day following the receipt of a complete notification of that aid, being the time available to the Commission for the purposes of carrying out a preliminary examination;

— fourthly, all aid in respect of which the limitation period of ten years for recovery has expired;

— fifthly, all aid deemed to be existing aid because it can be established that, although it did not constitute aid at the time it was put into effect, it subsequently — without being altered by the Member State — became aid owing to the evolution of the common market.

78 In the present case, the Court notes that the earliest of the Italian laws establishing aid schemes to which reference is made dates from the year 1991. Consequently, the first situation in which an aid measure may be considered to be existing aid does not apply in the present case.

79 Moreover, as stated at paragraph 62 above, the Commission has indicated that the CIGS scheme and the mobility scheme were never notified to it or assessed by it in the light of the State aid rules. Accordingly, the second and third situations in which an aid measure may be considered to be existing aid have not been established in the present case either.

80 Furthermore, in the contested decision, the Commission merely ordered the Italian Republic to take all necessary measures to recover the aid granted on the basis of the measure at issue. Accordingly, the fourth situation in which an aid measure may be considered to be existing aid has not been established either in the present case.

81 Finally, the Court notes that the parties have not argued that the measure at issue did not constitute aid at the time of its entry into force and that it only became aid owing to the evolution of the common market. Accordingly, the fifth and final situation in which an aid measure may be considered to be existing aid has not been established in the present case either.

82 In view of the foregoing, the measure at issue must be considered as not constituting existing aid.

83 That plea in law must therefore be rejected.

Compliance of the contested decision with Article 88(3) EC, Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty

Infringement of Article 88(3) EC

— Arguments of the parties

84 The Italian Republic submits that, contrary to what is stated at recital 22 of the contested decision, the alleged unlawfulness of the measure at issue — arising from

the fact that it was put into effect before the Commission had taken a decision — is negated by the urgency. According to the Italian Republic, if that measure had not been implemented while the administrative procedure was ongoing, it would have been deprived of *effet utile*.

85 The Commission contends that Article 88(3) EC makes all aid schemes subject to prior notification and prohibits the putting into effect of proposed measures until the examination procedure has resulted in a final decision. A Member State is not entitled to free itself unilaterally of those obligations by relying on the need for urgency, since the fixing of a two-month time-limit to complete the preliminary examination already meets that need (Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 73).

— Findings of the Court

86 The Court points out that Article 88(3) EC establishes clearly and unequivocally that the Member State concerned may not put its proposed measures into effect until the preliminary examination procedure has resulted in a final decision.

87 Moreover, that provision is supplemented by Article 4(5) of Regulation No 659/1999, which allows a period of, in principle, two months — starting on the day following the receipt of the notification — for the adoption of a decision, on completion of the preliminary examination of the measure notified.

88 As regards that period of two months, which was originally imposed by the case-law, the Court of Justice held in *Austria* v *Commission* (paragraph 73) that, in drawing

guidance from Articles 230 EC and 232 EC, and by thus assessing the maximum duration of the period as two months, the Court intended to remove all legal uncertainty, which would be manifestly contrary to the objective of the preliminary examination procedure for State aid under Article 88(3) EC. As the Court of Justice stated, such an objective — which is to offer Member States the necessary legal certainty by informing them quickly as to the compatibility with the Treaty of a particular aid which may be urgent — would be jeopardised if the period were to be regarded as merely indicative. Moreover, the legal uncertainty that would result could be aggravated if the preliminary examination phase were artificially prolonged.

89 Consequently, it must be accepted that the period provided for in Article 4(5) of Regulation No 659/1999 is binding on all the parties to the preliminary examination procedure. The Member State concerned is not therefore entitled to release itself from that obligation by invoking urgency. Moreover, as rightly indicated by the Commission, the fixing of a two-month period to complete the preliminary examination already meets that need.

90 In view of the foregoing, the first part of this plea in law must be rejected.

Infringement of Regulation No 2204/2002

— Arguments of the parties

91 The Italian Republic challenges the contested decision in so far as it indicates in recitals 32 and 33 that the measure at issue cannot be considered compatible with the common market in the light of Regulation No 2204/2002, particularly because it

applies to the entire national territory and it concerns takeovers of undertakings employing more than 1000 employees, in other words, principally takeovers of large undertakings. Even though that aid towards the creation of jobs in non-assisted areas is allowed only where it is given to small and medium-sized enterprises, in no way can that entitle the Commission to conclude on the basis of Regulation No 2204/2002 that the measure is wholly incompatible, since the possibility cannot be excluded that the purchase of undertakings of that type may also interest small and medium-sized enterprises.

92 The Commission contends that the Italian Republic exhibits an imperfect understanding of the control of State aid and, in particular, aid schemes. In order for a scheme to be held compatible, it is not enough for the compatibility criteria to be fulfilled in certain situations where that scheme could be applied. On the contrary, it is necessary for the aid granted on the basis of the aid scheme to fulfil those criteria in all such situations. That principle is expressly referred to in Article 3(1)(a) of Regulation No 2204/2002. In the present case, according to the Commission, the measure at issue does not preclude the grant of aid to a large undertaking in a non-assisted area and, consequently, the Commission rightly found that the aid does not fulfil the conditions laid down in Regulation No 2204/2002.

— Findings of the Court

93 The Court of First Instance notes that it is clear from the very wording of Article 4 of Regulation No 2204/2002 that only small and medium-sized enterprises may benefit from aid for the creation of jobs outside areas eligible for regional aid. Since the measure at issue is applicable to all undertakings and covers the entire national territory, that condition is not met, as is stated in recitals 32 and 33 of the contested

decision. Moreover, the only case in which the measure at issue has been applied concerns large undertakings in a non-assisted area and, consequently, even if examined on that basis, the aid is not compatible.

94 Moreover, the Court considers that, as the Commission has rightly stated, in order for an aid scheme to be considered compatible with the common market in the light of Regulation No 2204/2002, it is not enough for the conditions which it sets to be fulfilled only in certain cases where the scheme could, potentially, be applied. It is necessary for the aid granted on the basis of that scheme to fulfil those conditions in all such cases. That principle is expressly set out in Article 3(1)(a) of Regulation No 2204/2002. In the present case, the measure at issue does not preclude the grant of aid to a large undertaking in a non-assisted area. The Commission rightly decided, therefore, that the measure at issue does not satisfy the conditions laid down in Regulation No 2204/2002.

95 Furthermore, the Court points out that the contested decision deals with the measure at issue as a whole and provides expressly, at recital 38, that it is without prejudice to the possibility that aid granted under the scheme created by the measure at issue may subsequently by Commission decision be considered — in whole or in part — compatible on its own merits.

96 In the light of the foregoing, the second part of this plea in law must therefore be rejected.

Infringement of the Community guidelines on State aid for rescuing and restructuring firms in difficulty

— Arguments of the parties

97 The Italian Republic submits that, under paragraph 101 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission must examine the compatibility with the common market of any rescue or restructuring aid granted without its prior authorisation and therefore in breach of Article 88(3) EC. The Italian Republic rejects in that respect the Commission's argument alleging the lack of some of the evidence necessary in order to proceed to an individual examination of the case in which the measure was applied, and states that the Commission should have officially requested the information which it needed from the Italian authorities, rather than simply raising the possibility of an individual notification.

98 The Commission contends that under paragraph 64 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty such aid schemes can only be authorised in favour of small and medium-sized enterprises within the Community definition of that term. Contrary to the Italian Republic's assertion, paragraph 101 of the guidelines does not oblige the Commission to examine the compatibility with the common market of any rescue or restructuring aid granted without the Commission's authorisation. That provision merely governs the temporal application of the various rules which have succeeded one another in this matter, and certainly does not oblige the Commission to examine individually all cases in which non-notified schemes have been implemented.

— Findings of the Court

99 The Court of First Instance points out that, under the Community guidelines on State aid for rescuing and restructuring firms in difficulty, two types of rescue and restructuring aid measures may be authorised by the Commission, provided that the conditions defined therein are fulfilled: (i) rescue and restructuring aid notified individually to the Commission for all firms, irrespective of size (paragraphs 22 to 63 of the guidelines) and (ii) rescue and restructuring aid schemes for small and medium-sized enterprises only (paragraphs 64 to 69 of the guidelines).

100 In the present case, in accordance with Decree-Law No 23/2003, the measure at issue applies to all undertakings, irrespective of size. Moreover, the only case in which that measure has been applied has been the purchase of a large undertaking, Ocean, by another large undertaking, Brandt.

101 As has already stated in relation to Regulation No 2204/2002 at paragraph 94 above, in order for an aid scheme to be considered compatible with the common market, it is not sufficient that the required conditions be fulfilled in certain cases where the scheme could, potentially, be applied. It is necessary for the aid granted on the basis of that scheme to fulfil those conditions in all such cases. Consequently, in the present case, the purely theoretical possibility that, under the measure at issue, the business which might be taken over could be a small or medium-sized enterprise is not sufficient for the aid thus notified to be considered compatible with the common market in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

102 Since the measure at issue does not fulfil the conditions delimiting the scope of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, it is not necessary to examine whether the procedural conditions set by those guidelines were complied with.

103 Consequently, the third part of this plea in law must be rejected.

104 In view of the foregoing, the Court holds that the measure at issue cannot be considered compatible with the common market pursuant to any of the Community texts relied on. That plea in law must therefore be rejected in its entirely.

Infringement of Article 253 EC

105 As regards the applicants' allegation of failure to state reasons in the contested decision for the classification of the measure at issue as State aid, the Court considers that the reasons set out in section 5 of the contested decision are clear and sufficient enough to justify the Commission's position, since the line of argument followed in that section is the same as that adopted by the Court at paragraphs 63 to 70 above.

Arguments of the parties

— Failure to state reasons in the contested decision regarding the application of the condition of selectivity

106 The Italian Republic submits that insufficient reasons were given for the Commission's assessment, set out in recital 18 of the contested decision, according to which the measure at issue is not a general measure, but instead confers an economic advantage on specific undertakings, reducing the costs they would otherwise have to bear and strengthening their financial position as compared with that of competitors who do not benefit under the same measures, a finding which is confirmed, moreover — according to the Commission — by the fact that the measure has only been applied in one case. In the submission of the Italian Republic, that assessment is the result of an incorrect application of the selectivity condition laid down in the Treaty, which requires that the measure should favour certain undertakings or the production of certain goods. That condition is not fulfilled where, as in the present case, the measure at issue has neither the purpose nor the effect of favouring certain specified undertakings or the production of certain specified goods, since it applies to persons who are well defined, in accordance with objective criteria, which leaves no margin for adjusting its implications on a discretionary basis. As regards the brief duration of the measure at issue and the fact that it has been applied only once — which, according to the Commission, proves that it is selective in nature — the Italian Republic states that what is important, in reality, is the general and abstract nature of the legislation by which it is established, which should have precluded the Commission from ruling out, in the context of a pre-check — which is what the Commission's investigation should amount to — the possibility that the measure at issue could be applied to other beneficiaries satisfying the conditions specified.

107 The Commission contends that, even if a measure determines its scope on the basis of objective criteria, it may nevertheless be selective in nature (Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission*, paragraph 163, and Joined Cases T-92/00 and T-103/00, paragraph 58).

The detailed precision of the criteria for its application, as well as its very brief period of application, which has led to its being applied only in one case, shows that the general and abstract nature of the measure at issue, as relied upon by the Italian Republic, is purely a matter of appearance. Furthermore, since the contested decision concerns the measure at issue as a whole, it is sufficient if the measure proves to be selective for just one of the two categories of beneficiary. Moreover, in reply to the observations submitted by the Italian Republic concerning the relevance of the case-law cited, the Commission states that it is not necessary for an advantage to be accorded in a discretionary way for it to be considered selective. Its selective nature may well become apparent precisely from the application of the criteria laid down for its automatic attribution (*Belgium* v *Commission*, paragraphs 27 to 31). The Commission contends, lastly, that the selective nature of the measure at issue is confirmed by the fact that it has only been applied once.

— Failure to state reasons in the contested decision regarding the identification of the beneficiary of the aid granted on the basis of the measure at issue

108 The Italian Republic submits that the contested decision is also vitiated by a failure to state sufficient reasons, in so far as it identifies as beneficiaries of the measure at issue undertakings in financial difficulty which are under special administration, which employ more than 1000 employees and which are the subject of a transfer of ownership, merely on the basis of a finding that the true beneficiary of the measure at issue depends, in fact, on a number of factors, which have not been specified by the Italian authorities, and in so far as it does so without specifying which of those factors are relevant for the purposes of such an identification, or why.

109 The Commission contends that the measure at issue can indeed constitute aid even though only the vendor or only the purchaser is the beneficiary thereunder. The Commission refers in that regard to the case-law of the Court of Justice to the effect that the beneficiaries of a measure do not necessarily correspond to the persons to whom the State directly grants positive benefits or relief (Case C-156/98 *Germany* v

Commission [2000] ECR I-6857, paragraphs 22 to 28). In the present case, it is, for example, perfectly possible that an undertaking under special administration which is undergoing a transfer of ownership in respect of one of its branches of activity continues to carry on other activities. In such circumstances, the measure at issue reduces the costs which that undertaking would otherwise have to bear, that is to say, the salaries and redundancy-linked compensation, as well as the various other contributions, in particular those paid for the operation of the CIGS. Finally, other advantages may result from the fact that a measure adopted by the State enables ownership of an undertaking to be transferred in situations where otherwise that would have been either impossible or subject to different conditions, such as a higher price.

— Failure to state reasons in the contested decision regarding the adverse effects of the measure at issue on Community trade and competition

110 In the submission of the Italian Republic, the contested decision also fails to state reasons for the assessment made in relation to the third and fourth conditions for application of Article 87(1) EC, relating respectively to the affecting of trade between Member States and adverse effects on competition, since the Commission disposes of those issues in recital 20 merely by means of a statement which it considers to be self-evident.

111 Brandt expresses the same criticism, maintaining that, in recital 20 of the contested decision, the Commission refers in very general terms to the strengthening of the financial position of certain undertakings as compared with that of their competitors. Thus the Commission failed to assess and to demonstrate the impact of the measure at issue on trade between Member States, or the damage which it would inflict on competition. Accordingly, the Commission failed to fulfil its obligation, referred to in Joined Cases 296/82 and 318/82 *Netherlands and*

Leeuwarder Papierwarenfabriek v *Commission* [1985] ECR 809, paragraphs 22 to 24, to set out the reasons for the decisions which it adopts in the field of State aid with at least a minimum of useful information so that, if nothing else, it is possible to determine the relevant market, the position of the undertakings concerned on that market, the pattern of trade between Member States in the products in question and the exports of the undertaking allegedly benefiting from the aid.

112 The Commission contends that, where aid has been granted unlawfully, the Commission is not required to demonstrate the actual effect of that aid on competition or on trade between the Member States (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33; Case T-55/99 *ECTM* v *Commission* [2000] ECR II-3207, paragraph 103; and *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, paragraph 142).

— Failure to state sufficient reasons in the contested decision regarding the assessment of compatibility of the measure at issue with the common market in the light of Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty

113 The Italian Republic claims, in parallel with the arguments already set out at paragraphs 91 and 97 above, that the Commission failed to state sufficient reasons in the contested decision for ruling out the possibility that the measure at issue might be considered compatible with the common market in the light of Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

114 In response, the Commission merely repeats the arguments already set out at paragraphs 92 and 98 above regarding the inapplicability in the present case of Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

— Failure to state reasons in the contested decision regarding the recovery of the aid

115 Brandt maintains that the contested decision is vitiated by a statement of reasons which is far less than sufficient in so far as the Commission did not indicate the reasons why the Italian Republic was required to take all necessary measures to recover the aid granted to Brandt. According to Brandt, in a legal and factual context in which the lawfulness of such an action appears at the very least doubtful, the Commission should have explained the contested decision on that point, in order to enable the Court of First Instance and the interested parties to make their own points of view known.

116 The Commission maintains that, as regards Brandt, it did not specifically state reasons for directing the Italian Republic to recover the aid granted to Brandt on the basis of the measure at issue, because recovery is a normal and general consequence of a finding that a particular form of aid is incompatible with the common market and unlawful, and because the Commission was accordingly not required to examine Brandt's individual case.

Findings of the Court

117 According to settled case-law, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35, and Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraph 67).

118 The statement of reasons required under Article 253 EC must be appropriate for the type of the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

119 It follows, in particular, from those principles, that the Commission is required to demonstrate that the measure constitutes State aid and that it is incompatible with the common market. It is not, on the other hand, required to reply point by point to arguments lacking in any relevance relied on by the national authorities concerned or by intervening third parties (Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739, paragraph 108).

— Failure to state reasons in the contested decision regarding the application of the condition of selectivity

120 Regarding the first point on which it is alleged that the contested decision fails to state sufficient reasons, the Court considers that the items of information set out at paragraph 66 above, which are mentioned in that decision, are, taken as a whole, sufficient and clear enough to establish the selectivity of the measure at issue.

121 Consequently, the first part of this plea in law must be rejected.

— Failure to state reasons in the contested decision regarding the identification of the beneficiary of the aid granted on the basis of the measure at issue

122 The Court points out, first, that the contested decision sets out, at recital 18, the two categories of potential beneficiary of the measure at issue, namely;

— purchasers of undertakings in difficulty and under special administration, which have at least 1000 employees, where the purchaser has concluded a collective agreement by 30 April 2003 at the latest with the Italian Ministry of Labour and Social Affairs approving the transfer of workers; and/or

— undertakings in difficulty and under special administration, which have at least 1000 employees, and which are the subject of a transfer of ownership.

123 The Court considers, further, that, contrary to the submission of the Italian Republic, the Commission was not required to identify in its decision a particular beneficiary of the aid granted on the basis of the measure at issue and that it was entitled to limit itself, as indeed it did in recital 18 of the contested decision, to indicating the two specific categories of beneficiary. Moreover, the Court points out that, in the one case in which the measure at issue was applied, the aid granted had

the purpose of facilitating the takeover of an undertaking in difficulty. By so being, it facilitated a voluntary economic transaction between two parties. The Court refers in that regard to the case-law to the effect that the beneficiaries of a measure do not necessarily correspond to the persons to whom the State directly grants positive benefits or relief (*Germany* v *Commission*, paragraph 28).

124 Since the Commission based its examination of the measure at issue solely on information submitted by the Italian authorities, which did not contain documents specific to the sole case of application, the Court considers that, overall, the information given in recital 18 of the contested decision — including the non-exhaustive list of the factors on which identification of the actual beneficiary may depend — is sufficient.

125 Consequently, the second part of this plea in law must be rejected.

— Failure to state reasons in the contested decision regarding the adverse effects of the measure at issue on Community trade and competition

126 The Court of First Instance points out that it is settled case-law that, although in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (see *Italy and Sardegna Lines* v *Commission*, paragraph 66 and the case-law cited, and *Regione autonoma della Sardegna* v *Commission*, paragraphs 73 and 74).

127 However, the Commission is not required to demonstrate the actual effect of unlawful aid on competition and trade between Member States. The obligation for the Commission to submit such evidence would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (see Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 67, and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 85 and the case-law cited). Moreover, that case-law is substantiated by the wording of Article 87(1) EC, according to which not only aid which 'distorts' competition is incompatible with the common market but also aid which 'threatens' to do so (*Keller and Keller Meccanica* v *Commission*, paragraph 85).

128 In the present case, the Court notes that, at recital 20 of the contested decision, the Commission makes the following findings:

'The third and fourth conditions for the application of Article 87(1) [EC] are that the measure must distort or threaten to distort competition and must affect trade between Member States. The scheme under examination threatens to distort competition because it reinforces the financial position of some undertakings compared to those of their competitors. In particular, it threatens to distort competition and affect trade in cases where the recipients compete with products coming from other Member States, even if they do not export their own products. If they do not export their own products there is nevertheless an advantage to domestic production, because undertakings established in other Member States have less chance of exporting their products to the market in question.'

129 The Court points out in addition that, as has already been held at paragraphs 86 to 90 above, the Commission rightly found at recital 22 of the contested decision that,

by putting the measure at issue into effect before being authorised to do so by the Commission, the Italian authorities failed to fulfil their obligation under Article 88(3) EC.

130 Consequently, in accordance with the case-law cited above, the Court considers that the reasons stated in recital 20 of the contested decision are appropriate and sufficient.

131 In view of the foregoing, the third part of this plea in law must be rejected.

— Failure to state sufficient reasons in the contested decision regarding the assessment of the compatibility of the measure at issue with the common market in the light of Regulation No 2204/2002 and the Community guidelines on State aid for rescuing and restructuring firms in difficulty

132 Regarding the other point on which it is alleged that the contested decision failed to state sufficient reasons, the Court considers that the reasoning set out in sections 5.4 and 5.5 of the contested decision is clear and sufficient enough to justify the Commission's position, since the line of argument followed in those sections is the same as that adopted by the Court at paragraphs 93 to 96 and 99 to 103 above.

— Failure to state reasons in the contested decision regarding the recovery of the aid

133 The Court of First Instance points out that, according to settled case-law, the cancellation of unlawful aid by means of recovery, along with interest accruing thereon, is the logical consequence of the finding that it is incompatible with the common market (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47; and Case C-110/02 *Commission* v *Council* [2004] ECR I-6333, paragraph 41).

134 In the present case, the Commission made a finding, in Article 1 of the contested decision, that the measure at issue is incompatible with the common market, which has been confirmed by the Court at paragraph 104 above.

135 Consequently, in accordance with the case-law cited and in view of the fact that, as is held at paragraphs 140 to 145 below, the Commission was not obliged to examine Brandt's individual case, the Court considers that the Commission did not fail in its obligation to state reasons in the contested decision on that issue either.

136 In view of the foregoing, the fourth part of this plea in law must be rejected.

137 This plea in law must therefore be rejected in its entirety.

The recovery of the aid

Infringement of Regulation No 659/1999

— Arguments of the parties

138 Brandt submits that the Commission based its order directing the Italian Republic to take all necessary measures to recover the aid which Brandt had received individually on the basis of the measure at issue, solely on its examination of that measure, which it nevertheless classified as a general scheme. The Commission failed however to carry out an appropriate examination of the case in which the measure was actually applied and in which the alleged aid consists. Brandt submits therefore that in directing the Italian Republic to recover from Brandt that aid, which might perfectly well have been shown to be compatible with the common market following a routine examination carried out in accordance with Regulation No 659/1999, the Commission infringed inter alia the provisions of that regulation (Case 22/80 *Boussac* [1980] ECR 3427 and the Opinion of Advocate General Alber in *France* v *Commission* [2001] ECR I-2481, at I-2484, point 40). If the Commission intended to order any recovery whatsoever of the alleged aid from Brandt, it should have followed the procedure laid down in Article 11 of Regulation No 659/1999.

139 The Commission contends that the contested decision contains no injunction for provisional recovery of the aid within the meaning of Article 11 of Regulation No 659/1999. Recovery was ordered solely on the basis of the contested decision, in accordance with Article 14 of Regulation No 659/1999, which means that the substantive conditions and the procedural requirements laid down in Article 11 of that regulation did not have to be taken into consideration. That manner of proceeding is perfectly legitimate, as is clear from numerous judgments confirming negative decisions relating to aid schemes in which the Commission rightly provided for the recovery of aid granted under such schemes (*Belgium* v *Commission*, paragraph 64 et seq; *Germany* v *Commission*, paragraph 112 et seq; Case C-310/99

Italy v *Commission* [2002] ECR I-2289, paragraph 98 et seq; Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraph 107 et seq; Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 86 et seq, which confirms the judgment in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319; and Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraphs 103 to 108).

— Findings of the Court

140 Regarding Brandt's allegation that the Commission was required to examine its individual case, the Court of First Instance points out, first, that, by letter of 12 February 2003, the Italian authorities notified the measure at issue. In response to the request for additional information regarding the measure at issue which the Commission had sent to it and throughout the administrative procedure, the Italian Republic maintained that the measure at issue was a general scheme entailing a single case of application, that is to say, the takeover of Ocean by Brandt. However, the Italian Republic did not send the Commission any information regarding Brandt's individual case, such as the restructuring plan, for example.

141 The Court further points out that, as observed at paragraph 13 above, the Commission's decision to open the formal investigation procedure referred to in Article 88(2) EC was published in the Official Journal on 18 December 2003. Nevertheless, despite that publication, Brandt did not consider it necessary to submit observations during the formal investigation procedure. It is settled case-law that publication of a notice in the Official Journal is an appropriate means of informing all interested parties that such a procedure has been initiated (Case

323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17; Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* v *Commission* [2005] ECR II-1579, paragraph 48; and Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 81). Despite that publication, Brandt did not intervene during the formal investigation procedure and did not submit any additional observations to the Commission.

142 Consequently, the Court considers that the Commission was in possession of the notification of the measure at issue and therefore had sufficient information to analyse that measure. Whilst the Court accepts that a doubt could exist as to whether the measure at issue could constitute individual aid, it must nevertheless be held that the Commission had no specific information enabling it to make such a finding, apart from the Italian Republic's admission that the measure at issue had only been applied in one case. The Court points out in that respect that, in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme at issue without being required to examine each particular case in which it applies, in order to determine whether that scheme contains aid elements (*Italy and Sardegna Lines* v *Commission*, paragraph 51; *Greece* v *Commission*, paragraph 24; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 67).

143 The Court points out, in addition, that the contested decision indicates clearly at recital 38 that it concerns the measure at issue and the individual cases in which it is applied, but without prejudice to the possibility that individual aid granted under the scheme may subsequently, by Commission decision, be considered — in whole or in part — compatible with the common market on its own merits.

144 Consequently, the Court considers that the Commission was right to examine the measure at issue precisely as notified to it by the Italian Republic and, accordingly, that the Commission has not caused Brandt any procedural disadvantage.

145 In the light of the foregoing, the first part of this plea in law must therefore be rejected.

Breach of the principle of protection of legitimate expectations

— Arguments of the parties

146 Regarding the recovery injunction, Brandt relies, essentially, on the principle of protection of legitimate expectations and claims that the obligation to state reasons was not complied with.

147 The Commission contends that, even before the adoption of Regulation No 659/1999 and independently of the existence of an express provision in that respect, the Court of Justice had accepted that the cancellation of unlawful aid by recovery of the aid paid, along with interest accruing thereon, is the logical consequence of the finding that it is incompatible with the common market (*Belgium* v *Commission*, paragraph 66; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75; Case C-169/95 *Spain* v *Commission*, paragraph 47; Case C-310/99 *Italy* v *Commission*, paragraph 98; and *Commission* v *Council*, paragraph 41).

148 Article 14 of Regulation No 659/1999 expressly requires the Commission, thenceforth, to provide for the recovery of aid from the beneficiary, provided that this would not be contrary to a general principle of Community law, such as the principle of protection of legitimate expectations.

149 The Commission maintains, however, that, according to settled case-law, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC. A diligent businessman should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the unlawfulness of the decision to grant aid to such a degree that its revocation appears to be a breach of the principle of good faith (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

150 Whilst the Commission recognises, moreover, that beneficiaries of aid are entitled to rely on exceptional circumstances on the basis of which they could base a legitimate expectation that the aid was lawful and thus decline to return that aid, it states that, according to the case-law, in such a case it is for the national court before which the matter may be brought to assess the facts at issue, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice (*Commission* v *Germany*, paragraph 16, and Case C-310/99 *Italy* v *Commission*, paragraph 103).

151 The Commission contends that, in the present case, the measure at issue was introduced by an immediately applicable decree-law. It is therefore clear that the Italian Republic, despite notifying that measure and admitting, on doing so, that it was an aid scheme, failed to comply with the obligation laid down in Article 88(3) EC and implemented the measure at issue unlawfully, since the Commission had not yet decided whether it was compatible with the common market. In addition, the Commission maintains that the letter of notification of 7 February 2003 itself called on the Commission to assess whether the measure at issue was compatible with the common market in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

152 It was therefore clear from the outset that the measures implementing the measure at issue were capable of constituting State aid and that Article 88(3) EC had thus been infringed. According to the Commission, that was enough to rule out automatically any question of legitimate expectations.

— Findings of the Court

153 As is clear from the facts and as has been held at paragraphs 70 and 104 above, the measure at issue is incompatible with the common market, having been adopted in breach of the Community rules, both substantive and procedural, on State aid.

154 The Court considers it impossible in the present case that a diligent business operator like Brandt could fail to be aware of the unlawful nature of the measure at issue. The Court points out in that respect that it is settled case-law that, in view of the mandatory nature of the review of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure (*Commission* v *Germany*, paragraph 14, and *Alcan Deutschland*, paragraph 25). A diligent business operator must normally be in a position to confirm that that procedure has been followed, even if the State in question was responsible for the unlawfulness of the decision to grant aid to such a degree that its revocation appears to be a breach of the principle of good faith (*Alcan Deutschland*, paragraph 41, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 135).

155 Finally, the Court points out that it is also settled case-law that, if, like Brandt, the beneficiary of the aid considers that exceptional circumstances exist on which it was

entitled to base a legitimate expectation that the aid was lawful, and such a case is brought before a national court, it is for that court to assess the aid, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice (*Commission* v *Germany*, paragraph 16; Case C-310/99 *Italy* v *Commission*, paragraph 103; and *Fleuren Compost* v *Commission*, paragraph 136).

156 Consequently, the second part of this plea in law must also be rejected.

157 In view of the foregoing, this plea in law must therefore be rejected in its entirety.

Costs

158 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In Case T-239/04, as the Italian Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the Commission. In Case T-323/04, as Brandt has also been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby

1. Dismisses the actions;

2. Orders the Italian Republic to bear its own costs and to pay those incurred by the Commission in Case T-239/04;

3. Orders Brandt Italia SpA to bear its own costs and to pay those incurred by the Commission in Case T-323/04;

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon J.D. Cooke

Registrar President