JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

5 August 2003 *

In Joined Cases T-116/01 and T-118/01,

P & O European Ferries (Vizcaya) SA, formerly Ferries Golfo de Vizcaya SA, established in Bilbao (Spain), represented by Sir Jeremy Lever QC, D. Beard, barrister, J. Ellison, solicitor, and J. Folguera Crespo, lawyer,

applicant in Case T-116/01
and intervener in Case T-118/01
in support of the Diputación Foral de Vizcaya,

Diputación Foral de Vizcaya, represented by M. Morales Isasi and I. Sáenz-Cortabarría Fernández, lawyers,

applicant in Case T-118/01
and intervener in Case T-116/01
in support of P & O European Ferries (Vizcaya) SA,

* Languages of the case: Spanish and English.

Commission of the European Communities, represented by J.M. Flett, J. Buendía and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATIONS for annulment of Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya (OJ 2001 L 89, p. 28),

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

composed of: B. Vesterdorf, President, K. Lenaerts, J. Azizi, M. Jaeger and H. Legal, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 February 2003,

gives the following

Judgment

Facts

1 On 9 July 1992 the Diputación Foral de Vizcaya (the Regional Council of Vizcaya, hereinafter 'the Diputación', 'the applicant in Case T-118/01' or 'the intervener in Case T-116/01') and the Ministry of Trade and Tourism of the Basque Government, of the one part, and Ferries Golfo de Vizcaya, now P & O European Ferries (Vizcaya) SA (hereinafter 'P & O Ferries', 'the applicant in Case T-116/01' or 'the intervener in Case T-118/01'), of the other part, signed an agreement (hereinafter 'the original agreement') relating to the establishment of a ferry service between Bilbao and Portsmouth. That agreement provided for the purchase by the signatory authorities between March 1993 and March 1996 of 26 000 travel vouchers to be used on the Bilbao-Portsmouth route. The maximum financial consideration to be paid to P & O Ferries was fixed at ESP 911 800 000 and it was agreed that the tariff per passenger would be ESP 34 000 for 1993-94 and, subject to alteration, ESP 36 000 for 1994-95 and ESP 38 000 for 1995-96. The Commission was not notified of the original agreement.

2 By letter of 21 September 1992, Bretagne Angleterre Irlande, a company which has, under the name 'Brittany Ferries', operated a shipping service between the ports of Plymouth in the United Kingdom and Santander in Spain for a number of years, lodged a complaint with the Commission concerning the large subsidies which were to be granted by the Diputación and the Basque Government to P & O Ferries.

3 By letter of 30 November 1992, the Commission requested the Spanish Government to provide all the relevant information concerning the subsidies in question. Its reply reached the Commission on 1 April 1993.

4 On 29 September 1993 the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC). It took the view that the original agreement was not a normal commercial transaction given that it concerned the purchase of a predetermined number of travel vouchers over a period of three years, that the agreed price was higher than the commercial rate, that the vouchers would be paid for even in respect of journeys which were not made or were diverted to other ports, that the agreement included an undertaking to absorb all losses during the first three years of operation of the new service and that the element of commercial risk was therefore eliminated for P & O Ferries. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to P & O Ferries constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and did not fulfil the conditions necessary for it to be declared compatible with the common market.

5 The Commission notified the Spanish Government of this decision by letter of 13 October 1993, requesting it to confirm that it would suspend all payments of the aid in question until the Commission adopted its final decision, to submit observations and to provide all the information necessary for assessing the aid.

6 By letter of 10 November 1993, the Basque Government informed the Commission that implementation of the original agreement had been suspended.

7 The decision to initiate a procedure concerning the aid granted by Spain to P & O Ferries was the subject of a communication of the Commission addressed to the other Member States and the interested parties, which was published in the *Official Journal of the European Communities* (OJ 1994 C 70, p. 5).

8 In the course of the administrative procedure, P & O Ferries and the Commission discussed the type of agreement which could be negotiated by the parties. In particular, the discussions related to proposed amendments to the original agreement and proposals for replacing it with a new one.

9 By letter of 27 March 1995 to an official in the Directorate-General for Transport responsible for State aid in the transport sector, P & O Ferries sent the Commission a copy of a new agreement (hereinafter 'the new agreement') which had been concluded on 7 March 1995 by the Diputación and P & O Ferries and would apply from 1995 to 1998. It is apparent from a letter enclosed by P & O Ferries that the Diputación was to receive interest on the sums which had been made available to P & O Ferries under the original agreement.

10 Under the new agreement, the Diputación undertook to purchase, for the period from January 1995 to December 1998, a total of 46 500 travel vouchers to be used on the Bilbao-Portsmouth route operated by P&O Ferries. The maximum financial consideration to be paid by the public authority was fixed at ESP 985 500 000, of which ESP 300 000 000 were to be paid in 1995, ESP 315 000 000 in 1996, ESP 198 000 000 in 1997 and ESP 172 500 000 in 1998. The agreed tariff per passenger was ESP 20 000 for 1995, ESP 21 000 for 1996, ESP 22 000 for 1997 and ESP 23 000 for 1998. Those tariffs were discounted to reflect the long-term purchasing commitment entered into by the Diputación and were calculated on the basis of a reference tariff of ESP 22 000, that is to say the published commercial tariff for 1994, plus 5% per annum, increasing the tariff to ESP 23 300 in 1995, ESP 24 500 in 1996, ESP 25 700 in 1997 and ESP 26 985 in 1998.

11 Clause 5 of the new agreement reads as follows:

'... the [Diputación] hereby confirms that all necessary steps have been taken to comply with all applicable laws in respect of the agreement and in particular that it does not contravene internal legislation, the Law on the Protection of Competition, nor Article 92 of the Treaty of Rome, and all necessary steps have been taken to comply with Article 93(3) of the Treaty of Rome'.

12 On 7 June 1995 the Commission adopted a decision terminating the review procedure initiated in relation to aid to P & O Ferries (hereinafter 'the decision of 7 June 1995').

13 The decision of 7 June 1995 stated that the new agreement introduced a number of significant modifications in order to meet the Commission's concerns. The Basque Government was not a party to this agreement. According to the information supplied to the Commission, the number of travel vouchers to be purchased by the Diputación was based on the estimated take-up of the offer by certain low-income groups and those covered by social and cultural programmes, including school groups, young people and the elderly. The cost of the vouchers was below the advertised brochure price of tickets for the period in question, in accordance with the normal market practice of volume discounts for large users of commercial services. It was also stated in the decision that the remaining elements of the original agreement which had caused concern had been deleted from the new agreement.

14 In the decision of 7 June 1995, the Commission also found that the viability of the service offered by P & O Ferries had been proven by its commercial results and that the latter had established its business without any benefit from State support. According to the new agreement, P & O Ferries had no special rights to use the port of Bilbao and its priority on the berth was limited to the scheduled arrival and departure times of its vessels, which meant that other vessels could in fact use

the berth at other times. The Commission considered that the new agreement, which was designed for the benefit of local people using local ferry services, appeared to reflect a normal commercial relationship, with arm's length pricing for the services provided.

15 The Commission thus considered that the new agreement did not constitute State aid and decided to terminate the procedure initiated on 29 September 1993.

16 By judgment of 28 January 1999 in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139 (hereinafter 'the *BAI* judgment'), the Court of First Instance annulled the decision of 7 June 1995 on the ground that the Commission had founded the decision on a misinterpretation of Article 92(1) of the EC Treaty when concluding that the new agreement did not constitute State aid.

17 On 26 May 1999 the Commission decided to initiate the procedure provided for in Article 88(2) EC in order to enable interested parties to submit their comments on the position adopted by the Commission in the light of the *BAI* judgment (OJ 1999 C 233, p. 22). It informed the Kingdom of Spain thereof by letter of 16 June 1999. It received comments from some interested parties and forwarded them to the Spanish authorities for their comments. The Spanish authorities made their submissions by letter of 21 October 1999, supplemented by further comments on 8 February and 6 June 2000.

Contested decision

By Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya (OJ 2001

L 89, p. 28, hereinafter 'the contested decision' or 'the decision'), the Commission terminated the procedure under Article 88(2) EC, declaring the aid in question incompatible with the common market and ordering the Kingdom of Spain to require its recovery.

19 According to the contested decision, the Diputación sought, by purchasing travel vouchers, first, to subsidise trips for senior citizens resident in Vizcaya, under a programme of made-to-measure holiday packages called 'Adineko', and second, to facilitate access to transport for people and institutions in Vizcaya in need of special arrangements for travel (for example, local authorities, associations, vocational schools and universities). It is also apparent from the contested decision that the Adineko programme was set up by the autonomous Basque authorities in order to replace, from 1996, the national subsidised travel programme called 'Inserso' from which approximately 15 000 Vizcaya residents had benefited each year (paragraphs 32, 33, 34, 48 and 51 of the decision).

20 In its assessment of the aid, the Commission observes that the total number of travel vouchers purchased by the Diputación was not fixed by reference to its actual needs. In the Commission's view, contrary to the explanations given to it by the Diputación, the number of vouchers purchased from P & O Ferries could not have been estimated from the Inserso programme figures. It states (paragraph 49):

'The [Diputación] decided to purchase 15 000 vouchers from [P & O Ferries] in 1995 while it was still participating in the Inserso programme, itself designed to benefit approximately 15 000 people of Vizcaya in 1995. The autonomous Basque authorities did not explain why Vizcaya's needs were double in that particular year. Nor did they indicate why the scheme only provided for 9 000 and 7 500 vouchers (instead of 15 000) in 1997 and 1998. When the [Diputación] decided to commit itself to buying this number of vouchers, it did not know that the Inserso programme would continue to benefit people from the area [even though the Diputación had stopped contributing to this programme] and that its own scheme would not be successful. Furthermore, no indication was given by

the autonomous Basque authorities of why the number of vouchers purchased had to differ significantly from month to month (e.g. 750 vouchers were purchased in January 1995 compared with 3 000 in February 1995).'

21 As regards the number of vouchers distributed, the decision states that under Adineko a total of 3 532 vouchers were distributed between 1996 and 1998, and that 12 520 vouchers were distributed between 1995 and 1998 under the programme for facilitating access to transport for the people and institutions of Vizcaya (paragraphs 50 and 51).

22 Finally, the Commission observes that the new agreement contains several provisions which a normal commercial agreement concerning the purchase of travel vouchers would not include. The Commission mentions, by way of example, the fact that the agreement specifies the weekly and annual number of crossings to be made by P & O Ferries, the fact that the consent of the Diputación is needed for P & O Ferries to change the vessel providing the service and the fact that the agreement lays down certain conditions, such as the nationality of the crew and the sources of goods and services (paragraph 52).

23 The Commission concludes therefrom as follows (paragraph 53):

'[The new agreement] did not correspond to the autonomous Basque authorities' genuine social needs and did not constitute a normal commercial transaction but rather constituted aid to the shipping company. The fact that the amount of money provided for under the [original agreement and the new agreement] remained at approximately the same level reinforces this conclusion. The autonomous authorities managed to design a second scheme allowing the ferry company to keep the amount of aid promised in 1992.'

24 According to the Commission, none of the derogations provided for in Article 87(2) and (3) EC applies in the present instance (paragraphs 56 to 73).

25 As regards recovery of the aid, the Commission rejects the argument that recovery would frustrate the legitimate expectations of the Diputación and P & O Ferries. In this connection it relies on paragraphs 51 to 54 of the judgment in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, citing them in full. It also relies on the fact that the decision of 7 June 1995 was challenged in due time and subsequently annulled by the Court of First Instance, that the aid was implemented before the Commission adopted its final decision on it and that the Member State never made a valid notification under Article 88(3) EC (paragraphs 74 to 78).

26 Article 1 of the contested decision states:

'The State aid which Spain has implemented in favour of [P & O Ferries], to the sum of ESP 985 500 000, is incompatible with the common market.'

27 Article 2 of the contested decision is worded as follows:

'1. Spain shall take all the necessary measures to recover from the recipient the aid referred to in Article 1 made available to it unlawfully.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.'

Procedure and forms of order sought

28 By application lodged at the Registry of the Court of First Instance on 25 May 2001, P & O Ferries brought Case T-116/01.

29 By application lodged at the Registry of the Court of First Instance on 31 May 2001, the Diputación brought Case T-118/01.

30 By application lodged at the Registry on 6 September 2001, the Diputación requested leave to intervene in Case T-116/01 in support of the form of order sought by P & O Ferries. That application was granted by order of the President of the Second Chamber (Extended Composition) of the Court of First Instance of 5 November 2001.

31 By fax sent to the Registry on 27 September 2001, the original of which was lodged at the Registry on 28 September 2001, P & O Ferries applied to intervene in Case T-118/01 in support of the form of order sought by the Diputación. That application was granted by order of the President of the Second Chamber (Extended Composition) of the Court of First Instance of 23 November 2001.

32 On account of the change in the composition of the Chambers of the Court of First Instance from 1 October 2002, the Judge-Rapporteur was assigned to the First Chamber (Extended Composition), to which the present cases were consequently allocated. Since the Judge-Rapporteur initially designated by the President of the Court of First Instance was prevented from performing his duties, the Court resolved, by decision of 3 October 2002, to allocate the proceedings to another Judge-Rapporteur.

33 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, it was decided to request production of a document and to put certain questions to the parties.

34 By order of 20 January 2003 the Court, having heard the parties, decided to join Cases T-116/01 and T-118/01 for the purposes of the oral procedure and judgment.

35 On 31 January 2003 the United Kingdom applied for leave to intervene in the present cases. Since that application was lodged out of time, it was dismissed by order of the President of the First Chamber (Extended Composition) of 4 March 2003.

36 In Case T-116/01, the applicant claims that the Court should:

— annul Article 2 of the contested decision;

— order the Commission to pay the costs.

37 The intervener in Case T-116/01 supports the claims of the applicant in Case T-116/01.

38 In Case T-116/01, the Commission contends that the Court should:

— dismiss the application;

— order the applicant to bear the costs.

39 In Case T-118/01, the applicant claims that the Court should:

— annul the contested decision;

— in the alternative, annul Article 2 of the contested decision;

— order the Commission to pay the costs.

40 The intervener in Case T-118/01 supports the claims of the applicant in Case T-118/01.

41 In Case T-118/01, the Commission contends that the Court should:

— declare the application partially inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

42 The applicant in Case T-116/01 bases its action on three pleas in law, alleging (i) infringement of the principle of the protection of legitimate expectations, (ii) infringement of Article 88 EC and (iii) infringement of Article 253 EC.

43 The applicant in Case T-118/01 founds its action on seven pleas in law, alleging (i) infringement of Article 87(1) EC in that the Commission found in the contested decision that all the sums paid constituted State aid, (ii) infringement of

Article 87(1) EC in that the Commission found in the contested decision that the amounts paid in consideration for travel vouchers which had not yet been used constituted State aid, (iii) breach of the right to property and of Article 295 EC, (iv) infringement of Article 87(1) EC in that the Commission failed to show in the contested decision that intra-Community trade was affected, and insufficiency of the statement of reasons for the contested decision so far as concerns the conditions for application of that article, (v) breach of procedural rules, in particular breach of the essential procedural requirements prescribed by the EC Treaty and by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), and breach of the duty to state reasons, (vi) infringement of Article 87(2)(a) EC, and (vii) infringement of Article 14 of Regulation No 659/1999, of the principle of the protection of legitimate expectations and of the principle of good administration.

44 The Court considers it expedient to examine first the pleas put forward by the applicant in Case T-118/01. Those pleas may be reorganised into five pleas concerning (i) infringement of Article 87(1) EC, (ii) breach of the right to property and Article 295 EC, (iii) infringement of Article 87(2)(a) EC, (iv) the lack of a request for information and an insufficient statement of reasons, and (v) infringement of Article 14 of Regulation No 659/1999, of the principle of the protection of legitimate expectations and of the principle of good administration. The fifth plea in Case T-118/01 and the first plea in Case T-116/01 are to be examined together.

45 Before examining those pleas, it is necessary to consider, as a preliminary point, whether the aid to which the contested decision relates (hereinafter 'the aid at issue') was granted in accordance with the procedure laid down in Article 88(3) EC and, therefore, whether or not lawful aid is involved.

The lawfulness of the aid at issue

Arguments of the parties

46 In order to establish that the present instance involves aid granted in accordance with the procedure laid down in Article 88(3) EC, the applicants maintain that, contrary to what is stated in paragraphs 75 and 77 of the contested decision, the aid at issue was not put into effect before the decision of 7 June 1995.

47 They state that clause 5 of the new agreement contains a condition precedent in accordance with Spanish law, under which the contracting parties agreed to suspend implementation of the agreement until the Commission had ruled on it under the procedure provided for in Article 88(3) EC. In Spanish law, a written contract may be subject to an unwritten condition precedent where such a condition has been agreed upon by the parties expressly or tacitly.

48 The applicant in Case T-116/01 explains that no State aid was granted pursuant to the new agreement until after the decision of 7 June 1995, since the adoption of that decision was a condition precedent for the entry into force of the new agreement pursuant to which the alleged aid was granted, corresponding to the findings of the Court of Justice in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, at paragraphs 40 to 44.

49 In its submission, the reason why the new agreement provided for the issue of vouchers which could be exchanged for tickets for use, initially, in January, February, March and April 1995, that is to say before the decision of 7 June 1995, was that the agreement was drafted in 1994, at a time when it was foreseeable that it would be approved by the Commission at the beginning of 1995.

50 As regards the alleged irregularity of notification because notice was given by the lawyers acting on behalf of the recipient of the aid instead of by the Spanish Government, the applicants submit that the validity of a measure giving effect to aid can be affected only if the obligations resulting from the final sentence of Article 88(3) EC have not been complied with (Case C-354/90 *FNCE* [1991] ECR I-5505, paragraph 12). Given that in this instance the aid was put into effect after the Commission's decision approving it, alleged irregularities in the notification cannot have the effect of rendering the aid at issue unlawful.

51 In any event, Article 88(3) EC does not provide that the Commission must be notified by the Member State. Article 2 of Regulation No 659/1999 which is referred to in paragraph 78 of the contested decision does not apply here because it was not in force on the date when a copy of the new agreement was sent to the Commission.

52 The applicants contest, finally, the Commission's argument that the new agreement is closely linked to the original agreement and state that the new agreement was not examined under a formal investigation procedure. The letters 'NN' related to the original agreement and not to a procedure concerning the new agreement. They point out in this regard that the Commission decided only on 26 May 1999 to extend the procedure initiated in 1993 in respect of the original agreement to include the new agreement. Thus, in this instance there are in actual fact two matters, the new agreement concerning notified aid and the original agreement concerning unnotified aid.

53 In the alternative the applicant in Case T-116/01, supported by the intervener, submits, relying on the legal principle of estoppel and *non venire contra factum proprium*, that the Commission is estopped from pleading a failure to comply

with Article 88(3) EC, given that it accepted notification of the new agreement by the lawyers acting on behalf of the applicant in Case T-116/01 without raising any objection as to the legal validity of the notification, it used the information received from the lawyers for the purpose of adopting the decision of 7 June 1995 and the Member State in question could have been asked to send the new agreement to the Commission if the Commission had so required.

54 The Commission submits, first of all, that there is continuity between the original, unnotified, agreement and the new agreement. It explains that the recitals to the new agreement state that it replaces the original agreement, that the *BAI* judgment emphasises the continuity in paragraphs 76 and 80, and that the administrative procedure began with the original, unnotified, agreement and continued with examination of the subsequent amendments thereto, including the new agreement. Since the Commission has found that there is unnotified aid, it is entitled to decide whether the aid might be compatible with the Treaty without having first to request a formal notification. Fresh notification cannot nullify the consequences of the failure to notify the original agreement, in particular the latter's unlawfulness.

55 Furthermore, Article 88(3) EC requires the Member State to effect formal notification (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 47) and a letter from the lawyers acting on behalf of the applicant in Case T-116/01 cannot be treated as a notification.

56 Finally, the Commission observes that all the exchanges which took place between it, the authorities concerned and the recipient of the aid before the decision of 7 June 1995 made it plain that an unnotified agreement was involved and that it was not possible to envisage a formal notification.

Findings of the Court

57 Article 88(3) EC states:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.... The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

58 The Court finds in this instance that the aid instituted by the new agreement was not granted in accordance with the procedure laid down in Article 88(3) EC and, therefore, is unlawful. It is apparent from the contested decision, reinforced by the explanations provided by the parties in the course of the present proceedings, that the original agreement and the new agreement constitute a single grant of aid, instituted and implemented in 1992 in the context of the original agreement's conclusion without prior notification of the Commission.

59 First, as is apparent from the recitals to the new agreement and the communication from P & O Ferries' lawyers of 27 March 1995, the new agreement merely alters the original agreement and was drawn up in order to replace it.

60 The alterations to the original agreement, as resulting from the new agreement, do not affect the substance of the aid as instituted by the original agreement (see, by analogy, Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111).

61 It is apparent from the agreements that they both relate to the purchase by the Diputación from the same shipping company, P & O Ferries, of a certain number of travel vouchers usable on the same shipping route, for a period of identical duration. Furthermore, the two agreements contain identical provisions as regards the frequency of sailings and they both require P & O Ferries to undertake to comply with certain clauses regarding the crew's nationality and the goods and services on board (see paragraphs 9 and 14 of the contested decision). Also, as is apparent, in particular, from paragraphs 9, 13, 31 and 32 of the contested decision, from clause 1 of the original agreement and from the recitals to the new agreement, both the agreements are intended to provide a regular shipping service, in order to promote trade, tourism and the regional development of the Basque Country, and to give economically disadvantaged groups an opportunity to travel abroad. Finally, it is not in dispute that the sums granted under the new agreement are roughly the same as those granted pursuant to the original agreement and that the latter sums remained available to P & O Ferries and were used to pay it under the new agreement (see paragraphs 18 and 53 of the contested decision).

62 Second, the contested decision and the documentation supplied by the parties show that P & O Ferries' communication of 27 March 1995 sent by its lawyers to an official in the Commission's Directorate-General for Transport, far from constituting formal notification of proposed new aid, concludes lengthy correspondence between the Commission and the applicants relating to the alterations progressively made to the original agreement (see paragraph 8 above).

63 It is apparent from the documentation supplied by the applicant in Case T-116/01 itself that, after adoption by the Commission of the decision of 29 September 1993 to initiate the formal review procedure, and prompted by a meeting on 22 April 1994 between officials in the Commission's Directorate-General for Transport and the Diputación and P & O Ferries, several letters were sent by the Diputación and P & O Ferries to the Commission with proposals for alteration of the original agreement (see, in particular, the letters of the recipient of the aid of 11 May, 6 June and 1 December 1994 sent to an official in the Commission's

Directorate-General for Transport and the letter of 25 November 1994 from the Diputación to the Commission containing an exhaustive list of the alterations made to the original agreement).

64 The fact that the communication of 27 March 1995 does not constitute notification of new aid is also clearly confirmed by the fact that it was sent by P & O Ferries' lawyers instead of by the Spanish Government. Nor do its form and content in any way satisfy the requisite formal criteria. Contrary to the requirements of points 3(a)(i) and (ii) of letter SG (81) 12740 of 2 October 1981 addressed by the Commission to the Member States, the communication was sent to an official in the Directorate-General for Transport instead of to the Secretary-General of the Commission, and it contains no reference to Article 88(3) EC.

65 Third, the letters which the applicants sent to the Commission, including the communication of 27 March 1995, all bear the reference number used by the Commission in the matter concerning the original agreement, namely 'NN 40/93' (see, in this regard, *Austria* v *Commission*, cited above, paragraph 42).

66 Fourth, the Court's analysis is borne out by the conduct of the Commission which, following receipt of the communication of 27 March 1995, acted on it by adopting the decision of 7 June 1995 instead of rejecting it as incomplete, in accordance with its letter SG (81) 12740 to the Member States, referred to above, and with its usual practice (see, for example, the Commission decision of 23 December 1992 pursuant to Article 88(2) EC to other Member States and other parties concerned regarding aid which Italy had decided to grant to Ente partecipazioni e finanziamento industria manifatturiera (OJ 1993 C 75, p. 2) and *BFM and EFIM* v *Commission*, cited above, paragraph 47).

67 Fifth, the Commission expressly stated in the decision of 7 June 1995 that, by its letter sent to the Spanish Government, it was terminating the procedure initiated on 29 September 1993.

68 It is therefore clear that the concerned parties themselves and the Commission, both during the prior administrative procedure and in the contested decision, provided indications from which it may be concluded that they regarded the aid at issue as unnotified aid.

69 The fact that the parties amended or deleted certain provisions in the original agreement which were considered incompatible with Article 87 EC does not alter in the least the fact that, in substance, the original agreement and the new agreement constitute a single grant of aid (*Government of Gibraltar* v *Commission*, cited above, paragraph 111).

70 In addition, contrary to the applicants' assertions, the fact that the Commission accepted the notification of the new agreement without raising any objection concerning the validity of the notification cannot under any circumstances alter the fact that the aid at issue is unlawful. Suffice it to note that the Commission cannot on any account permit a derogation from the notification procedure laid down in Article 88(3) EC and, by its conduct, alter the fact that aid is unlawful. In any event, it is clear from the foregoing that the Commission's conduct was perfectly normal in the context of a procedure relating to unnotified aid. The mere fact that P & O Ferries' lawyers were, allegedly, convinced that their communication of 27 March 1995 constituted formal notification of new aid cannot alter the fact that the aid at issue is unlawful.

71 Nor, finally, can the Court's analysis be affected by the fact that the Commission stated, in paragraphs 5 and 6 of the contested decision, that it had decided on 26 May 1999 'to extend the procedure initiated in 1993 in respect of the [original agreement] to include the [new agreement]' and to invite third parties to submit their comments on the aid at issue.

72 It is settled case-law that if the initial examination leads the Commission to conclude that State aid is incompatible with the Treaty or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 88(2) EC (see, *inter alia*, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39, and *BFM and EFIM* v *Commission*, paragraph 44).

73 Furthermore, under Article 88(2) EC the Commission makes a decision 'after giving notice to the parties concerned to submit their comments'. The Court of Justice has held that the sole aim of the notice initiating the procedure is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and *BFM and EFIM* v *Commission*, paragraph 45).

74 The fact that the Commission, by its decision of 26 May 1999, considered it necessary to seek the views of the parties concerned on the aid as altered by the new agreement cannot therefore in any way be interpreted as meaning that, before that date, the procedure initiated on 29 September 1993 and terminated by the decision of 7 June 1995 concerned solely the original agreement. It follows from all the foregoing considerations that the applicants have not adduced evidence from which the Court may conclude that the new agreement instituted new aid.

The first plea in Case T-118/01, alleging infringement of Article 87(1) EC

75 It is necessary first of all to consider the plea of inadmissibility raised by the Commission with regard to this plea. In its submission, the plea must be declared inadmissible inasmuch as it calls into question the force of *res judicata* of the *BAI* judgment. The Commission argues that the applicant is in essence contesting the findings of the Court of First Instance, in particular those set out in paragraphs 70 to 82 of the *BAI* judgment relating to the classification of the aid at issue and whether it had a genuine effect on competition and trade between Member States.

76 The applicant contends that the principle of *res judicata* does not have the effect of rendering the present plea inadmissible.

77 It is well-established case-law that 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 (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9, Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12, and Case T-28/89 *Maindiaux and Others* v *ESC* [1990] ECR II-59, paragraph 23), those conditions necessarily being cumulative (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 37).

78 Accordingly, *res judicata* cannot be pleaded where the actions in question do not relate to the same measure, since the measure whose annulment is sought is an essential element of the subject-matter of an action (Joined Cases 146/85 and 431/85 *Diezler* v *ESC* [1987] ECR 4283, paragraphs 14, 15 and 16, and *Maindiaux and Others* v *ESC*, cited above, paragraph 23).

79 Since the present action is directed against a measure other than the measure which gave rise to the *BAI* judgment, the two actions cannot be considered to have the same subject-matter.

80 Nor is the present action between the same parties as those involved in the *BAI* case.

81 Since the force of *res judicata* does not prevent the present action from being brought, the same is true for each of the pleas put forward by the applicants in the present cases, so that there is no need to examine whether those pleas, in essence, have already been assessed by the Court in the *BAI* judgment.

82 This plea must therefore be declared admissible.

Arguments of the parties

83 This plea may be divided into three limbs. Under the first limb, the applicant in Case T-118/01 submits that the Commission infringed Article 87(1) EC in considering that the new agreement in its entirety constituted State aid, without taking account of the travel vouchers actually used. In the second limb, it contends that the Commission should also have had regard to the travel vouchers which had not yet been used in its assessment of whether there was aid. The third limb relates to the lack of effect on intra-Community trade and an inadequate statement of reasons in this regard.

— The first limb

84 In this limb, the Diputación submits that the sums paid in consideration for a shipping service actually provided by P & O Ferries do not constitute State aid for the purposes of Article 87(1) EC, in that they do not involve the grant of any advantage to P & O Ferries, but constitute remuneration, at the market rate, for a service actually provided by the commercial operator.

85 The Court has held that, where a State measure consists in remuneration for a service provided by a commercial operator, aid for the purposes of Article 87 EC is not involved (Case 240/83 *ADBHU* [1985] ECR 531, paragraph 18, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 26).

86 Furthermore, it is appropriate to apply by analogy the Commission's analysis in its communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3). In that communication, the Commission indicated that aid elements in a sale should be relied on only where the sale is concluded at a price below the market price. The Commission also stated that the fact that there may be aid elements in a transaction does not mean that the transaction itself constitutes State aid. The Diputación concludes therefrom that, on the Commission's view set out in the communication, the sale in itself cannot be regarded as being contrary to the State aid rules.

87 In the Diputación's submission, the fact that the Court concluded in the *BAI* judgment that the new agreement was not a normal commercial transaction does not support the conclusion that the Court classified it as aid granted in breach of Article 87(1) EC. According to the Diputación, the Court considered rather that the agreement might contain aid elements.

88 Also, in paragraph 47 of the contested decision, the Commission, by referring to the total number of travel vouchers and stating that that number did not reflect 'actual needs', implicitly recognised that the vouchers actually used reflected 'actual needs'. The amount corresponding to the used vouchers cannot therefore be classified as aid, given that it constitutes the financial consideration for a service actually provided.

89 The explanations given by the Commission in the present proceedings that the consideration supplied by P & O Ferries gave rise to practically no additional cost are, in the Diputación's submission, inadmissible since they do not appear in the contested decision.

90 In addition, the agreement involves costs which the Commission should have taken into account in its assessment of the elements of aid, including those connected with the obligation on P & O Ferries to operate the service throughout the year under the new agreement, even if it not viable during the low season.

91 The Commission's reasoning also has unjust effects inasmuch as P & O Ferries could be compelled to bring proceedings against the Diputación for unjust enrichment in respect of services enjoyed by the Diputación free of charge.

92 Since the contested decision accordingly does not set out reasoning to substantiate the fact that the sums paid to P & O Ferries for the travel vouchers used constitute State aid, the Diputación submits that the decision is vitiated by a breach of essential procedural requirements.

93 The Commission contests the Diputación's argument that the sums paid to P & O Ferries in consideration for a service actually provided do not involve an advantage by stating that, under settled case-law, the fact that there is consideration does not preclude the presence of aid if the effects of the agreement in question amount to a significant advantage. From an economic point of view, since the new agreement enables P & O Ferries artificially to fill ferry capacity with passengers during the low season, it represents for P & O Ferries a significant economic advantage resulting from, on the one hand, additional income and, on the other, practically no additional costs, as the Court has already found at paragraph 76 of the *BAI* judgment.

94 The Commission adds that the fact that a transaction has allegedly been concluded at the market price does not in any way preclude the presence of elements of State aid where the transaction does not reflect an actual need on the part of the purchaser and is carried out with a specific beneficiary, to the exclusion of all other potentially interested parties.

95 Finally, the Commission states that an action for unjust enrichment is logical and normal where, following annulment of an agreement between two parties, repayment must be made for the services provided. The question as to whether any additional costs were borne by P & O Ferries and as to their amount is to be examined, if necessary, in the context of recovery.

— The second limb

96 The Diputación pleads that the contested decision is vitiated by a manifest error of assessment since the Commission, in its appraisal of the Diputación's 'actual needs', failed to take into consideration the fact that the travel vouchers purchased under the new agreement which had not been used could still be used and their purchase therefore likewise does not constitute State aid for the purposes of Article 87(1) EC.

97 The Diputación points out that clause 1 of the new agreement provides that the travel vouchers may be used beyond the period from 1995 to 1998, as long as it is during the low season. That proves that the Diputación's 'actual needs' were never linked to the period from 1995 to 1998, the validity of the travel vouchers not being limited in time.

98 It accordingly acted as a public investor exercising ordinary care and pursuing a comprehensive long-term structural or sectoral policy (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 21 and 22, and Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 23).

99 It submits in this regard that the terms of the new agreement, in particular as regards the long-term purchasing commitment, are comparable with those of the contracts which are generally concluded between shipping companies and private transport-ticket operators known as 'ITX', who purchase large numbers of tickets in advance in order to be entitled to volume discounts.

100 Finally, the Diputación rejects the Commission's assertion that P & O Ferries decided to operate the Bilbao-Portsmouth ferry service because of the voucher purchase conditions offered by the Diputación. It states that that service was operational from March 1993 and that its viability, which is not disputed by the Commission in the contested decision, had already been proved by the commercial results.

101 The Commission contends that the Diputación's arguments should be rejected as unfounded.

— The third limb

102 The Diputación submits that the Commission did not demonstrate in the contested decision that the new agreement affected competition and intra-Community trade.

103 It disputes the Commission's assertions in paragraph 55 of the contested decision, according to which the effects of the new agreement on competition and trade between Member States are the same as those which could be attributed to the original agreement, observing that examination of the latter did not give rise to a definitive assessment as to whether aid was granted to P & O Ferries. In any event, the Commission was required to indicate in the contested decision what those effects were or what those of the new agreement were (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66).

104 The Diputación also questions whether there was evidence justifying the Commission's assertion, in paragraph 54 of the contested decision, that Brittany Ferries might have carried more passengers but for the new agreement.

105 As regards the condition relating to an effect on intra-Community trade, the Diputación submits that in the contested decision the Commission merely made statements of a general nature.

106 Furthermore, the reference in paragraph 54 of the contested decision to the activities of P & O Ferries' parent company is irrelevant given that the dispute concerns possible elements of aid in the new agreement, which relates to the Bilbao/Portsmouth/Bilbao sea route.

107 The Commission contends that, since the new agreement constitutes unlawful aid, it was not obliged to demonstrate its actual effects on competition and intra-Community trade.

108 In the alternative, it argues that the contested decision is sufficiently reasoned and refers in this regard to paragraphs 54 and 55 thereof.

Findings of the Court

— The first and second limbs

109 The first and second limbs, both of which seek to challenge the Commission's classification, in the contested decision, of the new agreement as State aid, should be considered together.

110 Article 87(1) EC states that, 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

111 It is settled case-law that the aim of that provision is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 12, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 58).

112 Accordingly, in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (*SFEI and Others*, cited above, paragraph 60, and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22). Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20).

113 In order to determine whether an intervention such as that at issue confers an advantage on the recipient undertaking, it is to be assessed whether, as claimed by the Diputación, the State has acted in the same way as a private investor operating under normal market economy conditions (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959) who is comparable in size to public sector bodies.

114 Thus, a State measure in favour of an undertaking cannot be excluded as a matter of principle from the concept of State aid in the sense contemplated in Article 87 EC merely because the parties undertake reciprocal commitments (*BAI* judgment, paragraph 71).

115 In paragraph 75 of the *BAI* judgment, the Court stated in this connection that 'the fact that the terms of [the new agreement], particularly the long-term

commitment to purchase vouchers and the quantity discounts granted to the buyer, are comparable with those of agreements generally concluded by shipping companies with private operators... is not sufficient to establish that the purchase of travel vouchers by [the Diputación] is in the nature of a normal commercial transaction'.

116 In paragraphs 76 and 79 of that judgment, the Court, in assessing whether a normal commercial transaction was involved, adopted as the decisive criterion whether the agreement for the purchase of travel vouchers concluded between the Diputación and P & O Ferries reflected actual needs felt by the authorities. It found that that had not been satisfactorily established.

117 It follows from the foregoing 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.

118 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. In accordance with the Commission's settled practice, the fact that such a tender procedure is conducted before a Member State makes a purchase is normally considered sufficient for the possibility that the Member State is seeking to grant an advantage to a given undertaking to be ruled out (see, in particular, Information from the Commission — Community framework for state aid for research and development (OJ 1996 C 45, p. 5), point 2.5, and, to this effect, the Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5), Chapter 9).

119 Here, in order to prove that the new agreement constitutes a normal commercial transaction meeting an actual need felt by it, the Diputación draws attention in particular to the fact that a number of travel vouchers were used during the period covered by the new agreement and that unused vouchers could still be used after expiry of the contractual period.

120 However, as has been pointed out in paragraphs 114 to 117 above, the mere fact that consideration has been supplied by an undertaking to a State body does not demonstrate, in itself, that the latter had an actual need for the services in question. Merely to argue that services were actually supplied by P & O Ferries to the Diputación is thus not sufficient to show an actual need on the part of the Diputación for the services in question.

121 On the contrary, as the contested decision clearly shows, numerous factors together lead to the conclusion that the Diputación did not enter into the new agreement in order to meet actual needs.

122 First, the original agreement contained a series of matters which show that it did not constitute a normal commercial transaction.

123 It need merely be recalled that, as is apparent from paragraphs 10 and 11 of the contested decision, the original agreement included, *inter alia*, an undertaking by the autonomous Basque authorities to purchase a number of vouchers at a price much higher than the market price and to absorb all losses which might be incurred by P & O Ferries during the first three years.

124 Furthermore, as mentioned in paragraph 61 above, the reasons for the Diputación's commitment to purchase travel vouchers included that of encouraging the setting up of a regular ferry service. That is also clear from a letter of 8 February 2000 sent by the Permanent Representation of the Kingdom of Spain to the Commission. It is common ground that it was only after the original agreement was concluded that P & O Ferries started up operations on the Bilbao-Portsmouth route.

125 Second, as is apparent from paragraph 49 of the contested decision, the number of travel vouchers purchased by the Diputación pursuant to the new agreement was supposedly calculated on the basis of the experiences of the Basque Government under the Inserso programme which, it is stated, enabled approximately 15 000 trips per year to be offered to Vizcaya's senior citizens. Having regard to that figure, the Commission rightly considers it to be inexplicable that, for 1995, the Diputación decided to purchase 15 000 travel vouchers from P & O Ferries when it was still participating in the Inserso programme in that year. So far as concerns 1997 and 1998, the contested decision states that the autonomous Basque authorities did not explain either why the scheme provided for only 9 000 and 7 500 travel vouchers (instead of 15 000) in those two years. Furthermore, in paragraph 51 of the contested decision the Commission states that no indication was given by the autonomous Basque authorities of how the needs in respect of the purchase of vouchers to facilitate access to transport for the people and institutions of Vizcaya had been estimated. The Commission finds finally, in paragraph 53 of the contested decision, that since the amount of money provided for under the original agreement and the new agreement was at approximately the same level, the number of travel vouchers purchased under the new agreement was determined with the sole purpose of enabling the amount of aid promised in 1992 to be kept.

126 In order to explain the figures relating to the years 1995, 1997 and 1998, the Diputación stated, in response to a written question asked by the Court, that the new agreement did not oblige it to use a specific number of vouchers during a given year, because they could all be used during the three years following 1995 and even after the end of that period. According to the Diputación, it is those

three years that bear a relation to the total number of travel vouchers, namely 46 500, given that the annual demand under the Inserso programme for Vizcaya, that is to say approximately 15 000, was used as reference, by means of a projection over three years.

127 Those explanations are not persuasive.

128 First of all, the new agreement contains a provision laying down the number of vouchers which may be distributed per month and per year between 1 January 1995 and 31 December 1998. Thus, the agreement expressly stipulates that, in 1995, 15 000 travel vouchers were supposed to be distributed and that, in 1997 and 1998, distribution of only 9 000 and 7 500 travel vouchers was envisaged. In those circumstances, the argument put forward by the Diputación that no distribution was envisaged in 1995 and that the Diputación actually envisaged distribution of roughly 15 000 travel vouchers per year in 1996, 1997 and 1998 cannot be accepted.

129 It is all the more legitimate to raise the question of the Diputación's actual need because, by the undertaking which it gave to P & O Ferries, it abandoned all the destinations proposed up until then under the Inserso programme, in favour of a single destination in the United Kingdom offering manifestly different climatic conditions from the destinations offered under the Inserso programme which were all in Spain, Portugal and Italy.

130 According to the explanations provided by the Diputación, in 1997 and 1998 the Adineko programme was changed considerably so that, as early as 1997, only 1 000 trips to London were proposed while the programme included 8 000 trips to Spain (Benidorm, the Balearic Islands, Salou, La Manga, the Canary Islands, the Andalusian coast, seaside resorts, Galicia) and Italy (Rome). As is apparent

from the contested decision, during the period covered by the new agreement a total of 16 052 out of 46 500 travel vouchers were distributed, including a total of 3 532 vouchers to senior citizens, under the Adineko programme.

131 The Diputación has not disputed those figures in the present proceedings. On the contrary, P & O Ferries explained in response to a question asked by the Court at the hearing that only approximately 9 000 out of the 16 052 vouchers distributed had actually been used, including roughly 3 000 trips under the Adineko programme.

132 The fact that fewer than 25% of the travel vouchers purchased were actually used bears out the Commission's contention that no actual need for travel vouchers exists.

133 To explain that low rate of use, the Diputación essentially states no more than that unused travel vouchers may still be used after expiry of the period covered by the contract.

134 However, any use of the travel vouchers in the future cannot be sufficient to demonstrate the existence of an actual need (see paragraphs 114 to 117 above). Besides, P & O Ferries stated at the hearing that seven travel vouchers were used from 1998 to the end of 2001. While the Diputación has given the explanation that the lack of use of the travel vouchers since 1998 is due to the uncertainty caused by the initiation in 1999 of the procedure which resulted in the adoption of the contested decision, it has not, however, adduced any evidence capable of substantiating that assertion. Furthermore, even if a greater number of the vouchers is used in the future, the rates of use since 1995 show that the possibility of a substantial proportion of the hitherto unused travel vouchers being used remains purely theoretical.

135 In this connection, it may also be deduced from the lack of use of the travel vouchers after 31 December 1998 that the destination of London was, in fact, dropped from the Adineko programme from that date, bearing out the conclusion that the Diputación did not have an actual need for the travel vouchers.

136 So far as concerns the Diputación's reference to the judgments in *ADBHU* and *Ferring*, cited above, suffice it to state that those judgments concern situations in which the State has imposed public service obligations on undertakings. Here, however, while it is true that the Diputación has alluded in particular to the fact that the new agreement involves additional costs connected, *inter alia*, with the obligations on P & O Ferry to provide a regular service, it has at no time claimed that the transaction in question had to be regarded as State financing of a public service or that the measure in question was justified by virtue of Article 86(2) EC.

137 It follows from the foregoing that the Diputación has failed to adduce, either during the administrative procedure or before the Court, evidence sufficient to establish that the purchase of the travel vouchers under the new agreement met, wholly or even partly, an actual need and that it acted in a similar way to a private investor operating under normal market economy conditions. Accordingly, the Commission was entitled to conclude that the new agreement, in its entirety, conferred an advantage on P & O Ferries which it would not have obtained under normal market conditions and that all the sums paid in performance of the purchase agreement constituted State aid.

138 In those circumstances, it is irrelevant whether, as alleged by the Commission, the consideration supplied by P & O Ferries gave rise to practically no additional cost and whether, as the Diputación has submitted, such an argument is inadmissible.

139 So far as concerns the statement of reasons contained in the contested decision, it is also apparent from the foregoing that it discloses in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It is to be remembered that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission*, cited above, paragraph 86, and *Commission* v *Sytraval and Brink's France*, cited above, paragraph 63).

140 In view of the foregoing considerations, the first and second limbs of the plea must be rejected.

— The third limb

141 The applicant cannot complain that the Commission failed to examine the actual effects of the aid at issue on competition and on trade between Member States.

142 Suffice it to state that, in the case of aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. Such an obligation would ultimately favour Member States which pay aid without complying with the duty to notify the aid laid down in Article 88(3) EC, to the detriment of those which notify the aid at the proposal stage (see Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 103).

143 Since it has been found in paragraphs 58 to 74 of the present judgment that the aid at issue was granted unlawfully, the arguments put forward by the applicant under this limb must be rejected as unfounded.

144 Accordingly, the first plea must be rejected.

The second plea in Case T-118/01, alleging breach of the right to property and of Article 295 EC

Arguments of the parties

145 The Diputación contends that the contested decision infringes Article 295 EC in that it amounts to an unjust restriction on its ability to enter into contracts and denies its ownership of the travel vouchers purchased. In its submission, the contested decision leads to the conclusion that all purchases of goods and services by public authorities or public undertakings, even if made at the market price, constitute State aid, without there being any need to prove the existence of an advantage. In those circumstances, it would be difficult to find undertakings prepared to take the risk of supplying to public authorities goods or services the payment for which at the market price could at any time be classified by the Commission as State aid having, therefore, to be refunded. In the present instance, the consequence of the order for recovery would be, as regards the amounts paid for travel vouchers which have already been used, that the corresponding service has been supplied free of charge.

146 The Commission submits that this plea is inadmissible in that it is contrary to the principle of *res judicata*, since it essentially seeks to put in issue the Court's assessment of the concept of aid in the *BAI* judgment.

147 In so far as this plea is indissociable from the preceding plea, it refers to the relevant submissions made under that plea. In addition, it states that Article 295 EC is in any event inapplicable in this instance since the present dispute concerns supplies of services, which accordingly do not fall within the scope of rights *in rem*, such as the right to property.

Findings of the Court

148 This plea must be declared admissible for the reasons set out in paragraphs 77 to 81 of this judgment.

149 As to the substance, the Diputación's arguments amount, in essence, to calling into question the concept of State aid for the purposes of Article 87(1) EC, as assessed in the context of the preceding plea.

150 In accordance with Article 295 EC, the Treaty is in no way to prejudice the rules in Member States governing the system of property ownership.

151 It is apparent from the case-law of the Court of Justice that, although the system of property ownership continues to be a matter for each Member State under

Article 295 EC, that provision does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see, by analogy, Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38, Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 44, and Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 48).

152 Article 295 EC cannot therefore be considered to restrict the scope of the concept of State aid for the purposes of Article 87(1) EC.

153 Accordingly, the argument alleging breach of Article 295 EC is unfounded.

The third plea in Case T-118/01, alleging infringement of Article 87(2)(a) EC

Arguments of the parties

154 In the alternative, the Diputación submits that the Commission should have exempted the aid at issue on the basis of the derogation laid down in Article 87(2)(a) EC, given that the vouchers purchased were distributed under the social programmes administered by the Diputación and, therefore, the aid benefited individual consumers.

155 The Commission was wrong to find, in paragraph 58 of the contested decision, that the aid had not been granted without discrimination related to the origin of the products concerned, given that in 1995 there was just a single operator on the Bilbao-Portsmouth route whose services could be used by the residents of Vizcaya.

156 The fact that, for reasons unattributable to the will of the Diputación, there is just a single operator on the Bilbao-Portsmouth route is not a valid and adequate ground for treating the Diputación's conduct as discriminatory. Furthermore, in a case concerning the field of air transport, the Commission considered that, where the transport route concerned is open to every airline which decides to operate it, there can be no question of discrimination (letter SG (2000) D/102051 of the Commission of 3 March 2000 relating to aid having a social character in favour of certain categories of passengers on the eight air routes between Marseilles and Nice, on the one hand, and Ajaccio, Bastia, Calvi and Figari, on the other).

157 The Diputación alleges that in the present proceedings the Commission has introduced a new criterion, absent from the statement of reasons in the contested decision, under which one of the requirements for Article 87(2)(a) EC to be applicable is that the persons benefiting from the aid of a social character be able to choose the operator. In addition, the Diputación states that the consumers in fact have freedom of access to the subsidised service and thus to the social aid.

158 The Diputación observes with regard to the statement in paragraph 60 of the contested decision that 'other companies might have been willing to carry these passengers' that Brittany Ferries has never shown such an interest and has always merely asked the Commission to verify the actual use of the travel vouchers purchased by the Diputación, without ever alleging that it has been the victim of discrimination.

159 Finally it contends that the burden of proof lies with the Commission as regards in particular the derogations laid down in Article 87(2) and (3) EC, when it considers that State aid cannot be approved (Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 73).

160 The Commission contends that the discriminatory nature of the aid has been clearly established in the contested decision. The aid was not granted to individual consumers but to a supplier of services, namely P & O Ferries. There was therefore automatically discrimination in favour of that company. The fact that there was in practice just one operator for the shipping service between Bilbao and Portsmouth does not preclude the presence of discrimination, given that consumers could not have used the travel vouchers with an operator other than P & O Ferries. In order for Article 87(2)(a) EC to be applicable, the individuals benefiting from the aid must be able to choose the operator.

161 It also argues that the Diputación could have attained its social objectives by other means, in particular with modes of transport other than maritime transport and/or destinations other than Portsmouth, without the social objectives of the programme thereby being affected.

Findings of the Court

162 Article 87(2)(a) EC states that 'aid having a social character, granted to individual consumers', is compatible with the common market 'provided that such aid is granted without discrimination related to the origin of the products concerned'.

163 In order to determine whether aid is granted without discrimination related to the origin of the products concerned, it must be ascertained whether consumers benefit from the aid in question irrespective of the economic operator supplying the product or service capable of fulfilling the social objective relied on by the Member State concerned (see, to this effect, Commission Communication 94/C 350/07 on the application of Articles [87] and [88] of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, OJ 1994 C 350, p. 5, point 24).

164 That is not contradicted by the Commission's letter, referred to above, relating to aid having a social character in favour of certain categories of passengers on the eight air routes between Marseilles and Nice, on the one hand, and Ajaccio, Bastia, Calvi and Figari, on the other. In that case, it was considered that the aid in question, paid to several airlines, was in fact intended for individual consumers inasmuch as they could benefit from the aid irrespective of which airline was providing the service on the routes concerned.

165 Here, the Diputación merely observes that at the time P & O Ferries alone was operating in the port of Bilbao, while pointing out that any other shipping company could have had access to that port. However, the Diputación has not alleged, and *a fortiori* has not established, that consumers could also have benefited from the aid at issue by possibly using other shipping companies capable of operating between Bilbao and Portsmouth.

166 Under the new agreement, P & O Ferries receives an annual sum determined in advance, irrespective of the number of travel vouchers in fact used by the ultimate consumers. Also, the agreement for the purchase of travel vouchers in the present instance was entered into by the Diputación and P & O Ferries alone. It is not in dispute that the new agreement does not provide that the travel vouchers

distributed by P & O Ferries may be used with other companies capable of fulfilling the social objective pursued by the Diputación. Nor does the new agreement oblige P & O Ferries, where appropriate, to pay part of the aid at issue to those other companies.

167 In the absence of any evidence to prove that the ultimate consumers could also benefit from the aid at issue by using the services of other companies capable of fulfilling the social objective pursued by the Diputación, the Commission was justified in concluding that the aid had not been granted to individual consumers without discrimination related to the origin of the products concerned and that, therefore, the conditions laid down in Article 87(2)(a) EC were not met.

168 So far as concerns the statement of reasons contained in the contested decision, the Commission states in paragraph 58 that 'the condition laid down by the Treaty (the absence of discrimination related to the origin of the products concerned) is not met in the present case', that 'vouchers have only been purchased from [P & O Ferries] and [that] the autonomous authorities have failed to prove that the company was selected in a transparent manner'. In addition, the Commission observes in paragraph 59 that '[the autonomous Basque authorities] never claimed or demonstrated that they had contacted companies other than [P & O Ferries] when they decided to purchase vouchers in 1995 as part of their social scheme [and that,] in view of all the above, it may be concluded that the aid favoured [P & O Ferries]'. Finally, it adds in paragraph 60 of the contested decision that 'other companies might have been willing to carry these passengers to the United Kingdom via a different route. The autonomous Basque authorities might have achieved identical social goals with a diversified travel offer (for instance, to other regions of Spain or, if it had to be international, by organising trips to other neighbouring countries such as France or Portugal)'.

169 It is thus clear from the statement of reasons contained in the contested decision that the Commission considered that the aid at issue had not been granted without discrimination related to the origin of the products concerned in that it favoured a single undertaking, namely P & O Ferries, to the exclusion of any other undertaking.

170 In those circumstances, the Commission was not obliged to state expressly that consumers should have been able freely to select the operator. The grounds reproduced above disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It is to be remembered that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-56/93 *Belgium* v *Commission*, cited above, paragraph 86, and *Commission* v *Sytraval and Brink's France*, cited above, paragraph 63).

171 This plea must therefore be rejected.

The fourth plea in Case T-118/01, concerning the lack of a request for information and an insufficient statement of reasons

Arguments of the parties

172 The Diputación argues that the contested decision is vitiated by a breach of essential procedural requirements in that the Commission did not obtain for itself

the information essential for adoption of the final decision. In paragraphs 49, 51 and 59 of the contested decision, the Commission relied on insufficient information from the Spanish authorities relating, in particular, to the calculation of travel needs and to the question of discrimination and any contact between the Diputación and operators other than P & O Ferries.

173 In its submission, the Commission adopted the contested decision on the basis of no or insufficient information on issues in respect of which it had never sought explanation or clarification. Before adopting the contested decision, it should have required the Spanish authorities to provide it with all the information necessary for its assessment of the aid at issue. In accordance with settled case-law, the Commission is required, before adopting a decision concerning the compatibility of aid with the common market, to make use of all the possibilities available to it in order to oblige the Member State to provide it with the necessary information if it considers that the information provided is insufficient (Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 26 et seq., and Case C-17/99 *France* v *Commission* [2001] ECR I-2481). That obligation is also clear from Article 10 of Regulation No 659/1999.

174 The same considerations also lead the Diputación to conclude that the statement of reasons contained in the abovementioned paragraphs of the contested decision is insufficient in this regard.

175 The Commission maintains that it requested all the necessary information before it adopted the contested decision. Furthermore, the request for information contained in its decision of 26 May 1999 is in the nature of an order or injunction in conformity with that referred to in *Germany and Pleuger Worthington* v *Commission*, cited above, and in Article 10 of Regulation No 659/1999.

Findings of the Court

176 Under the procedure applicable to the assessment of unlawful aid, the Commission may adopt a final decision when it considers that it has all the documents, information and data necessary for examining whether the aid is compatible with the common market.

177 It is only when the Commission considers that it does not have sufficient information to adopt a final decision that it enjoins a Member State to provide information, in accordance with the judgment in Case C-301/87 *France* v *Commission*, cited above (see, to this effect, *Germany and Pleuger Worthington* v *Commission*, paragraph 26). That is also clear from Article 10(3) of Regulation No 659/1999.

178 Here, the Commission did not adopt the contested decision on the basis of insufficient information. In this regard, the applicant's arguments are founded on a misreading of the contested decision.

179 The Commission states in paragraph 49 of the contested decision that the autonomous Basque authorities did not explain 'why Vizcaya's needs were double in [1995]', 'why the scheme only provided for 9 000 and 7 500 vouchers (instead of 15 000) in 1997 and 1998' and 'why the number of vouchers purchased had to differ significantly from month to month'. Then, in paragraph 51 of the contested decision, the Commission states that 'no indication was given by the autonomous Basque authorities of how the needs relating to the other part of the scheme (facilitation of access to transport for the people and institutions of Vizcaya...) had been estimated'. Finally, in paragraph 59, concerning the application of Article 87(2)(a) EC, the Commission states that the autonomous

Basque authorities 'never claimed or demonstrated that they had contacted companies other than [P & O Ferries] when they decided to purchase vouchers in 1995 as part of their social scheme'.

180 It is clear from those paragraphs of the contested decision that the Commission did not merely set out questions there but carried out an assessment of the evidence provided by the national authorities in the context of the administrative procedure.

181 That is all the more true as, in its letter of 16 June 1999 notifying the Kingdom of Spain of its decision taken on 26 May 1999 to initiate the procedure provided for in Article 88(2) EC, the Commission expressed the same doubts concerning the aid at issue as those expressed by it in paragraphs 49, 51 and 59 of the contested decision. Thus, in that letter the Commission informed the Spanish authorities that, since they had not demonstrated that they needed a greater number of vouchers than in the past, it would assume that the number of vouchers purchased under the new agreement had been artificially increased in order to maintain the Spanish authorities' financial contribution at the level provided for in the original agreement. The Commission also stated in the letter that the Spanish authorities had not put forward any valid argument to explain the doubling of the number of vouchers and that the number of vouchers actually distributed did not correspond, even roughly, to the number of vouchers previously envisaged by the public authorities. As regards the applicability of Article 87(2)(a) EC, the Commission observed that the national authorities had not demonstrated that the aid had been granted 'without discrimination related to the origin of the products concerned'. In the penultimate paragraph of the decision, the Commission enjoined the Kingdom of Spain to submit its comments and to forward any information liable to assist assessment of the aid.

182 Thus, the Kingdom of Spain was given full opportunity to submit its comments on the doubts expressed by the Commission with regard to the aid at issue before the contested decision was adopted.

183 Besides, as is apparent from paragraphs 49 to 53 of the contested decision and the Court's analysis in connection with the first plea, the matters noted by the Commission in paragraphs 49 and 51 are not the only considerations which led the Commission to conclude that there was a lack of actual need. The applicant therefore cannot in any event rely on the allegedly interrogative form used in those two paragraphs to conclude that the Commission did not have sufficient information prior to the adoption of the contested decision.

184 Accordingly, there was no need for the Commission, which was in a position to make a definitive assessment as to whether the aid at issue was compatible with the common market on the basis of the information available to it, to require the Spanish authorities by an interim decision to provide it with additional information.

185 It is also apparent from the foregoing considerations (see in particular paragraph 180 above) that the contested decision is sufficiently reasoned.

186 Nor has the Diputación adduced any evidence under the first, second and third pleas capable of invalidating the findings made by the Commission in paragraphs 49, 51 and 59 of the contested decision.

187 Accordingly, this plea must be rejected.

The fifth plea in Case T-118/01, alleging infringement of Article 14 of Regulation No 659/1999, and the first plea in Case T-116/01, alleging infringement of the principle of the protection of legitimate expectations

188 Under the fifth plea in Case T-118/01, the applicant submits that Article 14 of Regulation No 659/1999 precludes the recovery of aid granted in accordance with the procedure laid down in Article 88(3) EC. In the alternative, it submits that even if the aid at issue were to be classified as unlawful aid, general principles of law, including in particular the principle of the protection of legitimate expectations and the principle of good administration, would prevent recovery of the aid.

189 The applicant in Case T-116/01 submits under its first plea that the principle of the protection of legitimate expectations precludes the recovery of aid granted in accordance with the procedure laid down in Article 88(3) EC.

190 These pleas should be examined as a single plea, divided into two limbs, one based on the premiss that aid granted in accordance with the procedure laid down in Article 88(3) EC is involved and the other on the premiss that the aid is unlawful.

The first limb: infringement of Article 14(1) of Regulation No 659/1999 and of the principle of the protection of legitimate expectations prohibiting the recovery of lawful aid

— Arguments of the parties

191 The applicants contend that the Commission cannot require the recovery of aid granted following a positive decision where the aid has been notified in accordance with the procedure laid down in Article 88(3) EC. In the submission of the applicant in Case T-118/01, supported by the intervener, that conclusion follows from Article 14(1) of Regulation No 659/1999. In the submission of the applicant in Case T-116/01, supported by the intervener, the same conclusion follows from the principle of the protection of legitimate expectations.

192 The Commission pleads that this limb of the plea is inadmissible, submitting that it is contrary to the principle of *res judicata*.

193 As to the substance, the Commission argues that, since the aid at issue was granted unlawfully by the Spanish authorities, Article 14 of Regulation No 659/1999 and the principle of the protection of legitimate expectations do not preclude the decision to recover contained in the contested decision.

— Findings of the Court

194 The plea of inadmissibility raised by the Commission must be dismissed for the reasons set out in paragraphs 77 to 81 of this judgment.

195 As to the substance, the applicants' arguments under this limb that Article 14(1) of Regulation No 659/1999 and the principle of the protection of legitimate expectations have been infringed are founded entirely on the premiss that the aid at issue was notified in accordance with the procedure laid down in Article 88(3) EC.

196 Since it has already been found, in paragraphs 58 to 74 of this judgment, that the aid at issue was granted unlawfully, the applicants' arguments put forward under this limb must be rejected.

The second limb: infringement of the general principles of Community law precluding the recovery of unlawful aid

— Arguments of the parties

197 Under this limb the applicant in Case T-118/01, supported by the intervener, submits that, should the aid at issue be classified as unlawful aid, the presence of exceptional circumstances giving rise to a legitimate expectation would prevent its recovery, in accordance with the final sentence of Article 14(1) of Regulation No 659/1999 (judgment in Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 13 to 17). Furthermore, by acting as it did, the Commission infringed the principle of good administration.

198 In its submission, the fact that the aid was not put into effect until after the Commission's final decision and the fact that the Commission never pointed out, when investigating the case, that the notification of the agreement by P & O's lawyers was not legally valid constitute exceptional circumstances which gave rise to an expectation as to the legality of the aid calling for legal protection. The Commission should have informed the Spanish Government that it was for it to effect notification of the new agreement, in accordance with the principle of cooperation in good faith laid down in Article 10 EC and the general principle of good administration (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 45). It further observes that the decision of 7 June 1995 was officially notified to the Spanish Government. It submits that the contact between the Commission and the Spanish Government during the procedure provided for in Article 88(3) EC and, in particular, the fact that the decision of 7 June 1995 was notified to the latter 'rectified' the effects of the lack of notification.

199 The intervener in Case T-118/01 adds that the Commission has recognised that, with regard to State aid, its conduct may foster a legitimate expectation both on the part of the authority which granted the aid and on the part of the recipient undertaking (Commission Decision 2001/212/EC of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty, OJ 2001 L 79, p. 29, paragraph 72).

200 The Commission argues that the fact that it did not initially raise objections to the aid at issue was not capable of giving rise to a legitimate expectation on the part of the recipient undertaking that the aid granted pursuant to the new agreement was lawful given that, as it has already demonstrated, the conditions laid down in Article 88(3) EC were not observed and the decision of 7 June 1995 was annulled by the *BAI* judgment.

— Findings of the Court

201 It is true that a recipient of unlawfully 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 (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16).

202 On the other hand, a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 88 EC may not plead the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 EC and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the Treaty ineffectual (Case C-5/89 *Commission* v *Germany*, cited above, paragraph 17, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 104). Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 183).

203 Accordingly, the Diputación is not justified in pleading that there are exceptional circumstances and that P & O Ferries' legitimate expectations should be protected.

204 Also, in the action brought by it in Case T-116/01, the recipient of the aid at issue, P & O Ferries, has not pleaded exceptional circumstances which could lead it to entertain a legitimate expectation apart from the fact that the Commission initially adopted the decision of 7 June 1995.

205 In this regard, the fact that the Commission initially adopted a positive decision approving the aid at issue could not have caused P & O Ferries to entertain a legitimate expectation, since that decision was challenged in due time before the Community judicature, which annulled it (*Spain* v *Commission*, cited above, paragraph 53).

206 It is not disputed that Article 230 EC balances the principle of legality, intended to prevent unlawful acts from giving rise to effects in the common market, and the principle of legal certainty, intended to prevent Community measures which produce legal effects from being called into question indefinitely (see, to this effect, Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 19, Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 29, and Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraph 34).

207 Also, case-law states that whilst it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must be balanced against requirements which protect public interests (Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at pp. 269 to 275, and Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 76).

208 In the field of State aid, there is an important public interest in preventing the operation of the market from being distorted by State aid injurious to competition, a fact which, in accordance with settled case-law, requires unlawful aid to be repaid in order to reestablish the previously existing situation (*Deufil* v *Commission*, cited above, paragraph 24, and Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 66). That public interest thus encompasses, in particular, the protection of competitors who, themselves, have a clear interest in being able to challenge Commission measures which adversely affect them (see, to this effect, *SNUPAT* v *High Authority*, cited above, at p. 87, and *Hoogovens* v *High Authority*, cited above, at p. 270).

209 To conclude otherwise would render ineffective the review, conducted by the Community judicature in accordance with Article 220 EC, the first paragraph of Article 230 EC and Article 233 EC, of the legality of measures adopted by the Community institutions. It is settled case-law that the requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39). The right to an effective remedy has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

210 It follows from the foregoing considerations that, in the circumstances of the instant case, no legitimate expectation could have been entertained by P & O Ferries.

211 So far as the alleged infringement of the principle of good administration is concerned, this argument appears essentially to criticise the conduct of the Commission when it investigated the case and thereby to call in question the unlawfulness of the aid at issue.

212 In those circumstances, this head of claim must be rejected by reference to the Court's analysis in the context of the first plea (paragraphs 57 to 74 above), without its being necessary to consider whether it has been presented in accordance with Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

213 Accordingly, the present plea must be rejected in its entirety.

The second plea in Case T-116/01, alleging infringement of Article 88 EC

Arguments of the parties

214 In the alternative, the applicant in Case T-116/01 submits that the aid at issue must be treated as authorised by default, whether by virtue of Article 4(6) of Regulation No 659/1999 or by virtue of the general principles of Community law as formulated before the adoption of that regulation, given that the Commission did not open (or reopen) the procedure laid down by Article 88 EC within two months following delivery of the *BAI* judgment. Otherwise the Commission could delay longer in deciding whether to open a formal procedure under Article 88(2) EC where it had originally taken a favourable decision which was subsequently annulled, than if it had dealt with the matter properly in the first instance (*Austria* v *Commission*, cited above, paragraphs 68 to 78).

215 The Commission submits that this plea is unfounded and must be rejected.

Findings of the Court

216 In Case 120/73 *Lorenz* [1973] ECR 1471, at paragraph 6, the Court of Justice held that Article 88(3) EC implies that 'if the Commission, after having been informed by a Member State of a plan to grant or alter aid, fails to initiate the contentious procedure, this State may, at the expiration of a period sufficient to enable a preliminary examination of the plan, grant the proposed aid, provided that it has given prior notice to the Commission, and this aid will then come under the system of existing aids'. The Court of Justice specified in later judgments that that period may not exceed two months (see, for example, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11, *SFEI and Others*, cited above, paragraph 38, and *Austria* v *Commission*, cited above, paragraph 74). This principle was subsequently reproduced in Article 4(6) of Regulation No 659/1999.

217 It is to be noted that the principle established by *Lorenz* and set down in Article 4(6) of Regulation No 659/1999 can be invoked only where aid has been notified in accordance with the procedure laid down in Article 88(3) EC. It does not apply where the Commission initiates a procedure in relation to unnotified aid.

218 Since the aid at issue was not notified in accordance with Article 88(3) EC, the argument that the Commission should have initiated the procedure laid down in Article 88(2) EC within a period of two months following delivery of the *BAI* judgment must be rejected.

219 This plea must therefore be dismissed.

The third plea in Case T-116/01, alleging infringement of Article 253 EC

Arguments of the parties

220 The applicant in Case T-116/01 also pleads in the alternative that the contested decision's reasoning is inadequate or irrelevant. It submits, in particular, that there is nothing in the contested decision to suggest that the Commission attempted to strike a balance between the principle of legality and that of legal certainty, as required by Community law. In any case, where, as here, aid has been notified to the Commission and cleared by the latter before its grant, any conclusion that the principle of legal certainty should not prevail would be inconsistent with the whole scheme of the Treaty rules on State aid and would render the grant of aid unacceptably risky, even where the public interest required that it should be granted, and granted without delay.

221 The applicant in Case T-116/01 concludes therefrom that Article 2 of the contested decision should be annulled on the further ground of misapplication of Community law.

222 The Commission submits that this plea must be rejected as manifestly unfounded.

Findings of the Court

223 The recovery of State aid which has been granted unlawfully is the logical consequence of a finding that it is unlawful (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 66). The aim of obliging the State concerned

to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation (Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 21, and Case C-75/97 *Belgium* v *Commission* [1999] I-3671, paragraph 64).

224 Thus, so far as the obligation on the Commission to state reasons for a decision ordering the recovery of unlawful aid is concerned, it is apparent from the case-law of the Court of Justice that, in the matter of State aid, where, contrary to the provisions of Article 88(3) EC, the proposed aid has already been granted, the Commission, which has the power to require the national authorities to order its repayment, is not obliged to provide specific reasons in order to justify the exercise of that power (Joined Cases C-278/92, C-279/02 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 78, Case C-75/97 *Belgium* v *Commission*, paragraph 82, and *CETM* v *Commission*, cited above, paragraph 172).

225 Since the aid at issue was granted unlawfully, it must be concluded that the Commission was not obliged to state reasons for its decision to order its recovery, and it is unnecessary to consider whether the reasoning set out in paragraphs 74 to 78 of the contested decision is adequate.

226 The contested decision is not therefore vitiated in this respect by any defect in its reasoning.

227 In so far as the applicant seeks, in actual fact, to contest the Commission's decision ordering recovery, reference should be made to the Court's analysis in

the context of the fifth plea. The plea alleging an error of assessment by the Commission cannot be examined within the framework of a plea concerning Article 253 EC (*Commission* v *Sytraval and Brink's France*, paragraphs 67 to 72).

228 It follows from all the foregoing considerations that the actions must be dismissed.

Costs

229 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants in Cases T-116/01 and T-118/01 have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

230 Under the third subparagraph of Article 87(4), the Court of First Instance may order an intervener to bear his own costs. Here, the parties which have intervened in support of the applicants in Cases T-116/01 and T-118/01 must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition),

hereby:

1. **Dismisses the actions;**

2. **Orders the applicant, in each case, to bear its own costs and those incurred by the Commission;**

3. **Orders the interveners to bear their own costs.**

Vesterdorf Lenaerts Azizi

Jaeger Legal

Delivered in open court in Luxembourg on 5 August 2003.

H. Jung B. Vesterdorf

Registrar President