Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

21 June 2012*

(Appeal — State aid — Scheme for the realignment of the value of assets for tax purposes — Banking sector — Taxation of capital gains — Substitute tax — Selectivity)

In Case C-452/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 September 2010,

BNP Paribas, established in Paris (France),

Banca Nazionale del Lavoro SpA (BNL), established in Rome (Italy), represented by R. Silvestri, G. Escalar and M. Todino, avvocati,

appellants,

the other party to the proceedings being:

European Commission, represented by V. Di Bucci and D. Grespan, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev, and C.G. Fernlund (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 8 February 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

Judgment

1 By their appeal, BNP Paribas and Banco Nazionale del Lavoro SpA (BNL) ('BNL') seek to have set aside the judgment of the General Court of the European Union of 1 July 2010 in Case T-335/08 *BNP Paribas and BNL* v *Commission* [2010] ECR II-3323 ('the judgment under appeal'), by which the Court dismissed their application for annulment of Commission Decision 2008/711/EC of 11 March 2008 on State aid C 15/07 (ex NN 20/07) implemented by Italy on the tax incentives in favour of certain restructured banks (OJ 2008 L 237, p. 70; 'the contested decision').

Background to the dispute

Preliminary observations

2 The contested decision relates to the Italian fiscal regime for the taxation of capital gains accruing following disposals between companies of company assets in consideration for stock.

3 An assets revaluation is an accounting operation by which the book value of fixed assets is stepped up to the current value. The revaluation surplus is a capital gain on the fixed assets and is depreciable.

4 A realignment is a tax operation by which the tax value is adjusted to the book value of the assets, giving rise to recognition of the capital gain for tax purposes which is then subject to tax.

5 In 1990, Italian legislation provided that, in principle, the transfer of a branch of a business or assets was regarded, for tax purposes, as a sale of company assets and triggered, in respect of company tax, payment of a tax on the capital gain stemming from the difference between the book value of the transferred asset and its value for tax purposes. A 'fiscal neutrality' or 'tax misalignment' mechanism allows the tax value not to be realigned immediately with the book value and thus enables payment of the tax on the capital gain to be postponed until a later date. That payment takes place on the date of the tax realignment.

6 The Italian legislation referred to in the contested decision relates to the taxation of capital gains following from the realignment of the value for tax purposes of certain assets with their book value. In this field, there was legislation which was specific to certain credit institutions following transfers of assets stemming from restructurings in the banking sector and legislation applicable to other companies.

The system of fiscal neutrality specific to certain credit institutions

7 Law No 218, containing provisions on the capital restructuring and consolidation of credit institutions governed by public law (Legge n. 218 su disposizioni in materia di ristrutturazione e integrazione patrimoniale degli istituti di credito di diritto pubblico), of 30 July 1990 (GURI No 182 of 6 August 1990; 'Law 218/1990'), aimed to rationalise banking activities in Italy and, in particular, to allow public entities operating in the banking sector to change their legal form into that of joint stock companies.

8 Since the transfer of assets by public banking entities ('the transferring entities') to credit institutions ('the recipient companies') was regarded, for tax purposes, as a sale of assets, a capital gain accrued from the difference between the current value of the assets transferred and their value for tax purposes. Corporation tax should have been payable on that capital gain.

9 In order to facilitate transactions entailing transfers of banking assets, Article 7(2) of Law 218/1990 provided for a system of partial fiscal neutrality pursuant to which 85% of the capital gain realised on the transfer of assets to recipient companies in consideration for stock in those companies under

Article 1 of that law was not recognised for tax purposes (and therefore not subject to tax) as long as that gain was not actually realised. The transferring entities were immediately taxed on the remaining 15% of the capital gain at the normal rate of corporation tax. At the same time, that 15% could be offset as an increase in the value for tax purposes of the shares received in consideration for the contribution (in the accounting records of the transferring entities) or in the value for tax purposes of the assets transferred (in the accounting records of the recipient companies).

10 That system of partial fiscal neutrality brought about a dual misalignment of the values for tax purposes both as regards the assets transferred (in the accounting records of the recipient companies) and the shares received by way of consideration (in the accounting records of the transferring entities).

11 Law No 489 on the extension of the period laid down in Article 7(6) of Law No 218 of 30 July 1990 (Legge n. 489 su proroga del termine di cui all'articolo 7, comma 6, della legge 30 luglio 1990, n. 218), of 26 November 1993 (GURI No 284 of 3 December 1993; 'Law 489/1993'), made it mandatory for public entities operating in the banking sector whose capital funds were held by the State to have adopted the form of joint stock companies, in accordance with the rules laid down in Law No 218/1990.

The systems of fiscal neutrality applicable to other companies

12 Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) was transposed into Italian law by Legislative Decree No 544 of 30 December 1992 (GURI No 9 of 13 January 1993; 'Legislative Decree 544/1992'). The objective of the directive was to bring to an end, through the introduction of a common system of taxation, distortions of competition arising from national legislation and to facilitate reorganisation operations among companies in different Member States by avoiding the imposition of tax in connection with the implementation of such operations, while at the same time safeguarding the financial interests of the Member States concerned.

13 The system of fiscal neutrality provided for by Directive 90/434 and by Legislative Decree 544/1992 was comparable to that provided for by Law 218/1990. It differed in so far as a system of total fiscal neutrality was provided for and the misalignment of the values for tax purposes was not dual but was only with regard to the assets transferred, that is to say, was only in the accounting records of the recipient companies. That system was applicable in transfers between companies in different Member States.

14 Legislative Decree No 358 on the reorganisation of income taxes applicable to disposals and transfers of undertakings, mergers, divisions and exchanges of shares (decreto legislativo n. 358 su riordino delle imposte sui redditi applicabili alle operazioni di cessione e conferimento di aziende, fusione, scissione e permuta di partecipazioni), of 8 October 1997 (GURI No 249 of 24 October 1997; 'Legislative Decree 358/1997'), extended the system of fiscal neutrality provided for by Legislative Decree 544/1992 to transfers between Italian companies.

15 Article 4 of Legislative Decree 358/1997 provided that the transfer of the assets of a branch of business between companies in Italy was fiscally neutral, provided that the value for tax purposes of the assets transferred was attributed to the shares received by the transferor and the assets received acquired the value for tax purposes that they had had when in the hands of the transferor. That system, in the same way as the system established by Law No 218/1990, thus brought about a dual misalignment for tax purposes.

16 Article 3 of Legislative Decree 358/1997 proposed an alternative solution. At the time of the transfer, it was possible to pay a substitute tax of 19% of the capital gain realised. In that case, there was no misalignment for tax purposes.

The tax realignment schemes

17 Legislative Decree No 41 introducing urgent measures for the consolidation of public finances and for employment in less favoured areas (decreto legislativo n. 41 su misure urgenti per il risanamento della finanza pubblica e per l'occupazione nelle aree depresse), of 23 February 1995 (GURI No 45 of 23 February 1995), granted companies to which assets had been transferred under Article 7(2) of Law 218/1990 the right to realign the value for tax purposes of the assets transferred and that of the shares received by the transferring entities with the higher book values of those assets or shares.

18 That realignment resulted in the end of the suspension of payment of tax and was therefore subject to payment by the recipient companies of a tax equivalent to 14% of the capital gain so far as concerns the realignment of the value for tax purposes of the assets transferred or 18% if the realignment concerned also the value for tax purposes of the shares received by the transferring entities. That right of realignment could only apply to assets transferred under Law 218/1990 and could not be extended to other assets.

19 Law No 342 on tax measures (Legge n. 342 su misure in materia fiscale), of 21 November 2000 (Ordinary Supplement to GURI No 276 of 25 November 2000; 'Law 342/2000'), put in place a scheme for accounting revaluation of assets and a scheme for tax realignment of the book values for the purposes of the companies concerned by Law 218/1990 and for the purposes of the other companies.

20 Specifically, Article 10 of Law No 342/2000 provided for the revaluation of certain assets held by undertakings. That article authorised undertakings to 'revalue tangible and intangible assets, except for those the production or exchange of which constitutes the undertaking's principal business, and shareholdings in controlled companies or companies that are affiliated in accordance with Article 2359 of the Civil Code, where those shareholdings constitute capital assets as recorded on the balance sheet for the financial year ending no later than 31 December 1999'. That revaluation scheme required the payment, in relation to the higher values recorded on the balance sheet following revaluation, of a substitute tax at the rate of 19% in respect of depreciable assets and at the rate of 15% in respect of non-depreciable assets (Article 12 of that law).

21 Moreover, Article 14 of that law provided for a scheme for tax realignment of the assets referred to in Article 10 of Law No 342/2000, realigning the values for tax purposes with the higher book values recorded on the balance sheet. Article 14 thus provided that '[t]he provisions in Article 12 [could] be applied, for the purposes of the tax on the income of natural persons, the tax on the income of legal persons and the regional tax on production activities, for the recognition of the higher values recorded on the balance sheet mentioned in Article 10 … of the assets referred to in Article 10'.

22 Articles 17 and 18 of Law 342/2000 governed the scheme for realignment of values for tax purposes with the book values recorded on the balance sheet for companies which had been reorganised pursuant to Law No 218/1990 or Article 4 of Legislative Decree 358/1997.

23 Article 17 provided that the companies to which assets had been transferred under Law 218/1990 could apply a substitute tax at the rate of 19% to the difference between the value of the assets received as a result of those contributions and the value attributed to those assets for tax purposes. The value of the assets retained is the value shown on the balance sheet for the financial year ending before the date of entry into force of Law 342/2000, that is 31 December 1999. The difference that was subject to the substitute tax was deemed to be a cost recognised for tax purposes of the shares received by the transferring entities.

24 By paying that tax, the companies which held the banking assets and those which possessed the shares in those companies could realign the values for tax purposes, respectively, of the assets and the shares in question. Provision was also made for recipient companies to be able to apply a substitute tax at the rate of 15% if they decided to realign only the value for tax purposes of those assets without realigning

the value of the shares (single realignment). In that latter case, the difference that was subject to tax was not recognised for tax purposes in respect of transferring entities and only recipient companies benefited from the system for realignment.

25 Article 19 of Law 342/2000 provided that the scheme in Article 17 of that law applied to companies to which the assets had been transferred pursuant to Article 4(1) of Legislative Decree 358/1997.

26 Article 18 of that law provided that the transferring entities, in the context of transactions carried out under Law 218/1990, could apply a substitute tax at the rate of 19% on the difference between the value of the shares received and their value that was recognised for tax purposes. The value to be attributed to the shares was the value shown on the balance sheet for the financial year ending on 31 December 1999. That difference was deemed to be a cost of the shares received that was recognised for tax purposes. That difference was not deemed to be a cost recognised for tax purposes for the recipient companies.

27 Article 3(1) of Law No 448 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2002) (Legge n. 448 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2002)), of 28 December 2001 (Ordinary Supplement to GURI No 301 of 29 December 2001; 'Law No 448/2001'), extended the applicability of the revaluation and realignment schemes provided for in Articles 10 and 14 of Law 342/2000 to assets recorded on the balance sheet for the financial year ending before 31 December 2000, by providing for payment of the substitute tax at the rates of 19% in respect of depreciable assets and 15% in respect of non-depreciable assets.

28 Article 3(11) of Law 448/2001 extended the applicability of the revaluation scheme established in Articles 17 to 19 of Law 342/2000 to assets recorded for the financial year ongoing at 31 December 2001. The rates of the substitute tax were set at 12% in the case of dual realignment and 9% in the case of single realignment.

29 The Italian corporation tax system underwent a reform in 2003 as a result of Legislative Decree No 344 on the reform of corporation tax pursuant to Article 4 of Law No 80 of 7 April 2003 (decreto legislativo n. 344 su riforma dell'imposizione sul reddito delle società a norma dell'articolo 4 della legge 7 aprile 2003, n. 80), of 12 December 2003 (Ordinary Supplement to GURI No 291 of 16 December 2003; 'Legislative Decree 344/2003').

30 Law No 350 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2004) (Legge n. 350 su disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004)), of 24 December 2003 (Ordinary Supplement to GURI No 299 of 27 December 2003; 'Law 350/2003'), again extended the revaluation and realignment scheme provided for in Law 342/2000.

31 Article 2(25) of Law 350/2003 amended Article 10 of Law 342/2000 so as to enable companies to have recourse to the voluntary revaluation mechanism for assets recorded on the balance sheet for the financial year ending no later than 31 December 2002. That provision also authorised the companies to use the realignment scheme provided for in Article 14 of Law 342/2000 for assets recorded on the balance sheet for the financial year ending no later than 31 December 2002. The substitute tax remained set at the rate of 19% for depreciable assets and 15% for non-depreciable assets.

32 Article 2(26) of Law 350/2003 stated that the provisions in, inter alia, Articles 17 and 18 of Law 342/2000 could be applied to assets recorded on the balance sheet for the current financial year as at 31 December 2003. The rate of substitute tax was set at 12% in the case of dual realignment and 9% in the case of single realignment.

33 By contrast, that law did not extend the application of Article 19 of Law 342/2000, that is to say, the realignment for tax purposes in respect of the transfers of company assets under Article 4 of Legislative Decree 358/1997.

The administrative procedure and the contested decision

34 Since Law 350/2003 was not notified to the European Commission for State aid review pursuant to Article 88(3) EC, the Commission decided to initiate a preliminary review of the scheme at issue.

35 In the light of the response provided by the Italian authorities, the Commission, by letter of 30 May 2007, notified the Italian Republic of its decision to initiate the procedure laid down in Article 88(2) EC and invited interested parties to submit their comments.

36 Having taken note of the comments submitted, the Commission adopted the contested decision.

37 After having described the rules governing the tax treatment of capital gains under the Italian tax system, the Commission, for the purposes of the examination as to whether there was a selective advantage, first held, in point 86 of the grounds of the contested decision, that the tax misalignment scheme put in place in respect of banking companies by Article 7(2) of Law 218/1990 and by Article 4 of Legislative Decree 358/1997 in respect of the other undertakings did not constitute State aid 'because the fiscal values of the assets exchanged remained unaltered, so that the fiscal gains did not materialise and no tax advantage was in conclusion granted. … The Commission therefore concludes that the tax neutrality was justified by the inherent logic of the tax system and does not constitute State aid'.

38 The Commission then concluded that the tax realignment schemes put in place by Laws 342/2000 and 448/2001 constituted general tax measures justified by the inherent logic of the system and did not therefore constitute State aid. The substitute tax did not provide any competitive advantage to the companies in question because it was applied under identical conditions to all companies, whether or not they were banking companies.

39 By contrast, the Commission held that the tax realignment scheme resulting from Article 2(26) of Law 350/2003 did not constitute a general measure because it applied exclusively to the capital gains realised by certain credit institutions, as a result solely of the reorganisations effected under Law 218/1990. The other credit institutions and the other companies concerned by the transactions implemented under Legislative Decree 358/1997 were not able to benefit from the same tax realignment scheme.

40 According to the Commission, the scheme provided for by Article 2(25) of Law 350/2003 'is not a tax realignment of values realigned following tax-neutral reorganisations but rather a tax revaluation scheme which [made it possible] to realise the [suspended] gains deriving from the adjustment of the [base] value of the assets held by the beneficiary companies to their current value'. The schemes provided for in Articles 2(25) and 2(26) of Law 350/2003 are, it submits, not equivalent in view of the difference between the statutory substitute tax rates provided for by the two schemes.

41 The Commission also held that, in so far as the system of fiscal neutrality provided for by Law 218/1990 and that provided for by Law 358/1997 are equivalent, the Italian legislature should have applied the same tax realignment scheme in 2003.

42 According to the Commission, the tax advantage provided for in Article 2(26) of Law 350/2003 cannot be regarded as '*de minimis*'.

43 In terms of the justification relating to the nature of the tax scheme, the Commission held that the scheme applicable to the banking sector 'does not represent an adaptation of the general system to the particular characteristics of the banking sector, but, rather, a selective advantage which has an impact on improving the competitiveness of certain undertakings'.

44 The Commission concluded from this that the scheme granted to certain credit institutions was a specific advantage which was not justified by the nature of the tax system.

45 In the light of all those considerations, the Commission decided that the derogating tax scheme implemented by the Italian Republic under Article 2(26) of Law 350/2003 ('the tax scheme at issue') constituted State aid and was incompatible with the common market.

The procedure before the General Court and the judgment under appeal

46 By application lodged at the Registry of the General Court on 14 August 2008, the appellants in the present case brought an action for annulment of the contested decision.

47 They put forward two pleas for annulment alleging, first, infringement of Article 87(1) EC in so far as the Commission incorrectly established the existence of State aid, since the scheme at issue did not confer any advantage for the purpose of that provision and, secondly, infringement of the obligation to state reasons as a result of an error of fact.

48 The General Court first responded to the second plea, finding that sufficient reasons were stated for the contested decision. As regards the first plea, it held that the Commission did not err in using the normal tax rate as a reference framework for the purpose of determining whether there was an economic advantage. It then held that the Commission correctly decided to compare the tax scheme at issue with the normal tax scheme. It lastly rejected the appellants' argument that the advantage granted to certain companies was justified by the nature and overall structure of the tax system.

The procedure before the Court and the forms of order sought

49 By their appeal, the appellants claim that the Court should:

— set aside in its entirety the judgment under appeal and, accordingly,

  — uphold the form of order sought in the application initiating proceedings at first instance for the annulment of the contested decision in its entirety,

  or

  — in the alternative, refer the case back to the General Court for reconsideration in the light of the judgment of the Court of Justice;

— order the Commission to pay the costs.

50 The Commission contends that the Court should:

— dismiss the appeal in its entirety on the ground that it is in part inadmissible or ineffective and entirely without foundation;

— order the appellants to pay the costs of the proceedings at both instances.

The appeal

The Commission's preliminary observations

51 Without lodging a cross-appeal, the Commission noted, in its response, that it had submitted before the General Court that BNL's action was inadmissible since it had not received the aid granted. The General Court held that there was no need to examine BNL's standing to bring legal proceedings in so far as BNP Paribas' action was admissible. At the hearing, the Commission did not request the Court of Justice to reconsider this issue.

The third ground of appeal

Arguments of the parties

52 By their third ground of appeal, which it is appropriate to examine first, the appellants criticise the General Court for having given *ex novo* reasons without any basis in the contested decision as regards determining the reference framework for the purpose of assessing whether the tax scheme at issue is selective.

53 First of all, they criticise the General Court for having analysed the characteristics of the general realignment scheme, for having compared it to the tax scheme at issue and for having decided that the two schemes had a different purpose. Not only did the Commission not carry out such an examination in the contested decision, but the General Court also erred by failing to recognise that the general realignment scheme also allowed gains realised following transfers of assets made under Law 218/1990 to be realigned.

54 The General Court distorted the facts by not taking into account the appellants' arguments concerning a circular from the Italian Ministry of Finance and, incorrectly, declared inadmissible an item of evidence which they produced at the stage of the reply.

55 The Commission primarily takes the view that that ground is ineffective and unfounded. The reasons criticised by the appellants are given for the sake of completeness, since in paragraph 173 of the judgment under appeal the General Court clearly stated that the general realignment scheme was not the reference framework. Paragraph 185 of the judgment under appeal dealt with the tax scheme at issue and specified that the existence of other derogatory schemes does not call into question the finding that that scheme was derogatory in nature.

56 In the alternative, the Commission asserts that the general realignment scheme and the tax scheme at issue were not identical. Moreover, the fact that banking institutions to which assets were transferred under the scheme laid down by Law 218/1990 had the option to realign certain assets under the general realignment scheme and had made use of that option did not in any way alter the fact that the tax scheme at issue was reserved to them and was more favourable. Lastly, the contested decision limited recovery of the aid to the difference between the substitute tax reserved to banking institutions and that paid in respect of transactions under the general realignment scheme.

Findings of the Court

57 It is apparent from the judgment under appeal and the documents included in the file that the appellants submitted before the General Court that, contrary to what the Commission stated in point 97 of the grounds of the contested decision, the normal tax rules for company profits could not be used as a valid basis for comparison and thus as a reference framework for the assessment of the selectivity of the tax scheme at issue.

58 The appellants then stated that, even if those rules were able to be used as a reference framework, the tax scheme at issue had not conferred any economic advantage on them.

59 The appellants lastly claimed that the general realignment scheme could not be used as a reference framework either, since its characteristics were totally different from those of the tax scheme at issue. Even if that were the case, the tax scheme at issue did not confer any economic advantage as against the general realignment scheme.

60 It is apparent from those submissions that, according to the appellants, neither the normal tax rules for profits nor the general realignment scheme could be used as a reference framework and that, even if that were the case, the tax scheme at issue did not confer any economic advantage as against one or other of those schemes.

61 In order to respond to those arguments, the General Court, in paragraph 161 of the judgment under appeal, first of all duly reiterated the Court of Justice's case-law on the determination of the reference framework for the purpose of checking whether a measure is selective in the following terms:

'The Court of Justice has stated that the determination of the reference framework for the purpose of determining whether a measure is selective has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation ([Case C-88/03] *Portugal* v *Commission* [[2006] ECR I-7115], paragraph 56), that is to say, the taxation normally applicable to undertakings which are, in the light of the objective pursued by the scheme in question, in a factual and legal situation that is comparable to that of the undertakings benefiting from the scheme ([Case C-143/99] *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [[2001] ECR I-8365], paragraph 41).'

62 The General Court then, in paragraphs 165 to 167 of the judgment under appeal, made the following observations:

'165 It is necessary, first, to consider the [appellants'] complaints relating to the Commission's choice of normal [corporation] tax as the reference framework and the finding made by that institution, within that framework, that there was a selective economic advantage.

166 In the present case, the Commission found that, although the system of fiscal neutrality established by Law … 218/1990 resembled, as regards gains realised but not recognised, the system of fiscal neutrality under Article 4 of … Decree … 358/1997 [the second sentence of point 99 of the grounds of the contested decision] — a finding which dictated that any realignment scheme that may be introduced by the legislature should be applied without distinction, under the same conditions, to gains realised in the context of either of those two systems [point 88 of the grounds of the contested decision] — the Italian Republic had limited the benefit of the realignment scheme under Article 2(26) of Law … 350/2003 to undertakings reorganised under Law … 218/1990 [point 90 of the grounds of the contested decision].

167 On the basis of those considerations, the Commission concluded that the Italian Republic had conferred a selective advantage on those undertakings, corresponding to the difference between the tax actually paid pursuant to Article 2(26) of Law … 350/2003 and the normal tax that would have been paid if the realignment had taken place in the absence of the preferential scheme [point 91 of the grounds of the contested decision].'

63 In paragraphs 169 to 172 and paragraph 186 of the judgment under appeal, the General Court then responded to the appellants' complaints as regards the Commission's choice of using the normal tax rules for profits as a reference framework, and dismissed them in the following terms:

'169 However, it is not for the Commission, in examining a scheme in the light of the rules on State aid, to envisage the subjective choices that might have been made by the beneficiaries of that scheme in the absence of such a scheme but to examine the scheme in order to determine whether it entails, from an objective standpoint, an economic advantage by reference to the tax provisions from which it derogates which would normally have been applicable in the absence of the scheme (see, to that effect, Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 118). The fact that, in the absence of the realignment scheme at issue, the undertakings concerned would allegedly not have disposed of their assets is, in the context of such an objective assessment, irrelevant.

170 The [appellants] also claim … that the use of the normal tax as the reference framework is inappropriate because, whilst the application of the tax normally applied in the event of disposal would undoubtedly eliminate any misalignment of the assets for the establishment to which the assets were transferred under Law … 218/1990, it would, on the other hand, have no effect on the misalignment of the shares received by the transferring entity.

171 As regards the [appellants'] reference to the situation of the transferring entities under Law … 218/1990, it should be noted that the contested decision does not in any way concern those entities, but simply the banks to which assets were transferred under that law. The Commission considered in the contested decision whether there was an advantage, and concluded that that was the case, solely in connection with those banks.

172 It follows that the repeated references made by the [appellants] in the present action … to the situation of the transferring entities under Law … 218/1990, in particular to the fact that the 2003 tax reform did not remove for those entities the risk of the double taxation of suspended gains distributed as dividends, are irrelevant.

...

186 It follows from the above considerations that, contrary to the [appellants'] claims, the Commission did not err in using the normal tax as a reference framework for the purpose of determining whether there was an economic advantage.'

64 Lastly, the General Court responded to the appellants' complaints relating to the fact that the general realignment scheme could not be used as a reference framework, while observing, in paragraph 173 of the judgment under appeal, that the scheme set out in Article 2(25) of Law 350/2003 had not been chosen by the Commission as a reference framework, as follows:

'With regard to the [appellants'] argument that the realignment scheme under Article 2(25) of Law … 350/2003 was not, to any greater extent than the normal tax, a valid reference framework …, — which, moreover, contradicts the argument set out at paragraph 174 below — it is sufficient to point out that the Commission did not in the contested decision use the scheme established by Article 2(25) of Law … 350/2003 as a reference framework.'

65 The General Court then responded, in paragraphs 182 and 183 of the judgment under appeal, to the appellants' arguments relating to the comparison between the tax scheme at issue and the other realignment schemes as follows:

'182 In view of that difference in the objectives of the two realignment schemes, it was not necessary to compare realignment under Article 2(26) of Law … 350/2003 with realignment under Article 2(25) of that law.

183 The only measure with which realignment under Article 2(26) of Law … 350/2003 could have been compared was the realignment measure in Article 19 of Law … 342/2000, by which the legislature had extended the benefit of realignment under Article 17 of Law … 342/2000 to undertakings that had been reorganised under Article 4 of Legislative Decree … 358/1997.'

66 It is apparent from those considerations that, in contrast to what is stated in the ground of appeal, the General Court did not give reasons which were unrelated to the contested decision since, in paragraphs 165, 173 and 186 of the judgment under appeal, it observed that the reference framework chosen by the Commission was the normal tax rules for profits and it was only to respond to the appellants' arguments that it compared the tax scheme at issue and the general realignment scheme. On that issue, the appellants state, in point 15 of their reply in the proceedings before the Court of Justice, that those arguments were not submitted in the alternative. It follows that the General Court was required to respond to them.

67 In addition, in paragraph 182 of the judgment under appeal, the General Court held that there was no need to compare the tax scheme at issue with the general realignment scheme, which was exactly what the appellants had maintained in points 98 to 100 of their application initiating proceedings before the General Court and as they point out in point 77 of their appeal. It is thus apparent that the appellants have been successful and that they have no legal interest in challenging the judgment under appeal on that issue.

68 Concerning the complaints that the General Court distorted the facts regarding a circular from the Italian Ministry of Finance and that it incorrectly declared inadmissible an item of evidence which the appellants produced at the stage of the reply, it must be observed that the reasoning at issue was expounded by the General Court in response to the appellants' arguments that the tax scheme at issue had not conferred any economic advantage on them in the light of the general realignment scheme. However, it is apparent from point 101 of the application submitted to the General Court that those arguments were made solely in the alternative, in the event that the General Court were to hold that the tax scheme at issue was comparable to the general realignment scheme. That was not the case, as stated in paragraph 66 of this judgment.

69 It follows from all those considerations that the third ground of appeal must be declared in part inadmissible and in part unfounded.

The fourth ground of appeal

Arguments of the parties

70 The appellants criticise the General Court for having stated, in paragraph 193 of the judgment under appeal, that it was not important that the scheme for the transfer of assets under Law 218/1990 was made obligatory from the entry into force of Law 489/1993 since that scheme had been optional for the first three years it was applied.

71 The appellants consider this reasoning to be flawed. They submit that it was the obligatory nature of the scheme for the transfer of assets under Law 218/1990 which led the Italian tax legislature to put in place a tax realignment scheme with payment of a substitute tax.

72 The Commission contends that that ground of appeal is inadmissible because it asks the Court to examine the facts. In the alternative, the ground of appeal is unfounded, as the appellants are relying on unverified assumptions.

Findings of the Court

73 Before the General Court, the appellants claimed that, even if the tax scheme at issue had conferred an economic advantage on them, that advantage was not selective. In support of that contention, they stated that the companies to which the tax scheme at issue was applied, that is to say, the companies to which assets had been transferred under Law 218/1990, were in a different legal situation from that of the other companies to which assets had been transferred. That difference stemmed from the fact, inter alia, that restructurings in the banking sector were not carried out spontaneously but on the basis of a recommendation and then, after the entry into force of Law 489/1993, an obligation.

74 In rejecting those arguments that there was a difference between the two categories of companies to which assets had been transferred, the General Court, in paragraph 193 of the judgment under appeal, made the following finding:

'Accordingly, with regard to the fact that the scheme established by Law … 218/1990 was mandatory and that public credit institutions were therefore under an obligation to transfer their banking assets to joint stock companies …, it is sufficient to point out that that obligation arose only in 1993 … Before that obligation was introduced, Law … 218/1990 already recognised that the transfer of assets under that law by public credit institutions was neutral for tax purposes.'

75 It is thus apparent that the General Court merely found that it had been possible for transfers of banking assets to joint stock companies under the system of fiscal neutrality to be carried out on a voluntary basis from the entry into force of Law 218/1990. Given those findings, the General Court

was able to conclude that the appellants' argument that the justification for the difference between the two categories of companies to which assets had been transferred resulted from the obligatory nature of the transfers of assets in the banking sector was irrelevant.

76 Consequently, the fourth ground of appeal is unfounded.

The fifth ground of appeal

Arguments of the parties

77 The appellants criticise the General Court for having held, in paragraph 191 of the judgment under appeal, that the selectivity of the tax scheme at issue was proved by the fact that the Italian legislature had put in place, when drafting Law 342/2000, a uniform tax realignment scheme for the recognition of suspended gains arising as a result of company reorganisations under one or other of the systems of fiscal neutrality.

78 According to the appellants, it is apparent from the Court of Justice's case-law that whether a tax measure is selective or not must be assessed in the light simply of its likely effects from a tax point of view and that the prior legal situation of the presumed beneficiary of the measure is not important. The General Court should not have relied on the situation prior to 2003.

79 The Commission primarily contends that that ground of appeal is inadmissible in so far as the Court is being requested to assess the national law, which is an issue of fact. As to the substance, the Commission submits that even if, for the purposes of the application of Article 107 TFEU, it is not important whether the situation of the beneficiary of the measure is improved or worsened in relation to the state of the law prior to that measure, that does not mean that the General Court should not take into account the fact that certain situations were treated identically in the past.

Findings of the Court

80 As stated in paragraph 73 of this judgment, the appellants sought to establish that the companies to which assets had been transferred under Law 218/1990 were in a different legal situation from that of the other companies to which assets had been transferred.

81 In contrast to what is stated in the ground of appeal, the General Court, in paragraph 191 of the judgment under appeal, did not conclude that the tax scheme at issue was selective but merely held that the tax realignment schemes of those two categories of companies under Law 342/2000 were uniform. In addition, the General Court relied on other grounds in order to decide that the two categories of companies were not in different situations.

82 It follows that the fifth ground of appeal is unfounded.

The first two grounds of appeal

Arguments of the parties

83 By the first ground of appeal, the appellants criticise the General Court for having approved, immediately and without examining whether it was well founded, the Commission's position according to which the transferring entities did not fall within the scope of the contested decision. They state that they claimed before the General Court that the tax scheme at issue was consistent with the inherent logic of the Italian tax system and that the companies to which assets had been transferred under Law 218/1990 were in a specific situation which was different from that of the companies to which assets had been transferred under Article 4 of Legislative Decree 358/1997.

84 The appellants state that they had stressed that there was no inequality of treatment between the companies in the two categories. The tax misalignment scheme provided for in Article 4 of Legislative Decree 358/1997 could not lead to double taxation after the adoption of Legislative Decree 344/2003, which was not true of the scheme for capital gains accruing following transfers of assets under Law 218/1990.

85 In the second ground of appeal, the appellants state that they claimed before the General Court that the application of the tax scheme at issue only to companies and entities which had transferred assets under the system of fiscal neutrality established by Law 218/1990 was justified by the nature of the Italian tax system. At the time of the adoption of Law 350/2003, those companies and entities were the only ones at risk of double taxation of the capital gains relating to those transfers and the tax scheme at issue aimed specifically to neutralise that risk.

86 They submit that the General Court rejected those arguments solely on the basis that the contested decision concerned only companies to which assets had been transferred under Law 218/1990 and not the transferring entities. Thus, the General Court did not examine in sufficient depth whether the tax scheme at issue was justified by the nature and overall structure of the Italian tax system or whether it resulted directly from the founding or guiding principles of that tax system. The reasons stated for the contested decision are therefore inadequate. Moreover, the assessment of whether a State measure is selective or not should be carried out in the light of the objective pursued by it.

87 According to the appellants, the tax realignment schemes providing for the payment of a substitute tax did not only have the aim of tax realignment, but also sought to ensure that capital gains were only taxed once. Consequently, the realignment schemes were justified only if the companies and entities which had transferred assets were at risk of double taxation.

88 That risk of double taxation disappeared in the case of companies which had transferred assets under Legislative Decree 358/1997 on the introduction of the ‘shareholding exemption’ scheme by a tax reform which entered into force with Legislative Decree 344/2003. As a result of the ‘shareholding exemption’ scheme, the system of fiscal neutrality put in place by Legislative Decree 358/1997 no longer gave rise to a risk of double taxation, but a single taxation of solely the recipient company. However, that risk continued to exist in respect of companies and entities which had transferred assets under Law 218/1990. That is why the tax realignment scheme was extended for those companies and entities.

89 Contrary to the Commission’s submissions, Article 19 of Law 342/2000, in referring to Article 17 of that law, included the situation of companies to which assets had been transferred under Legislative Decree 358/1997 and also that of companies transferring assets. That is apparent from the actual wording of Article 17. The omission of a reference to Article 18 of Law 342/2000 means only that the transferring companies could not choose to pay of their own accord the higher value of the shareholding recorded following the transfer. Lastly, Article 18 concerned only companies which had carried out transfers and not transferring entities that were not in the legal form of a company.

90 As regards the first ground of appeal, the Commission submits, as a preliminary point, that the entities which had transferred assets under Law 218/1990 have become banking foundations, which are neither credit institutions nor, in the majority of cases, undertakings, and which are not subject to the rules on State aid. They are subject to a tax system which is different from that of companies. Moreover, those banking foundations have no further link with the recipient companies.

91 The General Court was correct to state that the contested decision did not concern those entities and that the fact that they may be taxed because of a risk of double taxation was not a fact such as to justify the grant of a selective advantage to the recipient companies. The General Court thus fully exercised its power of review.

92 Furthermore, the appellants have not proved justification by the nature and overall structure of the Italian tax system. In any event, the Court of Justice could substitute its own grounds or reject, on the substance, the argument that the selectivity of the measure is justified by the nature and overall structure of the system.

93 As regards the second ground of appeal, the Commission contends primarily that it is inadmissible. The appellants merely repeat their arguments at first instance without identifying the error of law allegedly committed by the General Court. The issues relating to national law constitute issues of fact in respect of which the General Court has exclusive jurisdiction. In the context of an appeal, a claim alleging an incorrect assessment of national law is thus inadmissible, unless that law has been fundamentally misread.

94 In the alternative, the Commission claims that the second ground of appeal should be rejected. First, concerning the issue of whether the selectivity of the tax scheme at issue could have been justified by the inherent logic of the system, it disputes the appellants' contention that the selective nature of a State measure must be evaluated having regard to that measure's objective. That contention is contrary to the Court of Justice's case-law. Moreover, the General Court did not merely state that the transferring entities were not concerned by the contested decision, but also pointed out that the fact that they might be taxed does not justify the recipient companies being granted an advantage.

95 Furthermore, it submits that companies transferring assets in transactions other than those under Law 218/1990 never benefited from the tax realignment scheme. Article 19 of Law 342/2000 stated that the provisions of Article 17 of that law applied to companies to which assets had been transferred under Legislative Decree 358/1997. No reference was made to the provisions of Article 18 of that law, which related to transferring entities.

Findings of the Court

96 By these grounds of appeal, the appellants criticise the General Court for not having exercised its power of review to examine whether the tax scheme at issue was justified by the nature and general scheme of the Italian tax system.

97 It is apparent from paragraphs 124 to 130 and from paragraph 200 of the judgment under appeal that the appellants submitted that the tax scheme established in Articles 17 and 18 of Law 342/2000 was extended only in respect of companies and entities which took part in transfers of assets in exchange for shares under the system of fiscal neutrality provided for in Article 7(2) of Law 218/1990. They argued that, following the entry into force of Legislative Decree 344/2003 and the establishment of the special exemption regime known as 'shareholding exemption', the risk of double taxation disappeared for the companies and entities which carried out such transactions under the system of fiscal neutrality provided for in Article 4 of Legislative Decree 358/1997.

98 The Commission contended, as set out in paragraphs 150 to 152 of the judgment under appeal, that the entities which had transferred assets in transactions carried out under the scheme laid down by Law 218/1990 were no longer credit institutions and that, in the majority of cases, they were no longer undertakings. In respect of the risk of double taxation, the Commission observed that the entities which had transferred assets in transactions carried out under Legislative Decree 358/1997 had never benefited from the tax realignment scheme set out in Article 18 of Law 342/2000.

99 The General Court responded to that line of argument in paragraphs 199 to 202 of the judgment under appeal as follows:

'199 Next, it is necessary to consider the [appellants'] complaint … alleging that the Commission was wrong to consider that the selective nature of the scheme established by Article 2(26) of Law … 350/2003 could not be justified by the inherent logic of the system.

200 In that context, the applicants submit essentially … that the 2003 tax reform eliminated any risk of the double taxation of the gains arising on the transfer of assets under the system of fiscal neutrality established by Article 4 of Legislative Decree … 358/1997, namely the taxation of both the companies transferring and the companies in receipt of assets. On the other hand, that reform did not remove the risk of the double taxation of the gains arising in connection with the transfer of assets under the system of fiscal neutrality introduced by Law … 218/1990. The [appellants] maintain that that explains the decision of the Italian legislature to extend the realignment scheme under Articles 17 and 18 of Law … 342/2000 only to assets transferred in the context of Law … 218/1990.

201 However, it should be recalled that the contested decision does not concern transferring entities but only banking establishments to which assets were transferred under Law … 218/1990 and the economic advantage reserved to those establishments by the scheme at issue. Consequently, the fact that the transferring entities under Law … 218/1990 might have been taxed because there was a possibility of double taxation cannot be a factor that justifies a selective advantage being conferred on recipient banks by means of Article 2(26) of Law … 350/2003.

202 The Commission was therefore correct to consider, at recital 105 in the preamble to the contested decision, that the scheme introduced by Article 2(26) of Law … 350/2003 conferred a selective advantage which had the effect of improving the competitiveness of credit institutions which were reorganised under Law … 218/1990 by comparison with other undertakings.'

100 According to the Court's case-law, however, State aid, as defined in the Treaty on the Functioning of the European Union, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must in principle and having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see, inter alia, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111).

101 Moreover, according to equally well-established case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see to that effect, inter alia, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 42; *Portugal* v *Commission*, paragraph 52; *British Aggregates* v *Commission*, paragraph 83; and Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* [2011] ECR I-11113, paragraph 145).

102 It is apparent from those considerations that, in carrying out the necessary comprehensive review of the characterisation of the tax scheme at issue as State aid, the General Court had to examine whether the differentiation between undertakings arising from that scheme was due to the nature or general scheme of the tax system of which it formed part.

103 Admittedly, the Court of Justice has held that judicial review is limited with regard to whether a measure comes within the scope of Article 107(1) TFEU, in a case where the appraisals by the Commission are technical or complex in nature (see, inter alia, *France* v *Ladbroke Racing and Commission*, paragraph 25, and *British Aggregates* v *Commission*, paragraph 114). However, the General Court did not find that this was the case here.

104 Thus, by merely observing that the contested decision did not concern the transferring entities without considering the tax realignment scheme in its entirety, and without having assessed the appellants' and the Commission's arguments, the General Court erred in law by failing to carry out a comprehensive review as to whether the tax scheme at issue came within the scope of Article 107(1) TFEU (see, to that effect, *British Aggregates* v *Commission*, paragraph 115).

105 The judgment under appeal must therefore be set aside to the extent that it infringed Article 107(1) TFEU.

The action before the General Court

106 Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes the decision of the General Court it may itself give final judgment in the matter, where the state of the proceedings so permits.

107 In the present case, the state of the proceedings is such that judgment can be given on that point and it is necessary to examine the plea put forward at first instance by the appellants, alleging that the tax scheme at issue was justified by the nature and general scheme of the Italian tax system, in order to ascertain whether the forms of order sought at first instance by the appellants may be granted.

Arguments of the parties

108 The appellants claimed that the extension of the realignment scheme reserved to companies to which assets had been transferred under Law 218/1990 could not confer any selective advantage on those companies in relation to the normal rules for the taxation of profits since that special treatment was justified by the structure of the Italian tax system.

109 First, according to the appellants, the reform of corporation tax, which entered into force with Legislative Decree 344/2003, removed any risk of economic double taxation of gains arising on the transfer of assets pursuant to Article 4 of Legislative Decree 358/1997. More specifically, there was no longer a risk that transferring companies would be taxed on those gains as a gain on the shares received in consideration for the assets transferred, and that the recipient companies would be taxed on those gains as a gain on the assets transferred.

110 The 'shareholding exemption' scheme exempted 95% of the gains accruing on the disposal of shares, including in respect of shares received in exchange for transfers of assets carried out under the system of fiscal neutrality established in Article 4 of Legislative Decree 358/1997.

111 By contrast, the reform of corporation tax did not eliminate that risk of double taxation of the gains accruing from assets transferred under Article 7 of Law 218/1990. The transferring entities which had disposed of all their assets could therefore no longer be characterised as trading organisations and could not benefit from the 'shareholding exemption' scheme. Furthermore, those entities remained subject to corporation tax in respect of the reserve to which they had appropriated the difference between the book value of the shares received and their cost for tax purposes if they distributed that reserve to their members.

112 The decision to extend the tax realignment scheme only for companies to which assets had been transferred under Law 218/1990 can be explained by the fact that only under that scheme was it still possible for gains to be liable to double taxation after the entry into force of the reform of corporation tax. The tax scheme at issue was necessary to allow recipient companies to exit the system of fiscal neutrality.

113 Secondly, the appellants claimed that the differences in the rates of substitute tax laid down in Article 2(25) of Law 350/2003 and in the tax scheme at issue respectively were justified by different origin of the misalignments between the book values and the values for tax purposes, which could be eliminated under each of those two schemes.

114 The realignment scheme for transfers of assets made under the scheme established by Law 218/1990 only enabled misalignments arising from a system of partial fiscal neutrality to be eliminated whereas under the general realignment scheme all misalignments could be eliminated. The rate of tax was

fixed to take into account the fact that the transfers of assets had given rise to the payment of a tax of 15% on the gain realised during that transaction. The application of a higher rate of tax in the general realignment scheme than in the tax scheme at issue is balanced out by the fact that those which benefited from the former scheme did not need to pay the tax which those which benefited from the latter scheme paid. By retaining the realignment scheme for the benefit of solely the recipient companies, the Italian Government clearly showed that it did not consider the situation of those companies to be equivalent.

115 The Commission submits that the contested decision does not concern entities which transferred assets under Law 218/1990 and which have become banking foundations. In the majority of cases, they are entities which are not subject to the State aid rules.

116 So far as concerns the effects of the entry into force of the reform of corporation tax, the Commission points out that the companies which transferred assets under the scheme referred to in Article 4 of Legislative Decree 358/1997 never benefited from the tax realignment scheme provided for in Article 18 of Law 342/2000 and reserved to those entities.

117 According to the Commission, it is illogical to consider in the same way the tax treatment applicable to two subjects between which there is no further link, as is the case with banking foundations, or of which one holds only a minority shareholding in the capital of the other.

118 As regards the comparison between the tax scheme at issue and the general realignment scheme, the appellants' arguments are contrived and unfounded. Under Article 19 of Law 342/2000, the tax rates for realignments carried out in respect of transfers of assets pursuant to Article 4 of Legislative Decree 358/1997 and those laid down for the purposes of realignments carried out in respect of transfers of assets under the scheme established by Law 218/1990 were identical for a number of years, from which it follows that the reduced rate is not justified by the taxation of the capital gain at the rate of 15% when the transfer under the latter scheme was made.

119 Lastly, the Commission states that the realignments are opportunities offered and not obligations, and therefore are not a necessary complement to the misalignment schemes.

Findings of the Court

120 As set out in paragraph 101 of this judgment, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part.

121 It is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 43; C-279/08 P *Commission* v *Netherlands* [2011] ECR I-7671, paragraph 77; and *Commission and Spain* v *Government of Gibraltar and United Kingdom*, paragraph 146).

122 It is apparent from points 62 and 106 of the grounds of the contested decision that the Italian Government argued during the administrative procedure that the tax scheme at issue was a mere repetition of the scheme enacted under Law 342/2000, which did not involve State aid as it applied to realised gains deriving from all company restructurings.

123 According to that government, the scheme provided for in Article 2(25) of Law 350/2003 generalised the opportunity to realign the values for tax purposes by its implied reference to Article 14 of Law 342/2000, which concerned all misalignments arising from company reorganisations implemented under Legislative Decree 358/1997.

124 In points 68 and 69 of the grounds of the contested decision, it is explained that, according to the Italian Government, the application, on the one hand, of Article 2(25) of Law 350/2003 and, on the other hand, of the tax scheme at issue resulted in a taxation of capital gains which was practically identical.

125 Points 64 to 66 of the grounds of the contested decision also show that the Italian Government took the view that the realignment scheme provided for following transfers of assets in exchange for shares carried out in the context of the restructuring of the banking sector implemented by Law 218/1990 was justified by the very nature of those transactions and by the fact that the fiscal neutrality provided for in respect of those reorganisations was only partial. The system of partial fiscal neutrality was justified by the desire to facilitate the privatisation of certain credit institutions while avoiding granting them unnecessary advantages.

126 It follows, first, that during the administrative procedure the Italian Government justified the system of partial neutrality or partial tax misalignment put in place by Law 218/1990 by the specific nature of that system and, secondly, that Law 350/2003 generalised the opportunity to realign the values for tax purposes of the assets transferred and the shares received in exchange for the payment of a substitute tax on the gains accruing from that realignment.

127 It is also apparent from an examination of the Italian legislation that two different systems of fiscal neutrality in respect of gains realised following transfers of assets between companies were successively put in place, one in the context of the restructuring of the banking sector and the other in the context of transfers of assets in exchange for shares carried out between other companies.

128 Subsequently, the Italian legislature introduced, by Legislative Decree No 41 of 23 February 1995, cited in paragraph 17 of this judgment, a tax realignment scheme solely for gains accruing from transfers of assets in exchange for shares carried out in the context of the restructuring of the banking sector.

129 Article 17 of Law 342/2000 provided for the opportunity, for companies to which assets had been transferred following transactions carried out under Law 218/1990, to realign the value for tax purposes of those contributions provided they paid a substitute tax with different rates depending on whether they were realigning the value for tax purposes of the assets and the shares, or simply realigning the value for tax purposes of the assets. The same scheme was applicable, under Article 19 of that law, to all companies to which assets had been transferred in exchange for shares under the system of fiscal neutrality established by Legislative Decree 358/1997.

130 Consequently, in adopting Law 342/2000, the Italian legislature intended to put in place a single scheme for the realignment of the value of assets for tax purposes, regardless of in what context the transfer took place. That single realignment scheme was extended pursuant to Article 3(11) of Law 448/2001.

131 In point 89 of the grounds of the contested decision, the Commission acknowledged that those realignment schemes provided for in Laws 342/2000 and 448/2001, which allowed the gains realised to be recognised by payment of a substitute tax set at the same level for all the undertakings concerned, were, upon analysis, general tax measures justified by the inherent logic of the Italian tax system.

132 However, Law 350/2003 extended only the scheme established by Article 17 of Law 342/2000 and not that established by Article 19 of that law. It follows that only the companies to which assets had been transferred following transactions carried out under Law 218/1990 were able to continue to realign the value for tax purposes of those assets with their book value by payment of a substitute tax. The other companies to which assets had been transferred under the system of fiscal neutrality established by Article 4 of Legislative Decree 358/1997 could no longer realign the values for tax purposes of those assets by payment of that tax.

133 As mentioned in paragraphs 123 and 124 of this judgment, the Italian Government stated, during the administrative procedure, that Article 2(25) of Law 350/2003 generalised the opportunity to realign the values for tax purposes by its implied reference to Article 14 of Law 342/2000 and that the tax paid pursuant to that provision was practically equivalent to that paid pursuant to the tax scheme at issue.

134 It must, however, be stated that the scheme set out in Article 14 existed at the same time as that referred to in Articles 17 and 19 of Law 342/2000 and it cannot therefore be seen as the extension of the scheme established by Article 19. The scheme provided for in Article 14 of Law 342/2000 is not equivalent to that stemming from Article 17 of that law since it is only aimed at the realignment of certain assets and the difference between the rates of tax on the gains under Article 14 depends on whether or not the revalued asset is depreciable and not on whether the realignment affects only assets or assets and shares, as set out in Article 17.

135 The appellants submit that the continuance, by the tax scheme at issue, of the scheme established by Article 17 of Law 342/2000, which benefited only the companies to which assets had been transferred under the scheme established by Law 218/1990, is linked to the fact that, from the entry into force of the tax reform established by Legislative Decree 344/2003 and the 'shareholding exemption' scheme put in place by that reform, there was no longer any risk of double taxation of gains following transfers of assets in exchange for shares carried out under the system of fiscal neutrality established by Legislative Decree 358/1997. This was because the transferring companies which had received shares in exchange were exempt from tax on 95% of the gains accruing following disposals of shares.

136 Nevertheless, it is apparent from points 66 to 68 of the grounds of the contested decision that the Italian Government justified the tax scheme at issue by stating that it was the necessary complement of the system of partial fiscal neutrality established by Law 218/1990 and that it gave rise to taxation which was practically identical to that following from the application of Article 2(25) of Law 350/2000. The explanations provided by that government do not show that the failure to extend the scheme provided for in Article 19 of Law 342/2000 is attributable to the fact that the companies which had transferred assets under the scheme laid down in Legislative Decree 358/1997 benefited thereafter from the 'shareholding exemption' scheme, whereas the companies and entities which had transferred assets in exchange for shares under Law 218/1990 were taxed, upon realignment, in the case of both the transferring entity and the recipient company.

137 Thus the tax scheme at issue, which the Italian Government acknowledged conferred a tax advantage on companies to which assets had been transferred under Law 218/1990, does not appear to be justified by the inherent logic of the Italian tax system.

138 The plea alleging that the tax scheme at issue is justified by the inherent logic of the Italian tax scheme must be rejected.

139 Consequently, the action must be dismissed.

Costs

140 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of those rules, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

141 In the present case, since the appeal of BNP Paribas and BNL was upheld in part, it is appropriate to rule that both BNP Paribas and BNL and the Commission are to bear the costs which they have incurred before the Court.

142 Moreover, since the appellants’ action against the contested decision was unfounded and the Commission has applied for costs, BNP Paribas and BNL must be ordered to pay the costs incurred before the General Court.

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

1. **Sets aside the judgment of the General Court of the European Union of 1 July 2010 in Case T-335/08 *BNP Paribas and BNL* v *Commission* to the extent that it infringed Article 107(1) TFEU;**

2. **Dismisses the action brought by BNP Paribas and Banca Nazionale del Lavoro SpA (BNL);**

3. **Orders BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) and the European Commission to bear their own costs;**

4. **Orders BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) to pay the costs incurred before the General Court of the European Union.**

[Signatures]