OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 9 February 2006 [1]

1. The present cases are concerned with an appeal by P & O European Ferries (Vizcaya) SA ('P & O') and Diputación Foral de Vizcaya (the Provincial Council of Biscay ('the Diputación') against the judgment of the Court of First Instance of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya* v *Commission* ('the contested judgment') [2] which upheld in its entirety Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company P & O, which at that time was called Ferries Golfo de Vizcaya ('the contested decision'). [3]

I — Legislative Background

2. Article 87(1) EC declares, subject to derogations provided for in the Treaty, to be incompatible with the common market aid granted by a Member State or through State resources which, by favouring certain undertakings or the production of certain goods, distorts or threatens to distort competition and affects trade between Member States.

3. Article 88(3) EC provides that plans to grant or alter aid are to be submitted to the Commission in sufficient time and that the Member States may not put the planned measures into effect before the Commission has adopted a decision.

4. In addition, by Council Regulation (EC) No 659/1999 [4] ('Regulation No 659/1999') the European Community adopted a detailed system of procedural rules for applying the Community provisions on control of State aid.

1 — Original language: Italian.

2 — [2003] ECR II-2957.

3 — OJ 2001 L 89, p. 28.

4 — Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

II — Facts and Procedure

The facts giving rise to the dispute

5. In view of the complexity of the events at issue in these cases, which, moreover, have given rise to two pronouncements by the Court of First Instance, together with the fact that they span a rather long period of time, I shall merely outline the principal facts that are relevant to the present proceedings.

6. The proceedings derive entirely from agreement (hereinafter 'the original agreement') signed on 9 July 1992 by the Diputación and the Ministry of Trade and Tourism of the Basque Government, on the one hand, and, on the other, the maritime transport company now known as P & O. The agreement concerned the establishment of a service plying between Bilbao and Portsmouth and provided for the acquisition, over the period 1993 to 1996, of a number of travel vouchers by the signatory authorities, against payment of consideration specified in the agreement. That agreement was never notified to the Commission.

7. However, as early as 21 September in that year, a competing shipping company, Bretagne Angleterre Irlande ('hereinafter BAI') complained to the Commission of alleged subsidies granted by the Diputación and the Basque Government to P & O. After obtaining the necessary information, the Commission decided on 29 September 1993 to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC). [5]

8. After a preliminary examination, the Commission came to the conclusion that the original agreement did not constitute a normal commercial transaction but rather State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) which did not appear to fulfil the requirements for compatibility with the common market.

9. The Commission's views were based, amongst other things, on the fact that the price agreed for the purchase of tickets by the signatory authorities exceeded the ordinary commercial tariff and that the agreement contained an undertaking to absorb all losses suffered by P & O in the first three years of operation of the new service. In the Commission's view, therefore, the agreement ultimately eliminated any commercial risk for P & O.

10. Following notification of the decision to initiate the procedure, the Basque Govern-

5 — OJ 1994 C 70, p. 5.

ment informed the Commission that it had suspended implementation of the agreement. At the same time, P & O, in the course of the administrative procedure for examination of the measure, entered into protracted correspondence with the Commission in order to define the type of agreement which could be concluded between the shipping company and the public authorities without infringing the Community provisions on aid.

11. Against that background, P & O gave notice, by letter of 27 March 1995 (hereinafter 'the letter of 27 March 1995') addressed to an official in the Commission Directorate General (DG) for Transport,[6] of a new agreement (hereinafter 'the new agreement' or 'the contested measure'), entered into on 7 March 1995 between the Diputación and P & O. That agreement, which covered the period from 1995 to 1998, included an undertaking for the purchase — by the Diputación — of a total of 46 500 tickets to be used on the Bilbao-Portsmouth route, operated by P & O, and determined the price to be paid and the other terms and conditions of the purchase.

12. On 7 June 1995 the Commission decided to terminate the procedure commenced on 29 September 1993 (hereinafter 'the decision of 7 June 1995'),[7] stating that the new agreement differed in many respects from the previous version. In particular, it now provided that the Basque Government was no longer party to the agreement; that the ticket price was to be determined in accordance with new criteria and thus was lower than the one provided for in the original agreement; that numerous other matters in the original agreement — in respect of which the Commission had earlier expressed reservations — had been eliminated. On the basis of those considerations, the Commission therefore declared that the new agreement did not constitute State aid.

13. However, that decision was promptly challenged before the Court of First Instance by BAI, in its capacity as a company competing with P & O and a complainant regarding the aid, and in the subsequent proceedings before the Court, the Kingdom of Spain and P & O intervened in support of the Commission.

14. By judgment of 28 January 1999 in Case T-14/96 *BAI* v *Commission*[8] (hereinafter 'the *BAI* judgment') the Court of First Instance annulled the decision of 7 June 1995 on the ground that the new agreement did not constitute a normal commercial transaction and that, therefore, the Commission had made an incorrect assessment of that agreement under Article 87(1) EC.

15. In particular, the Court of First Instance observed that the total sums paid to P & O by the public authorities on the basis of the new agreement were not only not lower than those provided for in the original agreement but were even slightly greater. Although the

6 — The official responsible for the file concerning the aid at issue.

7 — OJ 1995 C 321, p. 4.

8 — [1999] ECR II-139.

unit price of the tickets had been reduced, the total number of travel vouchers acquired had increased significantly (46 500 tickets as against the 26 000 originally provided for). And the number of tickets purchased — the Court observed — had not in any way been determined in relation to the real needs of the purchaser. Moreover, P & O would not have to bear any additional cost as a result of the larger number of tickets because they could only be used in the low season. Therefore, the Court of First Instance concluded, the effects of the new agreement on competition were substantially the same as those observed in the original agreement. [9]

16. In the light of that judgment, the Commission decided to commence, on 26 May 1999, [10] the procedure under Article 88(2) EC in relation to the new agreement. According to the Commission, the Basque authorities had artificially increased the number of tickets to be purchased from P & O in order to offset the reduction in the price of the tickets and, therefore, to maintain public financing of the shipping company at the levels envisaged in the original agreement.

17. Upon conclusion of that procedure, by Decision 2001/247/EC of 29 November 2000 [11] the Commission declared that the new agreement constituted State aid incompatible with the common market (Article 1) and therefore ordered the Kingdom of Spain to recover the sums already paid (Article 2).

Procedure before the Court of First Instance and the contested judgment

18. That decision was in turn challenged before the Court of First Instance both by the Diputación and by P & O, but whereas the latter merely sought annulment of the order for recovery of the aid already paid, the Diputación sought annulment of the entire decision.

19. In support of their view that the agreement rejected by the Commission was lawful, both applicants stated as a preliminary point that the contested aid had been duly notified to the Commission by the beneficiary by the abovementioned letter of 27 March 1995.

20. They went on to make a number of criticisms concerning substantive aspects of the decision and alleged procedural defects which came about during the administrative procedure before the Commission. Essentially those criticisms related to: (a) reclassification of the measure as State aid; (b) breach of the right to property and of

9 — Paragraphs 74 to 80.
10 — OJ 1999 C 233, p. 22.
11 — See footnote 3.

Article 295 EC; (c) failure to apply the exemption under Article 87(2)(a) EC; (d) infringement of the procedural rules imposed by the EC Treaty and by Regulation No 659/1999, in particular with regard to the failure to seek further information from the authorities; (e) breach of the principles of the protection of legitimate expectation, legal certainty and sound administration; (f) infringement of Article 88 EC, in that the aid should have been regarded as implicitly authorised; and (g) inadequacy or irrelevance of the statement of reasons for the purposes of Article 253 EC.

21. For its part, the Commission, besides contesting the merits of all those pleas, contended that the plea concerning classification of the contested measure as State aid was inadmissible because it infringed upon the status of *res judicata* of the *BAI* judgment.

22. The Court of First Instance declared the actions admissible in their entirety but rejected all the pleas in law put forward by P & O and the Diputación, on the basis of the considerations which I shall now summarise briefly, in the same order as that followed by the Court in the contested judgment.

23. As a preliminary point, the Court of First Instance held that the new agreement had not been made in accordance with the new procedure provided for in Article 88(3) EC and should therefore be regarded as unlawful.

24. In that connection, it rejected the applicant's arguments that, since the new agreement should be regarded as new aid, it had been duly notified to the Commission by the beneficiary company. According to the Court of First Instance, however, notification of that agreement to the Commission by the recipient's lawyers could not in any way be regarded as formal notification of new aid within the meaning of the EC Treaty. [12]

25. In any event, the Court continued, the new measure did not constitute new aid different from that originally agreed (and never notified) because the changes made to the latter did not affect the substance of the aid. Since, therefore, the original agreement and the new agreement should be regarded as a single grant of aid, set up and implemented in 1992 and modified thereafter, the failure to notify the first also affected the legality of the second.

26. As regards, next, the classification of the contested measure as aid within the meaning

12 — Paragraphs 57 to 74

of Article 87(1) EC, the Court of First Instance first rejected the abovementioned objection of inadmissibility put forward by the Commission, observing that the force of *res judicata* of an earlier judgment can be invoked only if the application which gave rise to the judgment involved the same parties, had the same subject-matter and was founded on the same grounds. Not all those conditions were fulfilled in the case before it. [13]

27. On the substance, however, the Commission's analysis was upheld.

28. In the first place, the Court of First Instance took the view that numerous factors showed that the Diputación had not concluded the new agreement in order to meet actual needs. In its opinion, 'the mere fact that a Member State purchases goods and services on market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted ... if it turns out that the State did not have an actual need for those goods and services ... It is all the more necessary for a Member State to demonstrate that its purchase of goods or services constitutes a normal commercial transaction where, as in the present instance, selection of the operator has not been preceded by a sufficiently advertised open tender procedure'. [14] In this case, therefore, such necessity not having been demonstrated, the Commission was right to conclude that the new agreement was capable of conferring an economic advantage on P & O. [15]

29. Furthermore, according to the Court of First Instance, the Commission correctly noted the potential distorting effect on competition of the measure in question and its possible effect on trade between Member States. [16]

30. As regards, next, the alleged violation of the right of property enshrined in Article 295 EC, the Diputación had contended that the contested decision represented an unfair limitation of its ability to conclude contracts and deprived it of ownership of the travel tickets lawfully acquired. But the Court held that Article 295 EC does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty and, consequently, cannot restrict the scope of the concept of State aid for the purposes of Article 81(1) EC. [17]

31. The Court of First Instance also found that the contested measure could not be declared compatible on the basis of Article

13 — Paragraphs 75 to 82.

14 — Paragraphs 117 and 118.

15 — Paragraphs 121 to 140.

16 — Paragraphs 141 to 144.

17 — Paragraphs 148 to 153.

87(2)(a) EC because the aid had not been granted to individual consumers and without discrimination relating to the origin of the services, but favoured only P & O.[18]

32. As regards the alleged infringement of procedural rules, the Court did not accept the Diputación's criticism that the Commission had not sought from the Spanish authorities all the explanations or clarifications needed for the purposes of its decision. In its view, the criticism was based on a misreading of the contested decision in that the passages in the decision to which the Diputación took exception did not concern a genuine lack of information but rather a different assessment — by the Commission — of the evidence provided by the Spanish authorities during the administrative procedure.[19]

33. The Court then analysed and rejected the arguments put forward by both applicants concerning alleged breach of the principles of the protection of legitimate expectations and the principle of sound administration in relation to the order for recovery of the aid contained in the contested decision.

34. As regards the alleged breach of the principle of the protection of legitimate expectation, the Court observed first of all that the possibility cannot be excluded in all cases that a recipient of aid unlawfully granted may rely on exceptional circumstances on which it may have based its expectations concerning the propriety of the aid. However, the authorities who granted that aid in breach of the obligation of notification cannot invoke the legitimate expectations of the recipient to evade the obligation of adopting the measures necessary to implement a Commission decision unfavourable to it. However, that was what the Diputación had done, without justification.[20]

35. Moreover, the Court of First Instance continued, apart from invoking the fact that the Commission had initially adopted a positive decision, P & O had not pleaded any exceptional circumstances which could lead it to entertain a legitimate expectation. To consider that a prior positive Commission decision on aid — challenged within the period prescribed by Article 230 EC for proceedings to be brought and annulled by the Community Court — automatically prevents recovery of aid unlawfully granted would deprive of any useful effect the review by the Community Court of the legality of such decisions. In particular, the Court of First Instance observed, referring to the judgment of the Court of Justice of 14 January 1997 in *Spain* v *Commission*,[21] the recipient's competitors would be deprived of

18 — Paragraphs 162 to 171

19 — Paragraphs 176 to 187

20 — Paragraphs 201 to 203.

21 — Case C-169/95 [1997] ECR I-135 paragraph 53.

any effective remedy against Commission decisions that were unfavourable to them. [22] Consequently, P & O's arguments regarding its own legitimate expectations were also rejected.

36. As regards the alleged infringement of the principle of sound administration, the Court of First Instance observed that the applicant was criticising the Commission's conduct when it investigated the case in order once again to call in question the illegality of the aid. The Court therefore dismissed the criticism, referring to the analysis made earlier in the same judgment on that point. [23]

37. Considering next the alleged infringement of Article 88 EC, the Court of First Instance did not accept the Diputación's argument that the failure to initiate, within the two months following the adoption of the *BAI* decision, the procedure under Article 88 EC regarding the contested measure necessarily meant that the aid was deemed to be authorised. The Court referred to the *Lorenz* case [24] and concluded that the requirements laid down by it were not fulfilled in the present case. [25]

38. Finally, the Court of First Instance declared that P & O's allegation concerning an inadequate statement of reasons was manifestly unfounded. [26]

Procedure before the Court of Justice

39. By applications lodged on 17 October and 10 November 2003 respectively, P & O (Case C-442/03 P) and the Diputación (Case C-471/03 P) contest the conclusions reached by the Court of First Instance. P & O asks the Court of Justice to set aside the contested judgment and refer the case back to the Court of First Instance for it to give a fresh decision on Article 2 of the contested decision. The Diputación, for its part, asks the Court to set aside the contested judgment and, if the state of the proceedings so permits, to itself give judgment on the merits of the case, annulling the Commission decision (or, in the alternative, annulling only Article 2 thereof). Otherwise the Diputación submits that, the judgment at First Instance having been set aside, the case should be referred back to the Court of First Instance.

40. The Commission opposed those claims in both the cases, contending that the Court should dismiss the applications and order the appellants to pay the costs. It is also appropriate to note that the Diputación

22 — Paragraphs 204 to 210.

23 — Paragraphs 211 and 212.

24 — Case 120/73 [1973] ECR 1471 ('the *Lorenz* case'). That case lays down the rule that if the Commission does not, in the two months following notification of new aid, take a position regarding it (by initiating adversarial proceedings or adopting a favourable decision) the State in question may implement the measure, giving advance notice thereof to the Commission.

25 — Paragraphs 216 to 219.

26 — Paragraphs 223 to 227.

became a party to the proceedings brought by P & O, in support of the form of order sought by P & O, and — at the same time — P & O intervened in support of the Diputación in the appeal proceedings brought by the latter.

41. By order of the President of the Court of Justice on 7 June 2005, the cases were joined for the purposes of the oral procedure and the judgment. The parties presented oral argument at the hearing on 22 September 2005.

III — Legal Analysis

Introduction

42. The appellants have put forward various pleas in law against the judgment of the Court of First Instance, which I shall consider in detail in due course. First I must give my views on the doubts expressed by the Commission concerning the admissibility of the appeal brought by the Diputación, which were clarified at the hearing, being described as amounting to a formal objection of inadmissibility on the ground that the appeal was brought out of time.

The belatedness of the Diputación's appeal.

43. I would first point out that in its notice of appeal the Diputación gave an address for service not in Luxembourg but at the office of its lawyers in Bilbao, Spain, and agreed to receive service of documents by fax. That said, I would point out that the judgment of the Court of First Instance was delivered on 5 August 2003 and that on the same date the Diputación issued a press release stating publicly its intention to appeal. Moreover, following that judgment and in accordance with the abovementioned provisions, the Registry of the Court of First Instance sent a certified copy of the judgment to the Diputación by registered post with a return receipt, which was handed in at the Luxembourg post office on 11 August 2003. At the address for service given by the appellant, however, the document was notified, according to the details on the return receipt, on 1 September. The Diputación, therefore, took the view that that date should be the starting point for the time-limit for its appeal, which as a result was lodged on 10 November 2003. The copies of the judgment notified to the Commission and to P & O, on the other hand, were received on 13 and 14 August 2003 respectively and, therefore, as we have seen, the P & O appeal was lodged on 17 October.

44. Against that background, the Commission objects that, in the light of the second subparagraph of Article 100(2) of the Rules

of Procedure of the Court of First Instance, [27] the Diputación's appeal was out of time.

45. In its opinion, if I understand correctly, it is indeed true that the last sentence of that provision at the same time indicates deemed notification 10 days after lodgement of the document at the Luxembourg post office and a derogation therefrom ('unless it is shown by the acknowledgement of receipt ...' etc.). That derogation may, however, come into operation only if the *actual* date of receipt of the document precedes the one resulting from that presumption. Otherwise, there would be a risk of creating legal uncertainty since the addressee of the notification could indefinitely defer collecting the document and, therefore, the time at which the period for bringing an appeal started to run.

27 — It will be noted that, although paragraph 1 of that provision indicates that, in principle, '[w]here these rules require that a document be served on a person, the Registrar shall ensure that service is effected at that person's address for service ... by registered post with a form for acknowledgement of receipt', paragraph 2 nevertheless, adds that '[w]here, in accordance with the second paragraph of Article 44(2), the addressee has agreed that service is to be effected on him by telefax or other technical means of communication, any procedural document *other than a judgment or order of the Court of First Instance* may be served by the transmission of a copy of the document by such means' first subparagraph, emphasis added); 'Where for technical reasons or on account of the nature or length of the document, such transmission is impossible or impracticable, the document shall be served, if the addressee has failed to state an address for service, at his address in accordance with the procedures laid down in paragraph 1. The addressee shall be so advised by telefax or other technical means of communication. Service shall then be deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the registered letter at the post office of the place where the Court of First Instance has its seat unless it is shown by the acknowledgement of receipt that the letter was received on a different date ...' (second subparagraph).

46. But above all, objects the Commission, it is entirely clear in this case that the Diputación was apprised of the Court of First Instance's judgment long before 1 September 2003. That is demonstrated moreover by the press release published by the Diputación on the actual day of delivery of the judgment, and by the fact that the text of the judgment was made available on the internet. The appellant, it is contended, therefore failed in the duty of diligence which attaches to the parties to legal proceedings by intentionally delaying collection of the documents dispatched to it (and, therefore, signature of the acknowledgement of receipt) to enable it to extend the time-limit for bringing an appeal.

47. For its part, the Diputación retorts that its appeal was lodged in time in the light of the date of actual receipt of the copy of the judgment and the ordinary period for bringing an appeal (two months), as well as the extension of time allowed because of the distance of the address for service elected by the appellant. In that connection, the appellant refers to the last sentence of the second subparagraph of Article 100(2) of the Rules of Procedure of the Court of First Instance which, in its view, makes actual receipt of the document take precedence over deemed receipt.

48. For my part, I would make the preliminary point that the first subparagraph of Article 100(2) governs only the arrangements for notifying documents which, in principle, can be sent by fax or other technical means, but it expressly excludes from such arrangements notification of

judgments or orders of the Court of First Instance.

49. As we have seen, the second subparagraph of that paragraph (referred to both by the appellant and by the Commission) indicates that in those cases where — among other things — because of 'the nature ... of the document' (judgment or order) it is impossible to serve the document by telefax or other technical means, notification is to be made in accordance with the so-called ordinary procedure under Article 100(1), that is to say by registered post with a form for acknowledgement of receipt, with notice being given at the same time to the addressee by telefax or any other technical means of communication. That having been done, it is presumed that the registered letter has been delivered to the addressee on the 10th day following its lodgement at the Luxembourg post office (in the absence, of course, of an address for service in that country), unless the acknowledgement of receipt indicates that the document was received on a different date.

50. The presumption in the second subparagraph of Article 100(2) should, therefore, be kept separate from that in the third subparagraph of Article 44(2) of the Rules of Procedure of the Court of First Instance, to the effect that service is to be deemed to have been duly effected by the lodging of the registered letter at the Luxembourg post office. [28]

51. The first applies where, notwithstanding the agreement to have service effected by telefax or other technical means, such service cannot take place among other things because of the nature of the document (judgment or order). [29] The second, on the other hand, comes into operation where the applicant has not observed the formal requirements of the first and second subparagraphs of Article 44(2), in other words, has not given an address for service in Luxembourg or consented to the service of procedural documents by telefax or other technical means. [30]

52. In the present case, as has been seen, the Diputación did not give an address for service in Luxembourg but agreed to the service of procedural documents by telefax or other technical means. The applicable rule is therefore the second subparagraph of Article 100(2).

28 — I would point out, for the reader's convenience, that Article 44 provides that 'the application shall state an address for service in the place where the Court of First Instance has its seat' (Article 44(2) first subparagraph); 'In addition to or instead of specifying an address for service as referred to in the first subparagraph, the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication' (second subparagraph); 'If the application does not comply with the requirements referred to in the first and second subparagraphs, all service on the party concerned for the purposes of the proceedings shall be effected, for so long as the defect has not been cured, by registered letter addressed to the agent or lawyer of that party. By way of derogation from the first paragraph of Article 100, service shall then be deemed to have been duly effected by the lodging of the registered letter at the post office of the place where the Court of First Instance has its seat' (third subparagraph)

29 — As I have stated, however, the addressee must be advised of the lodging of the document, otherwise, the presumption cannot operate.

30 — See to that effect the order of 29 October 2004 in Case C-360/02 P *Ripa di Meana* [2004] ECR I-10339.

53. Following that clarification, it is now necessary to establish, in the light of that provision, under what conditions the presumption of due delivery of the registered letter on the 10th day following the lodging of it at the Luxembourg post office may fail. In other words, the question is whether or not the presumption fails whenever the acknowledgement of receipt indicates that receipt took place on a different date (as the appellant contends) or only when that date precedes the date resulting from that presumption (as the Commission suggests).

54. Of those two possibilities, I am more persuaded by the Diputación's argument. First, it appears to be more in conformity with the wording of the provision, which does not in any way confirm the Commission's inferences. Second, and more generally, I must observe that whilst the relevant procedural provisions grant a time-limit to the appellant, the latter is entitled to take advantage of it and to do so to the full, unless express exceptions apply. The setting of time-limits for an application is a matter, among other things, of protection of the rights of the defence; therefore, any proposal liable to curtail those rights would need to have a much more solid legal basis than an indirect, and moreover forced, inference from a sentence which has an entirely different literal meaning.

55. In any event, I consider that, on the basis of general principles, if any interpretative doubts still exist on the point, they cannot be allowed to have an adverse impact on the appellant and his rights of defence and, therefore, it is necessary to give precedence to the interpretation which best protects those rights.

56. I therefore consider that the Diputación's appeal must be regarded as in time and, therefore, admissible.

The pleas in law

57. As regards the substance of the appeals, P & O has put forward seven pleas in law and the Diputación nine which partly overlap. I shall, therefore, as far as possible, consider them together.

58. I shall commence my analysis with the pleas concerning classification of the contested measure as aid, then those focusing on the alleged misinterpretation of Article 88(3) EC and, finally, those concerning other errors of law allegedly made by the Court of First Instance.

A — *Pleas concerning the classification of the measure as aid*

59. Levelling various criticisms, the Diputación contests first of all the Court of First Instance's statements supporting the conclusions drawn in the contested decision regarding classification of the new agreement as State aid within the meaning of Article 87(1) EC.

1. The admissibility of the pleas

60. Before considering the merits of those criticisms, however, it is necessary to resolve certain doubts concerning their admissibility.

61. In particular, it is necessary to establish whether the classification of the measure in question as aid is still open to challenge before the Community Court. In its *BAI* judgment, in fact, the Court of First Instance already gave a decision to some extent concerning that measure, annulling the decision of 7 June 1995, which had approved it. Because the parties did not subsequently challenge it, that judgment became final and is *res judicata*. The question therefore arises whether the application by the Diputación to the Court of First Instance indirectly called in question the *BAI* judgment, thereby breaching the principle of *res judicata*.

62. In fact, in those proceedings the Commission had formally raised that objection, but unsuccessfully, because the Court of First Instance held that, according to settled case law, 'the force of *res judicata* attaching to a judgment can constitute a bar to the admissibility of an action if the action which gave rise to the judgment in question was between the same parties, had the same subject-matter and was founded on the same grounds'. [31] In this case, however, according to the Court of First Instance, the action by the Diputación concerned a measure different from that which gave rise to the *BAI* judgment (the contested decision and the decision of 7 June 1995 respectively) and, second, the proceedings did not involve the same parties as those to the BAI proceedings, because the Diputación was not a party to those proceedings. [32]

63. That objection has not been revived by the Commission in the present appeal proceedings, even though the parties were invited to give their views on the issue and indeed put forward their (opposing) views on the point at the hearing.

64. However, despite the absence of a formal objection from a party, I do not think the Court is precluded from considering whether in fact the principle of *res judicata* has been

31 — Joined Cases 172/83 and 226/83 *Hoogovens Groep* [1985] ECR 2831, paragraph 9; and Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12

32 — Paragraphs 77 to 80.

observed in this case. In my opinion, although the legal texts are silent, [33] in appeals the Court of Justice may of its own motion raise an objection justified by grounds of public policy against a judgment of the Court of First Instance.

65. I would also point out that its authority in that regard is clearly confirmed by the case-law of the Court of Justice and fully justified by Advocate General Jacobs in his Opinion in *Salzgitter*, and here I shall merely refer to his reasoning. [34]

66. Also, there likewise appears to me to be no doubt that observance of the principle of *res judicata* must be seen as a matter of public policy and thus specifically a matter which the Court may raise of its own motion at any time. It is a fundamental principle of the Community legal order, and not only of the Community legal order, observance of which must be upheld in the interests not only of the parties, but also, and more particularly, in the general interest. [35]

67. That point having been clarified, it now remains to consider whether in this case the objection is well founded and therefore whether, by declaring admissible the application at first instance and giving a further decision on the aid nature of the contested measure, the Court of First Instance breached the principle of *res judicata* in relation to the *BAI* judgment.

68. In that connection, I should first point out that at first instance the Court rejected the objection on the grounds of non-fulfilment of the conditions laid down by the case-law of the Court of Justice for a case of *res judicata* to be claimed. In particular, it held that the two cases did not involve the same parties or have the same subject-matter.

69. As regards the first aspect, I would point out that in the BAI case the Diputación was not a party and the public interests at stake were defended by the Spanish Government,

33 — Article 92(2) of the Rules of Procedure of the Court of Justice, which is specifically concerned with considering objections on its own initiative on grounds of public policy, is not referred to by Article 118 of those rules with regard to appeals.

34 — Case C-210/98 P *Salzgitter* [2000] ECR I-5843, paragraphs 56 and 57; and the Opinion in that case, point 125 et seq.

35 — Regarding the criteria for appraising grounds of public policy, the same and concordant views are set out in detail in the abovementioned Opinion of Advocate General Jacobs in *Salzgitter*, at point 140 et seq. Specifically, to the effect that issues concerning *res judicata* are matters of public policy and can, therefore, be considered of the Court's own motion, see the Opinion of Advocate General Roemer of 19 October 1965 in Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Société Anonyme des Laminoirs* [1965] ECR 911 and the Opinion of Advocate General Jacobs of 4 May 1994 in Case C-312/93 *Peterbroeck* [1995] ECR I-4599, at I-4601, in particular at I-4606, point 24.

as intervener in support of the Commission, the defendant in that case. Attention could also be drawn to the fact that, whilst it is true that both cases involve public authorities of the same State which defended before the Court of First Instance the position of the body paying the aid, it is also true that the parties were different. I confess, however, that I am not sure that the objection is in fact decisive, in particular if the diversity was justified by possible restrictions on the *locus standi* of the Diputación in the first proceedings.

70. It seems to me, therefore, to be of decisive importance to examine the other condition. Indeed, fulfilment of that condition would appear at first sight to be ruled out since the decisions contested in the two cases were different in form. However, I believe that the question is more complex.

71. I must point out that the term 'same subject-matter' 'cannot be restricted so as to mean two claims which are entirely identical' [36] and, in this case, it cannot be restricted to the identity of the act that has been appealed because the issue is not so much the identity of the acts but rather that of the points of law before the Court. It is on that issue that a judgment will be given and the force of *res judicata* will apply.

72. The matter is also clarified in that regard by the fact that, according to the Court of Justice, in taking under Article 233 EC the measures necessary 'in order to comply with the [annulling] judgment and implement it fully, [the Commission must] have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis ... It is those grounds which ... identify the precise provision held to be illegal and ... indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure'. [37]

73. In both the cases that are relevant here, the dispute appeared to be substantially identical. As in *BAI*, in fact, in the new proceedings too the subject-matter of the obligation was clearly the validity of the specific (and different in the two cases) Commission decision submitted for assessment by the Court; however, the point of law actually at issue in both cases, the one which I believe became *res judicata*, was the assessment that the Commission had made of the measure at issue, in the light of Article 87(1) EC, in determining, in both cases, whether or not the agreement constituted State aid.

74. It was precisely because of that assessment that the measure was annulled by the *BAI* judgment and the legal reasoning

36 — Case 144/86 *Gubisch* [1987] ECR 4861, paragraph 17

37 — Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* [1988] ECR 2181, paragraph 27.

underlying that decision should in principle have been binding on the Court of First Instance in the subsequent proceedings as well, when it was called upon to adjudicate on a decision which followed accurately the indications given in the *BAI* judgment.

75. That said, I must nevertheless point out that, following the *BAI* judgment the Commission did not confine itself to re-presenting, as such, the same measure with a new statement of reasons conforming to that judgment. It initiated a formal inquiry of the kind provided for by Article 88(3) EC in relation to the contested measure 'to allow interested parties to submit their comments on the position that the Commission intend [ed] taking [as regards the agreement] in the light of the judgment of the Court of First Instance'. [38] And in fact, as is clear from the text of the contested decision, in the course of that procedure P & O, the Basque authorities and *BAI* submitted further observations and information concerning the contested measure. [39]

76. Regardless of the extent to which the Commission should have respected the *BAI* judgment, it clearly could not fail to take account of any new or additional facts alleged by the parties to the procedure (for example, subsequent amendments to the measure, changes in the surrounding economic and/or legislative circumstances, and so forth), facts which, for obvious reasons, that judgment could not have taken into account but which, however, might have caused the Commission's final assessment to go in a different direction.

77. But if subsequent elements were in fact produced by the parties [40] and taken into consideration [41] by the Commission during the abovementioned formal investigation procedure, the Court of First Instance could not omit to take account of those new developments and fail to re-examine the issue. And that is so, notwithstanding the *BAI* precedent, because, as the Court of Justice has pointed out on several occasions, 'the principle of *res judicata* [in relation to a judgment of the Community judicature] extends only to the matters of fact and law actually or necessarily settled by the judicial decision'. [42]

78. I believe, therefore, that the contested judgment rightly went so far as to re-examine the nature of the measure at issue. All the more so, because any other approach would have meant, for the parties to the present proceedings and in particular the

38 — Decision of 26 May 1999, cited above, paragraph 1, sixth subparagraph.

39 — See paragraphs 20 to 40 of the contested decision.

40 — For example, the fact that the travel vouchers purchased could also be used in periods following that covered by the new agreement (see paragraph 25 of the contested decision) or again further information on the calculation method used by the authorities to determine the number of tickets required (see paragraph 47 of the contested decision).

41 — See, for example, paragraphs 48 to 50 of the contested decision.

42 — See Case C-281/89 *Italy* v *Commission* [1991] ECR I-347 paragraph 14; and the order of 28 November 1996 in Case C-277/95 P *Lenz* [1996] ECR I-6109, paragraph 50.

Diputación, a denial of judicial protection, in so far as the Commission's assessments concerning further matters raised by the parties would have been removed from the purview of the Community Court.

79. It seems to me, therefore, that the Court of First Instance's decision on this point was correct. I propose, therefore, that the Court of Justice declare that the grounds of appeal submitted by the appellants are admissible.

2. The substance

80. In view of the foregoing, it is necessary to consider the merits of the pleas concerning the interpretation of Article 87(1) EC.

81. According to the appellant, the Court of First Instance erred in law in interpreting that provision, because:

(a) in considering whether the Spanish authorities had conducted themselves in the same way as a private investor in a market economy, it emphasised a criterion, that of the need for intervention by the public authorities, which had nothing to do with the principle of the private investor;

(b) it wrongly concluded that the Diputación did not need to purchase the travel vouchers;

(c) it failed to criticise the absence in the contested decision of an economic analysis of the advantage conferred by the measure in relation to the sums already paid to P & O;

(d) it declared that it was unnecessary for the Commission to evaluate the real impact of the State measure on intra-Community trade and competition.

82. I shall analyse those criticisms.

(a) The criterion of the need for intervention by the public authorities

83. As I have already pointed out, the Diputación contends first of all that the Court of First Instance misinterpreted Article 87(1) EC when, in applying the principle of the private investor, it considered that it should verify whether in the present case the public authority concerned really needed the goods or services purchased by it.

84. In its opinion, for that principle to be correctly applied it is necessary to rely only on the price of those goods and services and the extent to which that price is in line with market values, which are objectively verifiable data. The criterion to which objection is taken, and of which moreover there is no trace whatsoever in the case-law of the Court of Justice, concerns a subjective examination of the reasons and grounds for public intervention. Moreover, it implies that the Member States would be required to inform the Commission of all supplies of goods and services which they obtain and to prove that they are really necessary.

85. For its part, the Commission considers that the finding that a purchase is manifestly unnecessary is an entirely relevant criterion for the purpose of applying the private operator test. A purchase of clearly useless goods or services is, in fact, liable to give the supplying undertaking a significant economic advantage within the meaning of Article 87(l) EC.

86. For my part, let me first point out that the well-known principle of the private operator makes it possible to determine whether public intervention can be ascribed purely to the logic of the market and is not designed to favour certain undertakings, with resultant distortion of the common market. As we know, it is clear from established Community case-law that in order to determine whether a public measure constitutes State aid, it must be considered whether, in similar circumstances, a private investor would have undertaken the economic transaction in question on the same terms as those observed by the public authority. [43]

87. There is nothing to show that, in order to carry out such an analysis fully and appropriately, the Commission must focus *exclusively* on the 'correct' price (or market price) of goods or services paid for by the public purchaser, completely disregarding the terms, conditions, and other circumstances surrounding the purchase. It seems to me, on the contrary, that it is only by examining all those factors that it is possible to determine whether the economic transaction in question is legitimate or seeks to confer on the seller an economic advantage prohibited by Article 87(1) EC. In short, the important aspect of the principle of the private investor is that not (only) the price but also the transaction as a whole must conform with the logic of the market.

88. For example, it is clear that, even if the price is, prima facie, the market price, it would go against the principle of the private operator for the decision of a public authority to purchase goods on terms (or other conditions) of payment which were much more favourable to the supplier than those normally available in the market. But

43 — See, among many others, Case C142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 29; Case C-261/89 *Italy* v *Commission* [1991] ECR 1-4437, paragraph 8; and Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 13.

the same applies, turning to the present case, also where the purchase has been made at the market price but in quantities much greater than were necessary, thus giving the supplier a disproportionate increase in turnover. As the Commission has emphasised, no private operator would acquire goods or services which are not in fact needed by it.

89. The Court of First Instance was therefore right to take the view that 'the mere fact that a Member State purchases goods and services on market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted, or in other words a normal commercial transaction, if it turns out that the State did not have an actual need for those goods and services'. [44]

90. I accept of course that it is not always easy to verify objectively the need for the public authorities to purchase certain goods or services; it is also true, however, that when it is possible to do so, the absence of any such necessity is a clear indication that the purchase in question does not constitute a normal commercial transaction.

91. In the present case, for example, the factors considered by the Court of First Instance (only a small percentage of the tickets was used, the authorities declined to purchase travel vouchers for other destinations which were potentially more attractive than the only route operated by P & O) [45] confirm that the Diputación did not have any real need to purchase such a large number of travel vouchers from P & O.

92. As regards, next, the fact, to which the appellant drew attention, that the criterion under consideration imposes an excessive burden on the Member States because it would oblige them to notify the Commission of all their purchases of goods and services, my objection is that in reality notification would be required only where the action taken, having regard to the specific circumstances, might result in economic benefits for the suppliers concerned which they could not have obtained from a private contracting party. In other words, the public authorities must consider, case by case, whether or not the contract is based on market conditions. But that assessment does not seem to me to be different from the one which they must make when, for example, deciding to make a capital investment in a company or to transfer to the private sector assets in public ownership.

93. For those reasons, I consider that this plea must be rejected.

44 — Paragraph 117 of the contested judgment.

45 — See paragraphs 128 to 137 of the contested judgment.

(b) The alleged need for the agreement

94. According to the Diputación, the Court of First Instance then wrongly concluded that the new agreement did not reflect a real need to purchase the travel vouchers.

95. The Commission, however, objects that that criticism is inadmissible in that it seeks to contest assessments of facts made by the Court of First Instance.

96. Under Article 225 EC and Article 51 of the Statute of the Court of Justice, judgments of the Court of First Instance may be challenged 'on points of law only', with the result that, according to settled case-law, '[t]he Court of Justice ... has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the principles of law and the rules of procedure in relation to burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it ... The appraisal by the Court of First Instance ... does not [therefore] constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice.' [46]

97. It seems clear to me that the plea under review here seeks to persuade the Court of Justice to re-examine the facts found by the Court of First Instance and the evidence produced to the latter as regards the lack of any need for the Diputación to purchase such a large number of tickets.

98. I would add that the appellant has not even alleged distortion of the facts, and in any event it seems to me that the Court of First Instance's analysis in that regard is based on a careful assessment of the information given both by the appellants and by the Commission. [47]

99. For those reasons, the plea is in my opinion inadmissible.

(c) The lack of an economic analysis concerning the sums already paid by the Diputación.

100. By a further ground of appeal the Diputación contends that the Court of First

46 — Case C-7/95 P *John Deere* [1998] ECR I-3111, paragraphs 21 and 22. To the same effect see, amongst many, Case C-122/01 P *T. Port* [2003] ECR I-4261 paragraph 27, and the order of 9 July 2004 in Case C-116/03 *Fichtner* (not published in the ECR, paragraph 33).

47 — See paragraphs 121 to 137 of the contested judgment.

Instance misinterpreted Article 87(1) EC by not penalising the absence in the Commission's decision of an economic analysis as to whether the sums already paid to P & O in implementation of the measure, and in particular those relating to travel vouchers already used, were such as to give P & O an economic advantage. Those sums were, it claims, the consideration for a transport service actually provided by P & O and could not therefore be seen as support measures.

101. According to the Commission, however, the contested decision contains a detailed economic analysis of the effects of the measure.

102. Let me say straight away that I cannot accept the appellant's criticism. If closely examined, it presupposes that the Commission, first, should have carried out an examination *ex post facto* of the economic merits of the measure implemented in the breach of the Treaty (or of the sums already paid); second, that it should have artificially broken down, in its assessment, the various components of the alleged aid (purchase of tickets already paid for and purchase of tickets not yet paid for), even though the aid was embodied in a single support measure, albeit comprising several parts.

103. As regards the first point, I would observe that, according to settled case-law aid measures must as a rule be examined in the circumstances apparent to the body paying the aid before implementation of the measure. The Court of Justice has made in clear that 'in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation'. [48]

104. On the second point, I shall merely observe that the public authority's purchase of tickets from P & O constituted a single commercial transaction. The economic validity and overall scope of the transaction could therefore only be assessed by examining the measure in its entirety. The Commission could certainly not be called on to make a separate assessment of the various components of the aid in order to determine whether and to what extent the amounts already paid, and paid in breach of the Treaty, specifically benefited the recipient undertaking.

105. In the light of those considerations, therefore, the plea alleging failure to appraise the economic advantage accruing to P & O from the sums already paid must be rejected.

48 — Case C-482/99 *France* v *Commission* [2002] ECR I-4397 paragraph 71. See also Case C-261/89 *Italy* v *Commission*, cited above, paragraph 21, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 43 to 45.

(d) The real impact of the contested measure on intra-Community trade and competition

106. The Diputación objects, finally, that the Court of First Instance misinterpreted Article 87(1) EC by failing to criticise, in the contested decision, the absence of any analysis of the specific impact of the contested measure on intra-Community trade and on competition. In the appellant's opinion, the Commission confined itself to mere presumptions on that point.

107. I believe, however, that the Commission is right to maintain that the decision contains an adequate exposition of the contested effects of the measure at issue.

108. According to settled Community case-law, it is not necessary for unnotified decisions on aid to examine specifically the effects of such aid on competition and trade between Member States. What is required, on the other hand, is that the Commission should show, in the light of the circumstances of the case, that the measures are liable to distort competition and are capable of having an impact on trade between Member States. [49] However, as the Commission has emphasised, certain passages of the contested decision (and in particular paragraphs 54 and 55) do in fact contain an analysis of that kind.

109. Secondly, as the Court of First Instance correctly pointed out, referring to settled case-law, if the Commission were required in each case to demonstrate in each decision the actual effect of aid already granted, that would ultimately favour Member States which pay aid in beach of the obligation to notify as compared with those that properly notify aid at the proposal stage, because the onus of proof would be heavier in the first case than in the second. [50]

110. In the light of the foregoing, it seems to me, in short, that the pleas concerning the interpretation of Article 87(1) EC by the Court of First Instance are inadmissible in part and unfounded in part.

49 — See, in particular Case 730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12; Case T-288/97 *Regione Autonoma Friuli Venezia Giulia* [2001] ECR II-1169, paragraphs 49 and 50; and the Opinion of Advocate General Saggio in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, point 24.

50 — See paragraph 142 of the contested judgment and the case-law there cited.

B — *Pleas concerning misinterpretation of Article 88(3) EC*

111. As mentioned, both appellants also accuse the Court of First Instance of misinterpreting Article 88(3) EC, because it:

(a) classified the new agreement as unlawful aid;

(b) concluded that the initial agreement and the new agreement constituted a single grant of aid, made and implemented in 1992.

112. I shall analyse those pleas.

(a) The legality of the contested measure

113. On the basis of various arguments, which are largely analogous, P & O and the Diputación object to the Court of First Instance's conclusion that the letter of 27 March 1995 did not amount to a valid notification under the Treaty.

114. In the contested judgment, the Court of First Instance first of all classified the new agreement as a mere alteration of the original agreement, concluding that the two agreements constituted a single measure, introduced and implemented in 1992. Moreover, it identified a series of factors from which it appeared that the letter of 27 March 1995 had not been intended as a proper notification of the new agreement. In particular, it draws attention to the fact that the letter was sent not to the Secretary General of the Commission but to a particular official; that it did not make a specific reference to Article 88(3) EC; and that it bore the reference 'NN 40/93' used by the Commission for the case relating to the original agreement.

115. As I have stated, the appellants contest that conclusion. In their opinion, not only is it based on matters of no evidential value but it even disregards indications to the contrary. In particular, it takes no account of a fact which, in the appellant's opinion, is very important, namely that P & O's lawyers had sent the letter in question with the consent of the Spanish authorities.

116. According to the appellants, notification of aid measures by private individuals was to be regarded, at that time, as permissible. That is so, first, because the Treaty says nothing about the persons entitled to have recourse to the procedure under Article 88(3); and second, because the limitation which Article 2 of Regulation

No 659/1999 imposes in that connection in favour only of Member States post-dates the material events and is therefore not relevant to the present case.

117. But if the aid was lawfully notified, P & O continues, the *Lorenz* case-law [51] should have been applied in full to the present case. Consequently, because, following the annulment of the decision of 7 June 1995 by the Court of First Instance, the Commission failed to take a position on the contested measure within the two months following that judgment, the aid should have been deemed to have been authorised by implication.

118. However, even if it were conceded that there was no proper notification of the new agreement, P & O continues, the Commission could not, by virtue of the principle of estoppel, invoke any irregularity of notification. Since it never made any objection to the Spanish authorities during the administrative procedure, those authorities did not feel it necessary to rectify the irregularity, as they could easily have done by proceeding to make a proper notification.

119. The Commission, concurring with the Court of First Instance's analysis, replies that the very nature of the procedure for monitoring State aid and also, implicitly, the case-law of the Court, and first and foremost the *Lorenz* case, confirm the view that planned aid can be notified only by the Member States. [52] It also emphasises that the matters described by the Court of First Instance in paragraphs 64 to 68 of the contested judgment (mentioned in point 114 above) fully support the conclusion that the Commission never treated the letter of 27 March 1995 as a proper notification.

120. For my part, I must say once again that I cannot go along with the appellants' arguments.

121. First of all, so far as concerns the possibility of treating a notification made by persons other than the public authorities as valid under Article 88(3) EC, the problem has now been resolved, as already mentioned, by Article 2 of Regulation No 659/1999, according to which 'any plans to grant new aid shall be notified to the Commission in sufficient time *by the Member State concerned*'. [53] But what was the position before the entry into force of that provision, since Article 88(3) EC merely provides that '[t]he Commission shall be informed, in sufficient time to enable it to submit its comments, of any plan to grant or alter aid'?

51 — Judgment of 11 December 1973, cited in footnote 24.

52 — The Commission refers above all to; Case C-367/95 P *Sytraval* [1998] ECR I-1719; Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 32; and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 75.

53 — Emphasis added.

122. Even if it were conceded that the terseness of that provision did not resolve the problem, it seems to me, on the other hand, that a comprehensive and systematic examination of Article 88 showed even then that notification by persons other than the public authorities was ruled out. Like the other Treaty provisions on State aid, Article 88 focuses entirely on the relationship between Member States and the Commission.

123. Moreover, as the Court of Justice emphasised in the *SFEI* judgment, before Regulation No 659/1999 was adopted, 'the notification requirement and the prior prohibition on implementing planned aid laid down in Article [88(3)] are directed to the Member State [and] the Member State is also the addressee of the decision by which the Commission finds that aid is incompatible with the common market and requests the Member State to abolish the aid within the period determined by the Commission'. [54]

124. I would also point out that in the case-law of the Court of Justice, now largely codified in Regulation No 659/1999, [55] the potential recipients of aid were simply described as 'interested parties' in the procedure, placing them in a situation not greatly different from that in which other interested third parties find themselves (for example the recipient's competitors). In the recent *Acciaierie di Bolzano* case, the Court thus stated that '[i]n the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role [of submitting observations following the initiation of a formal investigation procedure] and, in that regard, they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State ... *No special role is reserved to the recipient of aid, among all the interested parties, by any provision of the procedure for reviewing State aid.* In that regard, it must be made clear that the procedure for reviewing State aid is not a procedure initiated against the recipient or recipients of aid entailing rights on which it or they could rely which are as extensive as the rights of defence as such'. [56]

125. It therefore seems to me that it is the very nature of the procedure for reviewing aid that excludes the possibility of aid being notified by private persons.

126. It follows in this case that the new agreement could not be regarded as aid lawfully notified for the purposes of the

54 — Case C-39/94 [1996] ECR I-3547, paragraph 73. See also *Sytraval* cited in footnote 52, paragraph 45. Emphasis added.

55 — In relation to Regulation No 659/1999, in Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 23, the Court observed that 'that regulation is largely a measure codifying in detail the interpretation of the procedural provisions of the Treaty on State aid laid down by the Community judicature prior to the adoption of that regulation'.

56 — Joined Cases C-74/00 P and C-75/00 P [2002] ECR I-7869, paragraphs 80 to 83. Emphasis added. See also *Sytraval*, (cited in footnote 52 above), paragraphs 58 and 59; and Joined Cases T-228/89 and T-233/99 *Westdeutsche Landesbank Girozentrale* [2003] ECR II-435, paragraphs 122 to 125.

Treaty. And that conclusion would not change even if, as the appellant contends, the new agreement had been notified to the Commission with the consent of the national authorities. Those authorities could not have escaped the obligation of notification imposed on them by the Treaty by leaving the aid to be notified to the Commission by a private person through unofficial channels.

127. For those reasons, it seems to me that the Court of First Instance did not err in confirming the Commission's analysis on this point.

128. As regards the appellants' objections concerning the evidential value of the matters relied upon by the Court of First Instance to establish that, when the aid was notified to the Commission, it was regarded as unlawful, I shall merely observe that those objections concern the assessment of matters of fact made by the Court of First Instance. As I have already indicated (point 96 above), in appeals such assessments cannot be reviewed by the Court of Justice unless the appellants complain of and demonstrate distortion of the evidence, and that has not been done here.

129. It hardly needs pointing out, next, that the fact that the aid was not notified means that the *Lorenz* case-law cannot be applied here, since that case-law was, as is well known, concerned with aid properly notified by the national authorities.

130. As regards, finally, the argument alleging estoppel, [57] whereby the Commission was precluded from relying as against P & O on the irregularity of the notification for the reasons set out above (point 118 above), I consider that that allegation too should be rejected for two reasons.

131. First, it does not appear that the Commission ever stated that the letter of 27 March 1995 was a proper notification of the contested measure. Second, the fact that the Commission took due account of the information contained in that letter does not mean that it regarded it as a proper notification. It is usual practice that, when examining aid, the Commission should receive and use all relevant information, whatever its provenance (State authorities, potential aid recipients, competitors of recipients, etc.).

132. I would add that the appellant has not indicated any reason why the Commission

57 — Regarding Estoppel, see Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraphs 22 to 26, and Case C-69/89 *Nakajima* [1991] ECR I-2069, paragraph 131.

should have informed the Spanish authorities that it was treating the new agreement as unnotified aid. On the contrary, the fact that the letter of 27 March 1995 does not constitute due notification should have been clear to those authorities in the light of a whole series of factors properly referred to by the Court of First Instance (see point 114). [58]

133. It can therefore be concluded that the Court of First Instance did not in any way err in law in holding that the new agreement constituted unnotified aid. I therefore propose that the Court reject the pleas on this point as inadmissible or unfounded.

(b) The unicity of the aid measure

134. By a number of criticisms which largely overlap, the appellants seek essentially to demonstrate that the Court of First Instance erred in law in regarding the new agreement as an integral part of the original agreement. According to the Court of First Instance 'the original agreement and the new agreement constitute a single grant of aid, instituted and implemented in 1992'. [59]

135. Going into greater detail, the appellants as well as contesting the relevance of the case-law relied on by the Court of First Instance in support of its conclusions, [60] infer from Article 88(3) EC that plans to alter aid must be regarded as 'new aid'. It follows, in their opinion, that the obligation to notify altered aid must be regarded in isolation from the obligation to notify the original aid. Accordingly, the fact that aid has not been notified should not have any impact whatsoever on the legality of an amendment of it, where the amendment has been properly notified.

136. The appellants add that the considerable differences between the two agreements are not conducive to the conclusion — drawn by the Court of First Instance — that '[t]he alterations to the original agreement, as resulting from the new agreement, [did] not affect the substance of the aid as instituted by the original agreement'. [61]

137. Finally they accuse the Court of First Instance of distorting the nature of the Commission decision of 7 June 1995, by disregarding in particular the fact that that decision was twofold in nature: first, it closed the procedure opened in respect of the original agreement and, second, it found

58 — Paragraphs 64 to 68 of the contested judgment.

59 — Paragraph 58.

60 — P & O refers in particular to Joined Cases T-195/021 and T-207/01 *Government of Gibraltar* [2002] ECR II-2309, cited by the Court of First Instance in paragraph 60 of the contested judgment.

61 — Paragraph 60.

that the new agreement did not constitute State aid. A correct reading of that decision would therefore have shown that the two agreements had been treated by the Commission as distinct measures.

138. For my part, I shall merely observe that those criticisms are based on the false premiss that the new agreement was duly notified. However, having rejected that supposition earlier (points 122 to 126), I must conclude that the pleas examined here are unfounded. Even if it is analysed separately from the earlier unnotified aid, the new agreement nevertheless remains unlawful aid, by virtue of not having been notified under the Treaty.

139. In the light of the foregoing, I therefore consider that the grounds of appeal under review must be rejected.

C — *Pleas concerning other alleged errors in law*

140. Finally, the appellants contend that the Court of First Instance erred in law in other respects, in particular because the contested decision:

(a) rejected requests by the parties made on the basis of their legitimate expectation that the measure was in order;

(b) distorted the plea put forward in the Diputación's application concerning the alleged infringement of Article 10 EC and breach of the principle of sound administration;

(c) declared the exemption provided for an Article 87(2)(a) EC inapplicable to the aid at issue;

(d) failed to take a position on the appellant's request for the production of documents in the Commission's possession, thereby infringing the rights of defence of the Diputación and infringing Article 66 of the Rules of Procedure of the Court of First Instance.

141. In the following pages, I shall analyse those criticisms.

(a) Legitimate expectations

142. The Diputación maintains that in the contested judgment the Court of First Instance distorted the plea which it submitted at first instance on that point. According to the appellant the argument which it put to the Court of First Instance concerned the protection of the legitimate expectations of the authority which granted the aid, and not those of the recipients; however, the Court of First Instance focused solely on the latter.

143. For its part, P & O asserts that the order for recovery of the aid contained in the contested decision breaches its legitimate expectations as to the lawfulness of the measure at issue and therefore that the Court of First Instance erred by dismissing its application on that point. It considers that the Commission's first decision, according to which the contested measure was not in the nature of State aid, caused P & O to entertain legitimate expectations as to the possibility of benefiting from that measure.

144. The Commission contests the merits of both criticisms. Moreover, it contends that the Diputación's criticism in reality constitutes a new plea against the decision contested at first instance, but not put forward at that time. Before the Court of First Instance, the applicant specifically sought protection of the legitimate expectations of the recipient, not of its own. Therefore, the criticism is nothing more, according to the Commission, than a way of evading the prohibition referred to in Article 113(2) of the Rules of Procedure of the Court of Justice, of using an appeal to change the subject-matter of proceedings at first instance.

145. Let me say straight away that that objection seems to me to be unfounded. The application at first instance referred to the legitimate expectations which arose *'en las partes en el Acuerdo de 1995'*.[62] Although that concept of 'parties' was not developed or further argued in any of the pleadings at first instance, it seems to me to be correct to conclude that the Diputación, as a party to the agreement, must be included within the definition referred to above.

146. As regards the merits of that criticism, I think it appropriate to distinguish between the reference to the legitimate expectations of the public authorities which granted the aid and those of the recipient of the aid. The case-law of the Court of Justice is clear and settled in both cases.

147. As regards the first case, I would observe that whilst it is true that part of

62 — See paragraph 53 of the application to the Court of First Instance.

the plea put forward at first instance by the Diputación (i.e. that concerning its *own* legitimate expectations) was not explicitly rejected by the Court of First Instance, I think that its rejection is implicit in the overall reasoning of the Court of First Instance which — on the basis of settled case-law — correctly ruled out the possibility that, in the present case, the Spanish authorities could claim expectations of any kind regarding the legality of unnotified aid in order to oppose recovery thereof. [63]

148. I would also point out that the argument put forward at first instance by the Diputación concerning legitimate expectations were, to say the least, brief and general. In the pleadings submitted to the Court of First Instance, no details whatsoever were given of the reasons for which the legitimate expectations of the payer of the aid to the effect that the aid was proper should deserve protection. In view of the general arguments put forward by the appellant, the Court of First Instance cannot — in my view — be admonished for failing to deal with that aspect expressly.

149. Turning to P & O's criticism concerning the legitimate expectations of the *recipient* of the aid, I would point out straight away that, according to settled case-law, 'undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed'. [64]

150. However, the Community Court has also made it clear that '[i]t is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid'. [65]

151. Because, as has been seen, the aid at issue was not notified, it is necessary to examine whether the annulment of the Commission's favourable decision by the Community judicature is to be regarded as an 'exceptional circumstance' within the meaning of the case-law just referred to.

152. Obviously, that assessment must be made in the light of the purpose of the protection of legitimate expectations. In that connection, the Court of Justice has made it clear that 'the principle of the protection of legitimate expectations is the corollary of the principle of legal certainty ... and aims to ensure that situations and legal relationships

63 — See paragraphs 201 to 210.

64 — Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14. See also Case C-169/95 *Spain* v *Commission*, cited in footnote 21, paragraph 51.

65 — *Commission* v *Germany*, paragraph 16.

governed by Community law remain foreseeable'. [66]

153. Now, it seems clear to me that judicial review by the Community Court of decisions concerning State aid cannot be regarded as an exceptional and unforeseeable event, forming as it does an integral and essential part of the system established by the Treaty for that purpose. A diligent businessman should be well aware of the fact that a Commission decision to the effect that a State measure does not constitute State aid is, within the time-limit of two months referred to in Article 230 EC, liable to be challenged before the Community Court.

154. The Court of Justice itself has, moreover, and indeed recently, stated that 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted by the procedure laid down in that article ... It follows that so long as the Commission has not taken a decision approving aid and *so long as the period for bringing an action against such a decision has not expired*, the recipient cannot be sure as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part'. [67]

155. Subsequently, to the same effect, in *Spain* v *Commission*, the Court made it clear that '[t]he fact that the Commission initially decided not to raise any objections to the aid in issue cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time before the Court, which annulled it. However regrettable it may be, the Commission's error cannot erase the consequences of the unlawful conduct of the Kingdom of Spain'. [68]

156. Also — as the Court of First Instance pointed out — the appellants' argument would render ineffective the review conducted by the Community judicature of the legality of a positive Commission decision on State aid. If it were to be concluded that such a decision automatically gives rise to legitimate expectations on the part of the recipients, competitors of those recipients or other third parties harmed by the decision would have no interest in attacking the vitiated measure. That is because any annulment of a positive Commission decision on State aid would ultimately become a pyrrhic

66 — Case C-107/97 *Max Rombi and Arkopharma* [2000] ECR I-3367, paragraph 66.

67 — Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraphs 65 and 66. Emphasis added.

68 — Cited in footnote 21, paragraph 53.

victory, since the negative effects of the decision could never be eliminated.

157. I consider therefore that the adoption of a favourable decision by the Commission regarding aid cannot in itself be regarded as an event which causes potential beneficiaries to entertain legitimate expectations as to its lawfulness. The Court was therefore right to reject the appellants' criticisms regarding breach of the principle of legitimate expectations.

158. I therefore consider that those criticisms cannot be upheld.

(b) Infringement of Article 10 EC and breach of the principle of sound administration

159. The Diputación considers that the Court of First Instance distorted its arguments at first instance concerning infringement of Article 10 EC and breach of the principle of sound administration in the way the Commission handled the file.

160. In the contested judgment the Court of First Instance rejected those arguments on the basis that in reality they sought to call in question the legitimacy of the contested aid. Without therefore going into the merits of those arguments, the Court of First Instance merely referred to the considerations as set out by it in relation to the failure to notify the aid.

161. The appellant objects, however, that the purpose of its criticism was not to dispute the unlawful nature of the aid but to prevent recovery of it.

162. That said, I must observe, in agreement with the Commission, that in the pleadings submitted in this case, the appellant has not explained clearly and precisely in what sense and in what way the Commission is alleged to have breached the principle of sound administration or infringed Article 10 EC. On the other hand, it is a fact that, in its pleadings at first instance, the appellant had based its criticism in that connection on the same arguments as those used to show that the aid had been properly notified. Accordingly, and also in view of the fact that those arguments were rejected by it, it seems to me that the Court of First Instance was right to refer to its statements concerning the illegality of the aid and then to dismiss the criticism.

163. And that is what I, for my part, also propose.

(c) Non-application of the exemption under Article 87(2)(a) EC

164. The Diputación also criticises the Court of First Instance for considering that the

exemption under Article 87(2)(a) EC was not applicable to the contested measure. [69]

165. It seems to me that the Court of First Instance was right to hold that the conditions laid down for that exemption were not fulfilled. First, the measure in question directly favoured a single undertaking (and not consumers) and, second, it was discriminatory in that it excluded other potential service providers from its scope.

166. I therefore propose that the Court also reject this plea.

(d) Failure to respond to the request for the production of documents

167. Finally, the Diputación criticises the Court of First Instance for failing to respond to its request for the production of documents, thereby breaching its rights of defence and infringing Article 66 of its Rules of Procedure. [70] That request sought the production of certain documents in the Commission's administrative file relating to case C-32/93, from which, according to the applicant, it was apparent that at that time the Commission treated the 1995 agreement as lawful aid.

168. I would point out however that it is settled case-law that '[i]t is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced'. [71] A very recent pronouncement by the Court of Justice has since made it clear that, if it considers it pointless to adopt the measures of inquiry requested by the parties, the Court of First Instance may deny those requests by implication without having to give reasons in its judgment for that refusal. [72]

69 — That provision states that 'aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned' is compatible with the common market.

70 — That provision states: 'The Court of First Instance . . . shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved ...'.

71 — Case C-182/99 P *Salzgitter* [2003] ECR I-10761, paragraph 41; See also Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraphs 49 and 50.

72 — Order of 15 September 2005, in Case C-112/04 P *Marlines*, not published in the ECR, paragraphs 35 to 39

169. I therefore consider that the present plea must be rejected.

170. In conclusion, none of the criticisms made by the appellants appears to me to be well founded and therefore the present actions should be dismissed.

IV — Costs

171. Having regard to Article 69(2) of the Rules of Procedure, and in the light of the conclusions at which I have arrived, I consider that the appellants should be ordered to pay the costs.

V — Conclusion

172. For the foregoing reasons, I propose that the Court of Justice should:

— dismiss the action;

— order P & O European Ferries (Vizcaya) SA and La Diputación Foral de Vizcaya to pay the costs.