

## 2. Availability of procedures in Italy<sup>1</sup>

### 2.1 Introduction: Direct Applicability of EC legislation

In Italy direct applicability of EC law is a consequence of: (i) Article 11 of the Italian Constitution ("the European Clause"); (ii) Law of 14 October 1957, No. 1203, providing that the EC Treaty is directly applicable; and (iii) subsequent judgments of the Constitutional Court (*Corte Costituzionale*). According to Article 11 of the Italian Constitution, "*Italy [...] agrees to limit its sovereignty to the extent necessary to adhere to international organizations aimed at ensuring peace and justice among the States, and promoting and favouring the international organizations which are pursuing the above mentioned goal.*"

On 8 June 1984, the Constitutional Court (*Corte Costituzionale*) delivered its decision No. 170, holding that both Article 11 of the Constitution and Law No. 1203/1957 resulted in the withdrawal of Italian sovereignty on matters entrusted to the common European organizations by the EC Treaty ("the Treaty")<sup>2</sup>. As a consequence, EC legislation is directly applicable in Italy and pre-empts Italian legislation.

### 2.2 Application of Article 93(3) of the Treaty by the Italian Courts

The Court of Justice of the European Communities has recognized that national judges' power to apply EC legislation on State aids is based on Article 93(3) of the Treaty.<sup>3</sup> Both obligations enshrined in Article 93(3) (including (i) the obligation to inform the Commission sufficiently in advance of any plans to grant or alter aids; and (ii) the prohibition on putting the proposed measure into effect until this procedure has resulted in a final decision) are directly applicable. Consequently, the provision confers rights on individuals enforceable by Italian judges<sup>4</sup>.

<sup>1</sup> Stefania Baroncelli has written section 2 while Michela Cocchi has written section 3.

<sup>2</sup> The landmark case is: *Corte Costituzionale*, Judgment of 8 June 1984, No. 170, *Granital S.p.A. v. Amministrazione delle finanze*.

<sup>3</sup> See Court of Justice of the European Communities, Judgment of 15 July 1964, Case 6/64, *Costa v. ENEL*, [1964] ECR 585, Court of Justice of the European Communities, Judgment of 19 June 1973, Case 77/72, *Capolongo v. Azienda agricola Maya*, [1973] ECR 611. Both judgments were rendered on preliminary ruling and concern the interpretation of Articles 92 and 93 of the Treaty.

<sup>4</sup> See VAN BAEL - BELLIS, *Il diritto della concorrenza nella Comunità Europea*, Giappichelli, Torino, 1995, 891.

In the domain of State aids, therefore, Italian judges shall directly enforce EC law only in the case of aids granted in violation of Article 93(3).<sup>5</sup> In particular, they will be competent to grant recovery and damages to those individuals who have suffered injury from the State granting illegal aids to individuals.<sup>6</sup>

Italian courts have consistently recognized the case-law of the European Court of Justice, holding that preliminary rulings of the European Court of Justice on Article 93(3) of the Treaty are immediately and directly enforceable by Italian judges.<sup>7</sup>

The Italian Court of Auditors (*Corte dei conti*) has confirmed this concept in the context of Articles 92 and 93 of the Treaty. The Court has declared that<sup>8</sup>: "the Court of Justice [...] being a qualified interpreter of Community laws, has full authority to clarify their meanings [...], thus defining [...] the scope and content of their possible application".<sup>9</sup>

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<sup>5</sup> See Court of Justice of the European Communities, Judgment of 11 December 1973 (Preliminary Ruling), Case 120/73, *Gebr Lorenz GmbH v. Federal Republic of Germany*, [1973] ECR 1471.

<sup>6</sup> See Court of Justice of the European Communities, Judgment of 21 November 1991, Case 354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs des Saumon v. French Republic*, [1991] ECR 5505. See also Orlandi, *Sull'applicabilità da parte del giudice italiano degli articoli 92 e 93 del Trattato istitutivo della CEE*, "Giurisprudenza di merito", 1994, 791; Raffaelli, *I giudici nazionali e il diritto comunitario della concorrenza*, "Rivista di Diritto Civile", 1994, II, 4.

<sup>7</sup> See Constitutional Court, Judgment of 19-23 April 1985, No. 113, "Consiglio di Stato", 1985, II, 529; Constitutional Court, Judgment of 4-11 July 1989, No. 389, "Consiglio di Stato", 1989, II, 981. See also Council of State (*Consiglio di Stato*), Sec. V, Judgment of 31 July 1991, No. 1074, "Diritto Comunitario e degli Scambi Internazionali", 1994, 547; Court of Auditors (*Corte dei conti*), Sec.: Controllo Stato, Judgment of 8 October 1991, No. 102, "Diritto Comunitario e degli Scambi Internazionali", 1994, 547.

<sup>8</sup> The Court of Auditors (*Corte dei conti*) is an independent body of the State. Its competences are listed in Art. 100(2) of the Italian Constitution, according to which: "the Court of Auditors will exercise a legal formal control on the Government's acts before their enactment. It will exercise control on the State budget after its adoption. It will be competent, with other bodies, to control the financial accounting books of bodies normally financed by the State. It will be obliged to present a final report to the Parliament concerning its control". In addition, the Court of Auditors has a judicial section rendering judgments on State accounting and retirement plans.

<sup>9</sup> See Court of auditors (*Corte dei conti*), Sec.: Controllo di Stato, Judgment of 5 November 1991, No. 105, "Consiglio di Stato", 1985, II, 201.

## 2.3 Effects of the infringement of Article 93 of the EC Treaty in the Italian Legal System

### 2.3.1 General

In Italy, specific problems have arisen due to the principle of non-retroactivity on the State's capacity to recover financial aids declared illegal by the Commission. Other cases have centered on problems encountered by companies party to civil contracts relying on financial aids that have been denied.

Under Article 93(3) of the Treaty, a violation of EC Law by the State will occur whenever: i) the State does not inform the Commission of its plans to grant or alter aids; ii) the State grants aids without respecting the two-month period from the communication; iii) the State grants aids during the procedure initiated by the Commission pursuant to Article 93 of the Treaty; iv) the State grants aids after the Commission has enacted its final decision declaring its aid incompatible with the Treaty.

In all these cases, individuals can bring an action before a court, claiming that the aids, being in violation of Article 93 of the Treaty, are illegal and ask for an injunction. In addition, they can apply for damages.

Actions concerning violation of Article 93(3) of the Treaty are available in both administrative courts and civil courts.

Normally the Administration grants or denies a State aid through an administrative act enacted by the Administration (the so called "*atto amministrativo*") in compliance with a Statute.

Consequently, whenever an individual or a company is denied a State benefit to which it had a legitimate expectation, the natural outcome will be to lodge an administrative complaint. The complaint should be lodged with the agency that has made the decision by which the aid was denied. This complaint is called "*ricorso gerarchico*".

If the agency denying the aid, or the supervising authority of that agency, decides that the complaint should be rejected, private parties can file a petition before the Administrative Court (*Tribunale Amministrativo Regionale*, "*T.A.R.*") and, on appeal, the Council of State (*Consiglio di Stato*). The petitioner can claim that the administrative act adopted by the Administration is unlawful and has consequently

infringed its legitimate interest. As a consequence, the Administrative judge is entitled to grant an injunction and annul the administrative act, which is then declared illegal.

The same remedy is available to competitors of the recipient of the aid, which can bring an action before the administrative judge, asking for the annulment of the act granting illegal aids to competitors.

In addition, competing companies suffering damage by reason of the grant of illegal aid to their competitors can bring an action before the civil judge asking for recovery of damages, because they have been subject to unfair competition (Article 2043 Civil Code). Also, if they think appropriate, they can ask for an injunction (Article 700 of the Italian Code of Procedure).

Finally, once the judgment of the Administrative Court (*T.A.R.*) on the illegality of the act granting aids is clear, parties can petition the Court of Auditors (*Corte dei conti*), to enforce the obligation of beneficiaries to return aids declared illegal. The Court of Auditors (*Corte dei conti*) - as said above - acts also as a judicial body competent for state accounting.

Accordingly, we will take into account judgments on State aid delivered by: (2.3.2) the Constitutional Court (*Corte Costituzionale*); (2.3.3) Administrative Courts (*T.A.R.*); (2.3.4) Civil courts.

### **2.3.2 Constitutional Court (*Corte Costituzionale*)**

With reference to Articles 92 and 93 of the Treaty the Constitutional Court (*Corte Costituzionale*) stated that: "all judicial and administrative bodies in our court system which are entitled to enforce laws [...], irrespective of the fact whether or not they are entitled to interpret laws - such as judicial authorities and administrative authorities - are legally entitled to deny the enforcement of national rules which are incompatible with [...] Treaty provisions".<sup>10</sup>

The Court has correctly stressed that an act granting aid to undertakings is valid from a constitutional point of view only if adopted in full compliance with the procedure

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<sup>10</sup> Constitutional Court, Judgment of 4-11 July 1989, No. 49, "Giurisprudenza costituzionale", 1963, I, 213. See also Court of Auditors, Sec.: Contributi Stato, Judgment of 8 November 1991, No. 102; Administrative Court of Latium (*T.A.R. del Lazio*), Sec. III, Judgment of 11 June 1990, No. 1071, "Rivista Italiana di Diritto Pubblico Comunitario", 1992, 981.

under Article 93 of the Treaty.<sup>11</sup> Furthermore, it has added that the prohibition on the grant of illegal aids is directly enforceable even if the review procedure has not yet been started.<sup>12</sup>

The Constitutional Court (*Corte Costituzionale*) has, on several occasions, considered the relationship between Italian national laws and regional laws concerning aids. Judgments have been always originated by a petition filed by the State against one of its Regions, Sicily (See below, section 3.1).<sup>13</sup> The Italian State has a representative in every Region (State Commissioner, *Commissario di Stato*) entrusted with the power to control regional laws on constitutional or international principles. Where he finds evidence of violation, the Commissioner can petition the Constitutional Court (*Corte Costituzionale*) to solicit a preliminary ruling on regional laws.

The number of cases concerning Sicily is due to the special status of this Region, which allows a higher degree of discretion in decisions of fiscal allocation, although tax revenues are managed by the central government.<sup>14</sup> In addition, the greater amount of State or regional aids to Sicily is often justified because of Sicily's low standard of living and its high level of unemployment.

The leading case is judgment No. 49 of 1963, where the Constitutional Court (*Corte Costituzionale*) declared a Sicilian law enacted in January 1962 granting measures in favour of shipping companies contrary to the Constitution. Italy had notified Sicily's plan to the Commission under Article 93(3) of the Treaty. However, when the Commission objected to the plan and asked for additional explanations, Sicily decided to implement the program without awaiting the Commission's decision.

The Constitutional Court (*Corte Costituzionale*) established a fundamental principle following the conflict between the State and Sicily. It is true that Italian Regions are not bound by international treaties, such as the one establishing the European Communities. However, since State aids - either granted by the State or a Region -

<sup>11</sup> See Constitutional Court, Judgment of 9 April 1963, No. 49, "Giurisprudenza Costituzionale", 1969, 1686. See also Supreme Civil Court (*Corte di Cassazione*), Judgment of 11 December 1978, No. 5839, "Diritto Comunitario e degli Scambi Internazionali", 1979, 495.

See LEANZA, *Commento all'art. 93 del Trattato CEE*, "Commentario CEE", 755; TRIGGIANI, I poteri di controllo della Commissione sugli aiuti alle imprese pubbliche, "Rivista Europea", 1990, 3, 500.

<sup>12</sup> See Constitutional Court, Judgment of 8 July 1969, No. 120 (see below, section 3.1.2).

<sup>13</sup> None of the judgments originated from requests of parties or judges, pending a case (so called "*appello incidentale*").

involve the State's sole responsibility *vis-à-vis* Community institutions, a regional law granting aids is unlawful even though the regional Statute (*i.e.* the regional "Constitutional law") does not provide for limitations similar to those enshrined in Article 93 of the Treaty.<sup>15</sup>

Consequently, the implementation of the aid scheme by the Sicilian parliament was declared unlawful, being in conflict with the Italian Constitution, and in particular with Article 5 which regulates the relationship between the State and the Regions.

Similar reasoning was applied in judgment No. 120 of 1969 (See below, section 3.1.2).

The two remaining judgments adopted in 1995 and 1996 - other than judgment No. 134 of 1996, which establishes no new principles - concern direct violation of Article 93 of the Treaty and consequently of Article 11 of the Constitution ("the European clause"). In both cases, the regional acts under scrutiny were declared in compliance with the Constitution.

The two judgments mark the passage towards a more restrictive approach by the Constitutional Court (*Corte Costituzionale*). In 1995 the Court held that simple modifications to laws granting aids are not subject to the formal procedure established by Article 93 of the Treaty, an informal communication to the Commission being sufficient.

In particular, regional laws should contain special clauses making their effect conditional on a positive opinion of the Commission delivered on the basis of Article 93 of the Treaty.

### **2.3.3 Administrative Courts (Administrative judges - *Tribunali amministrativi regionali (T.A.R.)*; Council of State - *Consiglio di Stato*)**

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<sup>14</sup> Regions with a special status are as follows: Sicily, Sardinia, Valle d'Aosta, Trentino Alto Adige and Friuli Venezia Giulia.

<sup>15</sup> See GIZZI, *L'art. 93 del Trattato di Roma - Il regime di concorrenza e il divieto di aiuti - Problemi relativi alla legislazione regionale*, "Quaderni regionali", 1987, 517.

As noted above, beneficiaries denied State aid can lodge a petition before a Regional Administrative Court (*T.A.R.*) asking for the annulment of the negative act. The Regional Administrative Court (*T.A.R.*) for Latium stated that "aids granted under a provision of national law shall be permissible only if the express prior authorization of the EC Commission is obtained: therefore, the proposed beneficiary of the aid cannot claim any aid if the relevant authorization has been denied by the Commission".<sup>16</sup> The Administrative Court (*T.A.R.*) has maintained this principle only since 1990, thus reversing a contrary view adopted in the past by the Council of State (*Consiglio di Stato*).<sup>17</sup>

Most of the judgments before the Administrative Courts (*T.A.R.*) are originated by petitions filed by companies that have been denied State aids following a negative decision of the Commission (see below sections 3.3.1, 3.3.2, 3.3.3, 3.3.5, 3.3.7, 3.3.8).

A question has arisen concerning the type of legal act necessary to repeal a State aid once the Commission has enacted a negative decision. The Administrative Court (*T.A.R.*) of Latium in 1990 (section 3.3.8) confirmed a previous judgment of 1985 (section 3.3.1) stating that, where the European Commission has decided that aid to a specific industry pursuant to an Italian plan is incompatible with the common market, any administrative body must discontinue the application of the scheme even if it has not yet been modified by national legislation. However, the Council of State (*Consiglio di Stato*) has preferred to adopt a different approach, requiring a prior modification of the legislation before a corresponding modification of the administrative act.<sup>18</sup>

Administrative Courts (*T.A.R.*) have confirmed the legitimacy of the denial of aids despite the fact that companies had concluded civil contracts in the legitimate expectation of receiving such aids from the State (see below, section 3.3.1).

A second question concerned the relevant date for the denial. Case-law has confirmed the validity of the principle of non-retroactivity. Judges have held that the act of denial takes effect beginning from the enactment of the new law changing the rules (section 3.3.2). In any case, it does not affect the due course of public procurement procedures (section 3.3.6).

<sup>16</sup> Administrative Court of Latium, Judgment of 11 June 1990, No. 1071 (see below, case 3.3.8).

<sup>17</sup> Council of State, Judgment of 24 January 1989, No. 30, "Rivista Italiana di Diritto Pubblico Comunitario", 1991, I, 162.

<sup>18</sup> See below, case 3.3.1, footnote.

Only two judgments (section 3.3.4 and 3.3.6) result from a complaint lodged by a competing company that had been excluded by an aid plan. Both deal with a procedure of public procurement reserved for companies from the South of Italy. Both companies complained that such procedures were contrary to Article 92 of the Treaty, in that they ensured financial aid to their competitors. However, neither procedure produced result. In the first case, the judge suspended the procedure and requested a preliminary ruling (section 3.3.4), while in the second case the judge considered that the Commission's decision on the unlawfulness of the measures cannot take precedence over the principle of non-retroactivity (section 3.3.6).

As for the merits, the judgments are limited to an inquiry into the procedural correctness followed by state or regional authorities granting aids. Only in two cases (section 3.3.3 and 3.3.7) has the Administrative Court (*T.A.R.*) tried to establish if a certain behaviour of State authorities is to be deemed equivalent to an aid, under Article 92 of the Treaty. In both cases the answer was negative. In particular, the Administrative Court (*T.A.R.*) of Veneto has held that a regional aid granted to a hotel is to be justified on the ground of its being restricted to a particular territory and context (section 3.3.7).

#### **2.3.4 Civil courts**

Proceedings between private parties are governed by the Code of Civil Procedure (c.p.c.) and, partly, by the Civil Code (c.c.). The ultimate arbiter is the Civil Supreme Court (*Corte di Cassazione*), which is competent only for questions of law.

There are five judgments of civil courts concerning State aids. Two are merely administrative in nature (sections 3.2.3 and 3.2.4). In a third (section 3.2.1) the judge, holding that it is up to the plaintiff claiming a violation of Article 93 of the Treaty to give evidence to that purpose, decided that the plaintiff had failed to discharge that burden. The two remaining judgments were originated by a complaint filed by a company in competition with the recipient of a State aid.

In the first case (section 3.2.2), a company filed a motion against its competitor, a French company, claiming an infringement of Article 92 of the Treaty, to obtain damages for losses suffered because of unfair competition. The Civil Supreme Court (*Corte di Cassazione*), however, did not solve the question on the merits, limiting itself to affirm Italian jurisdiction.



In the second case (section 3.2.5), a company filed a motion against a competitor before the Civil Court of Genoa to obtain an injunction (pursuant to Article 700 c.p.c.) ordering the competitor to stop from engaging in unfair competition practices through predatory pricing. According to the complainant, predatory pricing was made possible through a grant of aid in violation of Article 93(3) of the Treaty. Although in the case the Court did not find aid to be proven, it stated in *obiter dicta* that the grant of illegal aids constitutes a violation of domestic rules on unfair competition by both the State and the beneficiary of the aid.

### 3. Member State Cases

#### 3.1 Proceedings before the Constitutional Court (*Corte Costituzionale*)<sup>19</sup>

##### 3.1.1 *Constitutional Court (Corte Costituzionale), Judgment of 9 April 1963, No. 49, State Commissioner of Sicily v. President of Sicily (C).*

In April 1963, the Constitutional Court (*Corte Costituzionale*) declared a regional law, providing measures in favour of shipping companies, in violation of the Constitution because it was adopted without compliance with the procedure in Article 93 of the Treaty.

**Background:** The case concerned the constitutional validity of a regional law passed by the Sicilian Regional Assembly on 5 November 1962, introducing modifications in the regional law of 20 January 1961, No. 7, concerning "measures in favour of shipping companies". In July 1962 the law had been notified to the European Commission pursuant to Article 93(3) of the Treaty. However, when the European Commission ("the Commission") submitted its comments on the law and required further explanation, the Sicilian Regional Government decided to pass and implement the law without awaiting the decision of the Commission.

The State Commissioner of Sicily, representing the Italian Government and competent to approve Sicilian laws before their enactment, brought an action before the Constitutional Court (*Corte Costituzionale*) in order to declare the Sicilian law illegal for failure to comply with Article 93(3) of the Treaty.

**The defendant's argument:** According to the Sicilian Government, Article 93(3) of the Treaty is binding only on the Member States and not on individual Regions

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<sup>19</sup> In chronological order.

**Judgment:** The Constitutional Court (*Corte Costituzionale*) held that the behaviour of the Sicilian Government was in breach of the Italian Constitution (mainly with reference to Article 5, which regulates the relationship between the State and the Regions). The Constitutional Court (*Corte Costituzionale*) rejected the argument of the Sicilian Government. The Sicilian law concerned an area of law, e.g. an international treaty, in which compliance must be secured by the central Government. Under the Italian Constitution it is therefore illegal for a Region to grant aid if the Commission, pursuant to Article 93(3) of the Treaty, has not approved the aid yet.

**3.1.2 Constitutional Court (Corte Costituzionale), Judgment of July 1969, No. 120, State Commissioner of Sicily v. Sicily (C)**

In July 1969, the Constitutional Court (*Corte Costituzionale*) declared a regional law supporting the citrus market to be in violation of the Constitution, because it conflicted with Articles 92 and 93 of the Treaty.

**Background:** The State Commissioner of the Region of Sicily challenged the law passed by the Regional Assembly during the session of 11 June 1969, introducing "Measures for the intervention in the food and agricultural sector". The State Commissioner requested a declaration of constitutional illegality based on infringement of Articles 92 and 93 of the Treaty.

This law authorized the Sicilian Authority for Industrial Promotion (ESPI — *Ente siciliano di promozione industriale*) in order to support the citrus fruit market to compensate a company for loss suffered in the purchase of considerable amounts of citrus fruits before the law came into force. The compensation was offered only for the products purchased by the company, on condition that a threshold of 50 tons per producer was not exceeded.

**Holding:** The Constitutional Court (*Corte Costituzionale*) declared the regional law in conflict with the Constitution, referring to the principles already affirmed in Judgment No. 49/63 (see above). The Court further specified that aids consisting of 'market interventions' in the field of fruit and vegetable products can be considered as compatible with Articles 92 and 93 of the Treaty only if the competent authorities of the Community have granted an authorization.

### **3.1.3 Constitutional Court (Corte Costituzionale), Judgment of 30 March 1995, No. 94, State Commissioner of Sicily v. Sicily (C)**

In March 1995, the Constitutional Court (*Corte Costituzionale*) declared two regional acts granting aids to fisheries to be in compliance with the Constitution because adopted pursuant Article 93 of the Treaty.

**Background:** The State Commissioner in the Region of Sicily challenged the validity of two legislative acts adopted by the Assembly of Sicily, under Article 93 of the Treaty and, consequently, with Article 11 of the Italian Constitution ("the European Clause"). The two acts were: (i) a regional law based on a previous regional law dealing with aids to the fishing sector (regional law adopted on 10 May 1994); (ii) a regional deliberation adopted by the Assembly of Sicily (*i.e.* a regional law not yet in force) granting aids to the fishing sector (regional legislative deliberation adopted on 4 March 1994).

**Holding:** The Court judged the two acts compatible with Article 93 of the Treaty. It referred to the case-law of the European Court, and in particular to the Judgment of 9 October 1984 (cases 91/1983 and 127/1983), according to which, once a Region has formally communicated to the Commission its regulation granting aids, subsequent legislative acts based on the regulation can be communicated informally. As this is exactly what happened in the case at hand, the Court dismissed the case.

### **3.1.4 Constitutional Court ("Corte Costituzionale"), Judgment of 29 April 1996, No. 134, State Commissioner of Sicily v. Sicily (*Il Foro Italiano*, 1996, I, 2980) (C)**

In April 1996, the Constitutional Court (*Corte Costituzionale*) dismissed a claim questioning the constitutional validity of a regional law granting extraordinary measures to carriers victims of the Mafia's attacks.

**Background:** The Sicilian regional law passed on 4 August 1995 granted extraordinary measures to some carriers who had been victims of the Mafia's incendiary attacks. The State Commissioner in Sicily challenged the constitutional validity of the act under Article 93 of the Treaty and, consequently, of Article 11 of the Constitution ("the European Clause").

**The claimant's argument:** According to the State Commissioner of Sicily, the act did not include a clause subordinating its application to a favourable decision of the Commission, as provided for by Article 93 of the Treaty.

**Holding:** The defendant presented to the Court an opinion of the Commission which denied that the measures provided in the law under scrutiny amounted to "State aid". Consequently, the Constitutional Court (*Corte Costituzionale*) declared the law to be in compliance with the Constitution.

**3.1.5 Constitutional Court (*Corte Costituzionale*), Judgment of 22 July 1996, No. 271, State Commissioner of Sicily v. Sicily (C)**

In July 1996, the Constitutional Court declared a regional law granting financial aid promoting employment in Sicily not to be in breach of the Constitution because it complied with Article 93 of the Treaty.

**Background:** The Sicilian regional law of 21 December 1995, No. 85, granted financial aids promoting employment in various sectors (self-employment, agriculture, handicraft). The State Commissioner in Sicily challenged the constitutional validity of the act on grounds of infringement of Article 93 of the Treaty and, consequently, of Article 11 of the Constitution. His reasoning was that the act did not contain an explicit clause subordinating its entry into force to the required positive decision of the Commission. In fact, the act did not only lack a specific clause but was also passed as an "urgent law", thus entering into force immediately without the lapse of time usually allowed.

**Holding:** The Court held that: (i) an explicit clause subordinating the entry into force of the law to the Commission's positive decision is not necessary and (ii) a general clause subordinating the validity of financial aids to European Community regulation is sufficient for compliance with Article 93(3) of the Treaty. Consequently, the regional law was in compliance with the Constitution.

### 3.2. Proceedings before Civil Courts<sup>20</sup>

#### 3.2.1 Civil Supreme Court (Corte di Cassazione), Judgment of 11 December 1978, No. 5939, State Financial Administration v. Oleificio S. Leonardo (B)

In December 1978, the Italian Civil Supreme Court issued its judgment confirming the judgment of the Court of Appeal of Palermo (*Corte d'Appello di Palermo*) of 27 February 1976 authorizing fiscal aids granted by Sicily on olive oil production. The Court upheld the Court of Appeal (*Corte d'Appello*) argument that in case of emergency, fiscal aids such as those provided by Sicily to areas where the standard of living is abnormally low and which are recovering from damages caused by an earthquake, are in accordance with Articles 92(2)(b) and 92(3)(a) of the Treaty.

**Background:** Mr. Leone, owner of a company producing olive oil (*Oleificio S. Leonardo*) was requested by the Administration of Sicily to pay a tax on the production of olive oil. He filed a petition against the Ministry of Finances before the Tribunal of Palermo (*Tribunale di Palermo*). He asked the court to declare the production tax inapplicable basing its assumption on the legislation enacted by Sicily granting fiscal aids to inhabitants of certain areas of Sicily which had suffered damages caused by an earthquake. The Tribunal (*Tribunale*) upheld the petition, which was consequently confirmed by the Court of Appeal of Palermo (*Corte d'Appello di Palermo*). The Ministry of Finances appealed to the Civil Supreme Court (*Corte di Cassazione*).

**The appellant's argument:** According to the Ministry of Finances, financial aids granted by Sicily and enforced by regional legislation are in breach of Article 92 of the Treaty and, consequently, in breach the Constitution, as: (i) evidence does not exist that communications have been sent or authorizations have been granted to Sicily by the Commission; (ii) financial aids result in promotion of certain areas of Sicily even a long time after the earthquake, distorting competition by favouring certain undertakings or the production of certain goods.

**Decision:** The Civil Supreme Court (*Corte di Cassazione*) confirmed the judgment of the Court of Appeal (*Corte d'Appello*), according to which: (i) Article 92 of the Treaty recognizes the compatibility with the common market of aids aiming at remedy of damage caused by a natural disaster, such as an earthquake; (ii) Articles 92 and 93 of the Treaty enable Member States to grant aids to promote the economic development

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<sup>20</sup> In chronological order.

of areas where the standard of living is abnormally low, or where there is serious unemployment, provided a communication is forwarded to the Commission.

The Supreme Court (*Corte di Cassazione*) considered that the compatibility of State aids with the common market should be judged following the procedure enshrined in Article 93(3) of the Treaty. As the appellant had failed to demonstrate a lack of communications from Sicily to the Commission, the constitutional invalidity of the regional legislation granting fiscal aids to some areas of Sicily could not be proved. According to the Civil Supreme Court (*Corte di Cassazione*): (i) it is up to the party claiming the constitutional invalidity of a law to prove infringement of Community law; (ii) the major point of criticism does not concern legal interpretation but factual analysis, which falls outside the jurisdiction of the Supreme Court (the jurisdiction of the Italian Supreme Court is limited to legal interpretation and not factual analysis); (iii) the question whether the procedure provided in Article 93 should be followed for every type of aid (for Article 92(2) as well as for Article 92(3)) falls outside its jurisdiction and must be submitted to the European Court under Article 177 of the Treaty.

**3.2.2 Civil Supreme Court (*Corte di Cassazione*), Judgment of 23 May 1980, No. 3397, Comafrika S.p.A. v. Smo-Società Mercantile Oltremare (G)**

In December 1980, the Civil Supreme Court (*Corte di Cassazione*) issued its judgment affirming the jurisdiction of the Italian judge in the interpretation of Article 92 of the Treaty and its direct effect on private citizens.

**Background:** Smo, a company distributing bananas in Italy, sued its competitor, Comafrika S.p.A., in an Italian civil court, alleging infringement of Article 92 of the Treaty and asking for damages for loss suffered because of unfair competition. Comafrika is a company which imported bananas from Martinique, and so benefit from a financial aid from the French government.

Comafrika appealed directly to the Civil Supreme Court (*Corte di Cassazione*) pursuant to Article 41 of the Italian Code of Civil Procedure, in order to settle the question of jurisdiction.

**The claimant's argument:** According to Comafrika, (i) Article 92 of the Treaty concerns only States and cannot be infringed by a private citizen; (ii) the question posed by the plaintiff concerned France's compliance with Article 92 of the Treaty, which could only be resolved within the EC framework and not by an Italian judge and;

(iii) the civil judge has no power to suspend or modify the administrative license for import (the administrative judge has competence in this matter).

**Decision:** The Civil Supreme Court (*Corte di Cassazione*) held that: (i) Article 92 of the Treaty has a direct effect for private citizens; (ii) the Italian judge is competent to evaluate cases of unfair competition even caused by State aids as defined in Article 92 of the Treaty; and (iii) the remedy provided for by the civil judge does not necessarily lead to the suspension or modification of the import license, thus its jurisdiction must be acknowledged in cases of unfair competition determined by State aids, without further inquiring into the legal meaning of the import licenses in question.

### **3.2.3 Court of First Instance of Trento (Tribunale di Trento), Judgment of 15 November 1980, *Denkavit Italiana Srl v. Ministry of Finances (B)***

**Judgment:** In November 1980, the Tribunal of Trento (*Tribunale di Trento*) issued its judgment recognizing that taxes and other contributions received by the State as a consequence of infringement of Community legislation and returned thereafter to private citizens should not be considered State aids. The Tribunal based its judgment on the case-law of the Court of Justice<sup>21</sup> and rejected the argument put forward by the Ministry of Finances, according to which taxes returned on the basis of Article 2033 of the Italian Civil Code amount to State aids and are consequently forbidden by Article 92 of the Treaty.

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

In April 1992, the Court of First Instance of Cagliari (*Tribunale di Cagliari*) declared Nuova Cartiera di Arbatax S.p.A. ("NCA") insolvent and ordered its decision to be notified to the Ministry of Industry and Commerce for subsequent measures to be taken.

**Background:** NCA asked for the Court of First Instance's declaration to be admitted to the special management procedure ("*procedura di amministrazione straordinaria*") provided by the Law of 3 April 1979 No. 95 ("the Prodi bill"), containing urgent measures for companies facing crisis. The request was based, *inter alia*, on the assumption that NCA was obliged to return State aids amounting to LIT 67 billion and

<sup>21</sup> See Judgment of 27 March 1980, Case 61/79, *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl.*, [1980] ECR 1205

529 million after the Commission had declared them illegal<sup>22</sup>. As a matter of fact NCA's capital amounted to a total of LIT 100 billions, thus the amount of money due was more than 51% of the capital, *i.e.* the percentage set out by the Law No. 95/79 as one of the conditions for the admission to the special management procedure. Consequently, according to NCA, it retained the right to be admitted to the special management procedure.

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

In April 1993, the Court of First Instance of Genoa (*Tribunale di Genova*) dismissed the action filed by the company Grandi Traghetti di navigazione S.p.A. ("GTN") against the company Viamare di Navigazione S.p.A. ("VDN").

**The Parties:** VDN is a maritime corporation owned by Finmare S.p.A. providing ferryboats for carriage of goods. GTA is a maritime corporation which competes with VDN on the same market (carrying of goods in the shipping route Genoa-Termini Imerese).

**The Background:** In July 1992, VDN put into service a goods-only ferry on the Genoa-Termini Imerese route. In the following months VDN put into service a second and a third ship. When the latter ship came into service, the company began a scheduled coasting trade. GTA filed a petition against VDN claiming unfair competition based on price cuts and unfair acquisition of clients. According to GTA, price cuts could be implemented only through financial aids granted by the Italian Government, which had injected funds through Finmare, the controlling company. In particular, GTA asked the civil judge: (i) to grant an injunction against VDN, on the basis of Article 700 of the Italian Procedure Code; (ii) to request a preliminary ruling of the Court of Justice stating if such behavior should be considered as a State aid under Articles 92 and 93 of the Treaty.

**Judgment:** The Court of First Instance (*Tribunale*) began by holding that the grant of State aids in violation of Article 92, 93 of the Treaty constitutes an act of unfair competition, not only for the State, but also for the beneficiary which is subsequently subject to injunction by the civil judge. In the present case, however, the Court dismissed the action and held that: (i) Article 92 of the Treaty is not applicable to

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<sup>22</sup> Decision of 27 November 1991



shipping services, as only Italian ships can provide them until 1 January 1999 under Article 6 of the Regulation No. 3577/92; (ii) financial aids granted by Finmare to VDN should not be considered State aids, as they are channeled through the financial market, and the State has not granted any guarantee whatsoever to Finmare, the ownership of which is divided among the State and 3,138 minority shareholders; (iii) accordingly, the State was not obliged to notify under Article 93 of the Treaty.

### **3.3. Procedures before Administrative Courts**<sup>23</sup>

#### **3.3.1 *Administrative Court of Lazio (T.A.R. del Lazio) - Sec.: III — Judgment of 22 January 1985, No. 103, Società Cooperativa Trasporto Latte and others v. Banca Nazionale del Lavoro (A)***

In January 1985, the Administrative Court of Lazio dismissed the action filed by Cooperativa Trasporto Latte and others asking for the annulment of a Ministerial decree enacted by the Ministry of Transportation. The decree repealed two previous Ministerial decrees enacted in 1981 granting financial aids.

**The Parties:** Società Cooperativa Trasporto Latte ("SCTL") is a company which transports milk. Banca Nazionale del Lavoro ("BNL") is a bank, which had granted loans to SCTL and other plaintiff companies.

**The Background:** In 1981, the Ministry of Transportation had enacted two decrees for applying the Law of 27 November 1980, No. 815, granting financial aids to companies for the renewal of their car parks. Financial aids were granted through government assisted loans. However, the European Commission held that Law No. 815 was incompatible with the common market. Following the Commission's decision, the Ministry of Transportation repealed the two decrees and declared that SCTL and other companies were not entitled to the financial aids.

SCTL appealed to the Administrative Court of Lazio, requesting the annulment of the Ministry of Transportation's decree denying the financial aid, on the grounds that: (i) it had suffered serious damage, as it had legitimately relied on the decree enacted by the Ministry of Transportation and had therefore begun to renew its car park; (ii) it had obtained substantial banking loans, which it intended to repay with the help of the State's aid.

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<sup>23</sup> In chronological order.

**Holding:** The Administrative Court dismissed the action and declared the ministerial decree legally valid. Additionally, it declared that when the European Commission holds that a State aid is incompatible with the common market and requests the State to annul it within a stated period of time, the Administration can decide immediately to annul the ministerial decree, without initiating the repeal of the legislation.<sup>24</sup>

**3.3.2 Administrative Court of Sicily (T.A.R. della Sicilia) — Palermo - Sec.: I - Judgment of 18 November 1986, No. 875, Società Enosicilia and Consorzio produttori vini siciliani cooperativa v. Istituto regionale vite e vino e Assessore agricoltura e foreste Regione siciliana (A)**

In November 1986, the Administrative Court of Sicily (*T.A.R. della Sicilia*) dismissed the appeal brought by Società Enosicilia ("SE") and Consorzio produttori vini siciliani cooperativa ("CPVSC"), asking for the annulment of an administrative order issued by the Istituto regionale vite e vino ("IRVV") and ending regional aids for wine producers.

**The Parties:** SE and CPVSC are two companies which produce and market wine. IRVV is an administrative body of Sicily with responsibility for the wine sector in Sicily. Assessore agricoltura e foreste Regione siciliana ("AAFRS") is a member of the Assembly of Sicily competent in forestry and agriculture.

**Background:** In 1973, Sicily had enacted a regional law (Law of 30 July 1973, No. 28) granting financial aids to IRVV for the marketing of Sicilian wine in Italy and abroad. In June 1982, however, the European Commission delivered a reasoned opinion on the basis of Article 169 of the Treaty stating that Italy had infringed Regulation No. 816/70 as amended, and inviting Italy to comply with the opinion.

Consequently, Sicily enacted a new regional law (Law of 14 June 1983, No. 58) repealing Law No. 28 of 1973 and limiting the amount of financial aid. In addition, IRVV delivered a regional decree (*circolare* of 14 November 1983, No. 3210) to CPVSC

<sup>24</sup> On appeal, however, the Council of State (*Consiglio di Stato* - Administrative Court of Appeal) expressed a slightly different opinion. According to the Council of State the decisions taken by the European Commission in pursuance of Art. 93 of the Treaty have the same effect as a Community Directive and, therefore, are not directly applicable. Consequently, whenever the Commission issues a decision imposing the annulment of State aids judged as incompatible with the Treaty, the State shall first modify its legislation and later repeal the administrative acts adopted to implement such legislation. See Council of State (*Consiglio di Stato*) — Sec.: VI — Judgment of 2 December 1988, *Società Cooperativa Trasporto Latte v. Ministry of Transportation*. See also Council of State — Sec.: VI — Judgment of 24 January 1989, *Cooperativa Carrettieri "La Rinascita" and others v. Ministry of Transportation and others*.

stating that it had stopped crediting financial aid already approved for 1982 and 1983 for the purpose of promoting the wine sector. Furthermore, AAFRS sent a fax to IRVV asking i.e. to suspend immediately any aid whatsoever to CPVSC.

SE and CPVSC appealed to the Administrative Court of Sicily (*T.A.R. della Sicilia*) claiming (i) the annulment of the IRVV regional decree; (ii) the annulment of the AAFRS fax; and (iii) the payment of financial aids for the years preceding the enactment of Law No. 58 of 14 June 1983 on the basis of the rule *tempus regit actum*.

**Judgment:** The Administrative Court (*T.A.R.*) dismissed the appeal. In particular, it held that both (i) the IRVV regional decree and (ii) the AAFRS fax were valid. In addition, it concluded that (iii) SE and CPVSC were not entitled to the payment of financial aids for the years preceding the enactment of Law No. 58 of 14 June 1983 (especially for 1982, which had not yet been credited), as they were already illegal, being in breach of Regulation No. 337 of 1979 regulating the European wine sector.

### **3.3.3 Administrative Court of Lombardia (*T.A.R. della Lombardia*) — Milan — Sec.: I, Judgment of 2 December 1986, No. 949, Bozzi and others v. Ente Ferrovie dello Stato - FF.SS. (Italian Railways) and the President of the Council of Ministers (C)**

In December 1986, the Administrative Court of Lombardia (*T.A.R. della Lombardia*) delivered its judgment that it did not have power to annul a law providing for the representation in court of the FF.SS. (Italian Railways) by the Italian State on the grounds that this amounted to a State aid.

**Background:** FF.SS. claimed that the appeal should be dismissed. In particular, it claimed that the representation in court of the FF.SS. by the Italian State was illegal because it amounted to a State aid, forbidden by Article 92 of the Treaty.

**Judgment:** The Administrative Court (*T.A.R.*) dismissed the claim raised by FF.SS., on the basis that: (i) the community order is to be realized gradually; in particular the rules on State aids are not legally binding and immediately applicable; (ii) as the Administrative Court (*T.A.R.*) is only competent to rule on the non-application of domestic laws conflicting with legally binding Community laws, consequently, it cannot set aside domestic laws conflicting with Community laws on State aids.

**3.3.4 Administrative Court of Tuscany (T.A.R. della Toscana), Judgment of 23 October 1987, No. 1166 [and Order of 23 October 1987, No. 1167], Società Du Pont de Nemours Italiana v. U.S.L. No. 2 of Carrara, Società 3M Italia, Du Pont de Nemours Deutschland GmbH (D)**

In October 1987, the Administrative Court of Tuscany made a reference for a preliminary ruling to the European Court of Justice pursuant to Article 177 of the Treaty.

**The Parties:** Società Du Pont de Nemours Italiana ("SDPNI") is an Italian company producing medical instruments. U.S.L. No. 2 of Carrara is an administrative unit of the Department of Health ("USL"). Società 3M Italia and Du Pont de Nemours Deutschland GmbH are two companies producing medical instruments.

**Background:** In 1986 the management committee of USL enacted a decision regulating a public procurement procedure, requiring that 30% of its supply be reserved for industrial companies in Southern Italy. The USL decision was taken in compliance with Law of 1 March 1986, No. 64, which made it compulsory for public bodies, such as USLs, to obtain part of their supplies from industrial, agricultural and handicraft businesses based in Southern Italy.

**Request for Preliminary Ruling:** SDPNI, after being invited to participate in the tender, was excluded because it did not meet the requirements specified under Law No. 64/86. Consequently, SDPNI appealed to the Administrative Court of Tuscany (*T.A.R. della Toscana*), claiming that the limitation applied to the tender was unlawful, as it conflicted with Community laws on free movement of goods and services among Member States. As a result, it requested a preliminary ruling by the European Court of Justice.<sup>25</sup>

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<sup>25</sup> Similarly, See Administrative Court of Lombardy (*T.A.R. della Lombardia*) — Brescia — Judgment of 12 August 1988, No. 634, *Istituto Behring v. U.S.L. No. 34 of Chiari and Lombardy*; Administrative Court of Latium (*T.A.R. del Lazio*), Sec.: I, Judgment of 17 November 1988, No. 1582, *Laboratori Bruneau v. U.S.L. RM-24 (n.c.)*. The contrary position is taken by the Administrative Court of Campania (*T.A.R. Campania*) — Naples — Judgment of 22 October 1990, No. 545, *B. Braun v. U.S.L. No. 40 of Naples*, according to which: "the national judge is entitled to ascertain if domestic law provisions are in contrast with Community regulations [...]; furthermore the Regional Administrative Court is entitled to provide its interpretation of Community regulation, as [...] the request for a preliminary ruling from the Court of Justice is mandatory only for the Courts of last instance". According to this judgment: "pursuant to Art. 93(3) of the Treaty, States are under the obligation of not carrying out plans to grant or alter aids timely notified to the Commission only if the Commission has started the procedure set out in Art. 93(2); if the Commission has not started the procedure yet, the Member States can implement their plans if a two-month

**3.3.5 Administrative Courte of Friuli Venezia Giulia (T.A.R. del Friuli-Venezia-Giulia), Judgment of 31 December 1987, No. 394, Industria farmaceutica lucana and other v. U.S.L. No. 11 of Pordenone (B)**

In December 1987, the Administrative Court of Friuli Venezia Giulia (T.A.R. del Friuli-Venezia-Giulia) affirmed the obligation on public bodies to comply with the requirements of the Law of 1 March 1986, No. 64, to reserve a quota of 30% to companies in Southern Italy in public procurement procedures.

**The Parties:** Industria farmaceutica lucana ("IFL") is a company producing pharmaceutical products and located in Lucania, a Region of Southern Italy. U.S.L. No. 11 of Pordenone is an administrative unit of the Department of Health ("USL") located in Pordenone.

**Background:** USL had not applied Law of 1 March 1986, No. 64. to its public tender and, consequently, had refused to set up a public tender reserved for companies located in Southern Italy. IFL appealed to the Administrative Court of Friuli Venezia Giulia (T.A.R. del Friuli-Venezia-Giulia).

**The respondent's argument:** USL claimed that Law of 1 March 1986, No. 64, was illegal, being in breach of Articles 30, 31, 92, 93 and 94 of the Treaty.

**Holding:** The Administrative Court (T.A.R.) set aside USL's claims, holding that<sup>26</sup>: (i) Article 92(3) of the Treaty considers as compatible with the common market "aids to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment", such as in the present case; (ii) only Member States are under the obligation to inform the Commission of their plans to grant or alter aids pursuant to Article 93(3) of the Treaty, while private citizens cannot ask domestic judges to determine the compatibility of aids with Community law, subject to a few exceptions which are not relevant in the case at stake (according to the case-

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*time-span has expired. The two-month time-span is provided by Articles 173 and 175 of the Treaty and is applicable by analogy to the cases of the Court of Justice*."

<sup>26</sup> A similar reasoning is followed also for aids provided by Art. 10 of Law 14 February 1963, No. 60, which reserves a quota of 70% to areas of Southern Italy. See Administrative Court of Latium (T.A.R. Lazio), Sec.: III [Order of 23 October 1992, No. 1329], *Lombardia v. C.I.P.E. and others, Campania and others* (n.c.).

law of the European Court of Justice<sup>27</sup>); (iii) a violation of Article 92(3) was not supported by evidence.

**3.3.6 Administrative Court of Puglia (T.A.R. Puglia), Bari, Sec.: I, Judgment of 26 October 1988, No. 255, Società Roussel Maestretti v. U.S.L. BA/12 and other (D)**

In October 1988, the Administrative Court of Puglia (*T.A.R. Puglia*) dismissed the action put forward by the complainant and affirmed the legality of the public tender procedure reserving 30% of supplies to companies from Southern Italy established before a communication of the Commission denying its compatibility with the common market.

**The Parties:** Roussel Maestretti ("RM") is an Italian company established in Northern Italy producing pharmaceutical products. U.S.L. BA/12 ("USL") is an administrative unit of the Department of Health ("USL") located in Bari.

**Background:** USL had announced two separate public tender procedures in compliance with Article 17 of Law No. 64/86. The first procedure was limited to 70% of supplies and was open to all companies, while the second procedure was limited to the remaining 30% of supplies and was reserved to companies from Southern Italy. RM appealed to the Administrative Court of Puglia (*T.A.R. Puglia*), claiming the public tender procedure reserved to companies from Southern Italy was unlawful on the basis, *inter alia*, of Articles 92, 93 of the Treaty.

**Judgment:** The Administrative Court (*T.A.R.*) referred to a principle already expressed by the Administrative Court of Veneto (*T.A.R. Veneto*), recognizing in principle the compatibility of Article 17 of Law No. 64/86 with the Common Market.<sup>28</sup> The Tribunal, however, acknowledged that the Commission had a different view and had considered aids granted by Law No. 64/86 as being incompatible with Community legislation. In 1987, the Commission had published a Communication declaring Article 17 of Law No.

<sup>27</sup> See European Court of Justice, Judgment of 19 June 1973, Case „Carmine Capdango v. Azienda Agricola Maya.“ C-77/72, [1973] ECR 611 and Judgment of 22 March 1977, Case „Iannelli & Volpi SpA v. Ditta Paolo Merani“ C-73/76, [1977] ECR 557, and Case „Steinike & Weinlig v. Federal Republic of Germany“ C-78/76, [1977] ECR 595.

<sup>28</sup> See Administrative Court of Veneto (*T.A.R. del Veneto*), Judgment of 10 June 1987, No. 616, according to which Art. 17 of Law No. 64/86 "is a regulation which, although granting privileges, is aimed at promoting Constitutional social goals. For the same reason, it cannot be deemed in violation of the Treaty, as it considers as compatible with the Common Market those aids which "promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment".

64/86 incompatible with the Treaty according to Article 93(3) and had initiated the procedure provided for in Article 93(2) of the Treaty for aids granted to the area of L'Aquila.

The Administrative Court (*T.A.R.*) based its decision on the principles of *tempus regit actum* and non-retroactivity. Consequently, it held that public tender procedures reserving 30% of supplies to companies from Southern Italy are compatible with the Common Market if established before the Commission's communication declaring its compatibility with the common market according to Article 93(2).

**3.3.7 Administrative Court of Veneto (T.A.R. Veneto), Sec.: II, Judgment of 26 July 1989, No. 1102, Compagnia OASI di Malcesine v. Veneto and others (A)**

In July 1989, the Administrative Court of Veneto (*T.A.R. Veneto*) delivered its judgment holding that regional aids are compatible with State backed loans if the former are justified by regional characteristics, and are therefore not in breach of Article 92 of the Treaty.

**The Parties:** Compagnia OASI di Malcesine ("COM") is an Italian hotel chain. Veneto is the Region of Veneto.

**Background:** COM had been granted a LIT 2,200,000,000 loan by the Council of Europe that had been backed by the Italian State against risks of alteration. Veneto refused to grant to COM regional aids claiming that a double grant (i.e. regional and State aids) is illegal because in violation of a regional law enacted by Veneto (law of 27 April 1997 No. 28). The assumption was based also on a violation of Article 92 EC Treaty.

**Holding:** The Administrative Court (*T.A.R.*) held that: (i) a regional aid is compatible with a State aid; (ii) a regional aid granted to a hotel is justified because "it refers to services offered in a given place, which are strictly tied to a particular regional area".

**3.3.8 Administrative Court of Lazio (T.A.R. Lazio), Rome, Sec.: III; Judgment of 11 June 1990, No. 1071, Società Fonderia A. v. Ministero dell'Industria and others (A)**

In June 1990, the Administrative Court of Lazio (*T.A.R. Lazio*) delivered its judgment dismissing the claim of a petitioner, which claimed its right to receive a State aid despite a decision of the Commission declaring its infringement of Article 92 of the Treaty.

**The Parties:** Società Fonderia A. ("SFA") is an Italian company. Ministro dell'Industria is the Italian Ministry of Industry.

**Background:** The Ministry denied SFA a reimbursement based on electricity use. The reimbursement was governed by the Law of 4 November 1981, No. 627, but the Commission Decision of 29 June 1983, No. 396 had declared it invalid. Consequently, SFA petitioned the Administrative Court (*T.A.R.*) claiming its legal right to receive the reimbursement.

**Judgment:** The Administrative Court (*T.A.R.*) dismissed the petition. It declared that the Administration is allowed to set aside an internal act which conflicts with a Commission declaration despite the existence of contrary internal regulations that have not yet been repealed. An individual is allowed State aid only if the Commission has authorized the aid; lacking such authorization no legitimate claims can be recognized. Consequently, it dismissed SFA's claim for reimbursement.<sup>29</sup>

**3.3.9 Council of State (Consiglio di Stato), Sec.: VI, Judgment of 15 October 1996, No. 1331, President of the Council of Ministers, Ministry of Labour and Social Welfare, Ministry of the Treasury, Ministry of Finances v. Istituto di Vigilanza Città di Pescara and others (B)**

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<sup>29</sup> For the appeal, see Council of State (*Consiglio di Stato*), Judgment of 16 March 1992, No. 167, *Società Fondiaria Assicurazioni v. Cassa Conguaglio Settore Elettrico* [issued on appeal to Administrative Court of Latium (*T.A.R. Lazio*), Sec.: III, Judgment of 11 June 1990, No. 1071], asking a preliminary ruling to the Court of Justice of the European Communities. For similar conclusions, see also Council of State (*Consiglio di Stato*), Judgment of 16 March 1992, No. 168, *Società Terni and another v. Cassa Conguaglio Settore Elettrico*; Council of State, (*Consiglio di Stato*), Sec.: VI, *Società Terni v. Società Italsider and Cassa Conguaglio Settore Elettrico*. See also Council of State (*Consiglio di Stato*), Sec.: VI, Judgment of 29 March 1995, No. 312, *Società Terni Spa and Italsider Spa v. Cassa Conguaglio Settore Elettrico*; Council of State (*Consiglio di Stato*); Sec.: VI; Judgment of 20 May 1995, No. 483, *Fonderia Spa v. Cassa Conguaglio Settore Elettrico*.



This judgment takes into account the new rule contained in Ministerial Decree (*Decreto Interministeriale*) of 5 August 1994 on employers' social security cuts and its relationship with Article 92 of the Treaty. It confirms the judgment delivered by the Administrative Court of Abruzzo (*T.A.R. dell'Abruzzo*) of 23 February 1995, No. 81.

### **3.4. Procedures before the Italian Auditors' Court (*Corte dei conti*)**

#### **3.4.1 Auditors' Court (*Corte dei conti*), Sec.: *Contributi Stato*, Decision of 5 November 1991, No. 105, Ministry of Defense (C)**

In November 1991, the Italian Auditors' Court (*Corte dei conti*) delivered its decision concerning public tender procedures reserved by law to businesses in Southern Italy.

The Court of Auditors held that "a declarative judgment of the European Court of Justice concerning rules with direct effect has the same legal status as the rules subject to interpretation". In March 1990 the European Court of Justice had issued a judgment holding that public tender procedures reserved only to businesses located in areas of Central or Southern Italy, such as those provided in Article 17 of Law of 1 March 1986, No. 64, are in breach of Articles 30, 92 and 93 of the Treaty.<sup>30</sup> Consequently, the Court declared that such public tender procedures are invalid.

#### **3.4.2 Auditors' Court (*Corte dei conti*), Sec.: *Contributi Enti*, Report to the Parliament of 16 March 1993, No. 3, Unione Nazionale Incremento Razze Equine (UNIRE) ed enti ippici (C)**

In March 1993, the Court delivered to the Parliament its report on the management of UNIRE, a public body. The Court stated that "the cut of State aids caused by Community legislation requires a complete revision of aid policies and the adoption of distribution criteria based on effective selection and quality systems".

#### **3.4.3 Auditors' Court (*Corte dei conti*), Sec.: *Contributi*, Decision of 23 March 1994, No. 18, Ministry of the Treasury (C)**

<sup>30</sup> See Court of Justice of the European Communities, Judgment of 20 March 1990, Case 21/88, *Du Pont de Nemours Italiana v. Unità Sanitaria Locale No 2 di Carrara*, [1990] ECR 889.

In March 1994, the Court of Auditors (*Corte dei conti*) confirmed its own jurisdiction to request a preliminary ruling of the European Court of Justice based on Article 177 of the Treaty.

The Court was asked by the public officer in charge of the control of the Treasury's decrees to judge on the possibility of modifying a decree in order to finance a State revenue-producing monopoly (*Azienda Tabacchi Italiani S.p.A.*). However, the Court held that in the case in question a preliminary ruling was not necessary because it was regulated directly by Article 90 of the Treaty, concerning "undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly".<sup>31</sup>

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<sup>31</sup> Similar conclusions are in: Court of Auditors (*Corte dei conti*), Sec.: Contributi Stato, 14 June 1996, No. 88, *Department of Treasury*. According to this judgment "*derogations on competition allowed in the Rome Treaty concerning revenue-producing monopolies or 'general economic interest' administrations (Articles 90 and 92), apply not only to absolute monopolies but also to "mixed ownership" businesses, that is businesses in which both monopolies or general economic interest companies and profit-earning private companies operate.*"