JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
28 January 1999 *

In Case T-14/96,

Bretagne Angleterre Irlande (BAI), a company incorporated under French law based in Roscoff, France, represented by Jean-Michel Payre, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and Anders Christian Jessen, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg

defendant,

supported by

Kingdom of Spain, represented in the written procedure by Luis Pérez de Ayala Becerril and in the oral procedure by Santiago Ortíz Vaamonde, Abogados del Estado, of the Community Legal Affairs Department, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

* Language of the case: French.

and

Ferries Golfo de Vizcaya SA, Bilbao, Spain, a company incorporated under Spanish law, represented in the written procedure by Julian Ellison and in the oral procedure by Ellison and Mark Clough, Solicitors, with an address for service in Luxembourg at the office of Bonn & Schmitt, 62 Avenue Guillaume

interveners,

APPLICATION for the annulment of the Commission's decision of 7 June 1995 terminating the review procedure initiated under Article 93(2) of the EC Treaty (aid to Ferries Golfo de Vizcaya SA), notified to the Spanish Government on 11 July 1995 and published in the *Official Journal of the European Communities* (OJ 1995 C 321, p. 4),

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

composed of: B. Vesterdorf, President, C. W. Bellamy, R. M. Moura Ramos, J. Pirrung and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 June 1998

gives the following

Judgment

Facts

1 For several years the applicant has operated, under the trading name of Brittany Ferries, a shipping line between the ports of Plymouth in the United Kingdom and Santander in Spain. By letter of 21 September 1992 it sent a complaint to the Commission concerning the large subsidies to be granted by the Regional Council of Biscay and the Basque Government to Ferries Golfo de Vizcaya SA, a company incorporated under Spanish law and formed by Vapores Surdíaz Bilbao, SA, a company incorporated under Spanish law, and P&O European Ferries (Portsmouth) Ltd, a company incorporated under English law, with a view to operating a regular shipping line between the ports of Portsmouth and Bilbao from March 1993.

2 Accordingly the applicant gave the Commission certain information in its possession concerning the agreement which was to be signed by Ferries Golfo de Vizcaya and the Basque regional authorities for the purpose of subsidising the operation of the Bilbao-Portsmouth line during the first three years of operation. In addition, the applicant formally requested the Commission to initiate a procedure pursuant to Articles 92 and 93 of the EC Treaty.

3 The Spanish Government was requested, by letter of 30 November 1992, to provide all the relevant information concerning the aid scheme in question so that the Commission could consider whether it was compatible with the common market, in accordance with Article 92 of the Treaty. Following a letter of formal notice from the Commission dated 5 February 1993, the Spanish Government sent its reply on 1 April 1993.

4 On 11 February 1993 the applicant sent the Commission additional observations concerning the aid granted to Ferries Golfo de Vizcaya, pointing out the urgent need to initiate the review procedure requested in its complaint, having regard to the imminent starting-up of transport services on the Bilbao-Portsmouth route. The applicant pointed out that as that service competed directly with the service operated by it, its opening under the conditions agreed upon with the Spanish authorities was likely to cause serious damage to its own economic interests.

5 The text of the agreement signed on 9 July 1992 by the Provincial Council of Biscay and the Ministry of Trade and Tourism of the Basque Government, of the one part, and Ferries Golfo de Vizcaya, of the other ('the 1992 agreement' or 'the original agreement'), that for the period from March 1993 to March 1996 the signatory authorities undertook to purchase a total of 26 000 travel vouchers to be used on the Bilbao-Portsmouth route. The maximum financial consideration to be paid by the authorities to Ferries Golfo de Vizcaya was fixed at PTE 911 800 000. It was agreed that the tariff per passenger would be PTE 34 000 for 1993/94 and, subject to alteration, an estimated tariff of PTE 36 000 was agreed for 1994/95 and PTE 38 000 for 1995/96.

6 On 29 September 1993 the Commission decided to initiate the procedure laid down in Article 93(2) of the Treaty. It took the view that the 1992 agreement was not a normal commercial transaction as it concerned the purchase of a predetermined number of travel vouchers for a period of three years, that the agreed price was higher than the commercial tariff, that the vouchers had to 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 Ferries Golfo de Vizcaya. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to Ferries Golfo de Vizcaya constituted State aid within the meaning of Article 92 of the Treaty and did not fulfil the conditions for it to be declared compatible with the common market.

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

8 The decision to initiate a procedure concerning the aid granted by Spain to Ferries Golfo de Vizcaya 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), so that they could submit their observations.

9 On 7 March 1995 the Provincial Council of Biscay and Ferries Golfo de Vizcaya concluded a new agreement ('the 1995 agreement' or 'the new agreement'). The text of this agreement shows that for the period from January 1995 to December 1998 the public authority undertook to purchase a total of 46 500 travel vouchers to be used on the Bilbao-Portsmouth route operated by Ferries Golfo de Vizcaya. The maximum financial consideration to be paid by the authority was fixed at PTE 985 500 000, of which PTE 300 000 000 would be paid in 1995, PTE 315 000 000 in 1996, PTE 198 000 000 in 1997 and PTE 172 500 000 in 1998. A tariff per passenger of PTE 20 000 was agreed for 1995, PTE 21 000 for 1996, PTE 22 000 for 1997 and PTE 23 000 for 1998. These tariffs were subject to a discount which took account of the long-term purchase undertaking entered into by the Provincial Council of Biscay. They were calculated on the basis of a reference tariff of PTE 22 000, which was the published commercial tariff for 1994, rising by 5% per annum, which increased the tariff to PTE 23 300 in 1995, PTE 24 500 in 1996, PTE 25 700 in 1997 and PTE 26 985 in 1998.

10 On 7 June 1995 the Commission adopted its decision terminating the review procedure initiated in relation to the aid to Ferries Golfo de Vizcaya ('the contested decision'). On the same day it published press release IP/95/579, which announced the adoption of the decision and contained a summary of its grounds.

11 By letters of 12 and 16 June 1995 the applicant asked for the text of the contested decision to be communicated to it. In reply, the Commission sent it the abovementioned press release by fax of 19 June 1995.

12 The Spanish Government was notified of the contested decision on 11 July 1995. The communication addressed to the other Member States and other interested parties, reproducing the text of the decision, was published in the *Official Journal of the European Communities* on 1 December 1995 (OJ 1995 C 321, p. 4). The Commission sent the applicant a copy of this published text by fax of 8 December 1995.

13 Before the fax was received, the applicant had on several occasions asked to be informed of the terms of the Commission's decision of 7 June 1995, as it was in possession of only the press release sent to it on 19 June 1995. On 28 November 1995 it sent to the Court Registry an application for compensation for the damage allegedly sustained by it by reason of the Commission's delay in sending it the decision. That action was registered on 18 December 1995 under number T-230/95, after the applicant had received the text of the contested decision.

The contested decision

14 According to the decision, the original agreement was suspended after the Commission's decision of 29 September 1993 initiating the procedure provided for by Article 93(2) of the Treaty. Ferries Golfo de Vizcaya made provision for all money paid to be refunded, together with interested calculated at 1% above the United Kingdom commercial bank rate.

15 The contested decision goes on to state that the 1995 agreement made a number of significant modifications in order to meet the Commission's concerns. The Basque Government is not a party to this agreement, which will be in force from 1995 to 1998. According to the information received by the Commission, the number of vouchers to be purchased by the Provincial Council was based on the estimated take-up of the offer by certain low-income groups and groups covered by social and cultural programmes, including school groups, young people and the elderly. The cost of the travel vouchers is less than 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. The remaining elements of the original agreement which caused concern are stated to have all been deleted from the revised agreement.

16 In the contested decision the Commission also finds that the viability of the service offered by Ferries Golfo de Vizcaya has been proven by its commercial results and that the company has established its business without any benefit from State support. The company has no special rights to use the port of Bilbao and its priority on the berth is limited to the scheduled arrival and departure times of its vessels, which means that other vessels can and do use the berth at other times. The Commission considers that the new agreement, which is designed for the benefit of local people using local ferry services, appears on both sides to reflect a normal commercial relationship, with arm's length pricing for the services provided.

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

Procedure and forms of order sought

18 The application initiating the present proceedings was lodged at the Registry of the Court of First Instance on 1 February 1996.

19 By applications lodged at the Registry on 12 and 14 June 1996 respectively, the Kingdom of Spain and Ferries Golfo de Vizcaya applied for leave to intervene in support of the form of order sought by the defendant. By letters of 28 June and 2 August 1996 the applicant requested confidential treatment of the document produced as Annex III to the reply, in relation to both the Kingdom of Spain and Ferries Golfo de Vizcaya.

20 By order of 13 November 1996 the Court (First Chamber, Extended Composition) granted the Kingdom of Spain and Ferries Golfo de Vizcaya leave to intervene. In addition, the Court refused the applicant's request for confidential treatment, while authorising the applicant to withdraw the document in question from the file before it was communicated to the interveners. The applicant lodged an application for that purpose within the period prescribed by the Registrar.

21 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, by letter of 7 May 1998 it requested the defendant to produce the full text of the 1995 agreement. The Commission lodged this document at the Registry on 14 May 1998.

22 The parties presented oral argument and replied to the Court's questions at the hearing on 16 June 1998.

23 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— leave the interveners to bear the costs of their intervention.

24 The Commission contends that the Court should:

— rule that the action is inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

25 The Kingdom of Spain, intervening, contends that the Court should:

— rule that the action is inadmissible;

— in the alternative, dismiss the action;

— order the applicant to pay the costs.

26 Ferries Golfo de Vizcaya, intervening, contends that the Court should:

— rule that the action is inadmissible;

— dismiss the action as unfounded;

— order the applicant to pay the intervener's costs in this action.

Admissibility

The arguments of the parties

27 The Commission, supported by the interveners, claims that the action has been brought out of time and must be declared inadmissible. It observes that, of the events specified in the fifth paragraph of Article 173 of the Treaty, the decisive event for causing time to run for the purpose of proceedings is the event which is the first in time, in this case, the applicant's acquisition of knowledge of the measure. A mere comparison of the text of the decision as published in the *Official Journal of the European Communities* and the press release sent to the applicant shows that the press release repeats the main points of the decision, in particular the reasoning on the basis of which the Commission concluded that the 1995 agreement did not constitute State aid. The terms of the decision of 7 June 1995 therefore came to the applicant's knowledge by means of the fax of 19 June 1995, so that the applicant could, as from that date, have exercised its right to bring an action.

28 The Commission submits that the press release, which was published at the seat of the Commission on 7 June 1995, may be regarded as an actionable measure of which the applicant was notified on 19 June 1995. The publication of the decision in the *Official Journal of the European Communities* of 1 December 1995 was merely a measure confirming an earlier measure which had not been challenged by the applicant within the period prescribed by Article 173 of the Treaty. Furthermore, the applicant was not notified of the decision on 8 December 1995. The decision was merely communicated to it on that date as it had been notified to the Kingdom of Spain, the only addressee, on 11 July 1995.

29 The applicant contends that the Commission's plea of inadmissibility is not only unfounded in law, but also completely inappropriate in fact. In its submission, it is, to say the least, bold of the Commission to argue now that the action for annulment is out of time when it was the Commission which refused to communicate to the applicant the complete official text of the decision before it was published in the *Official Journal of the European Communities*.

30 According to the applicant, it follows from the clear and precise terms of the fifth paragraph of Article 173 of the Treaty that it is only in the absence of publication or notification of the measure that the time prescribed for initiating proceedings can begin to run on some other date, that is to say, the day on which it came to the applicant's knowledge.

31 The applicant adds that, in so far as the essential function of a press release is to give the public information in summary, and therefore incomplete, form, it is obvious that it cannot set out clearly and unequivocally the terms of a Commission decision or enable a party to exercise its right to bring an action. Moreover, it is sufficient to compare the text of the press release of 7 June 1995 with the text published in the *Official Journal of the European Communities* to see that it is very far from reproducing the entire decision whose existence it reports.

Findings of the Court

32 Under the fifth paragraph of Article 173 of the Treaty, the actions provided for in that article are to be brought within two months of the publication of the measure, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the applicant's knowledge.

33 It is clear from the actual wording of that provision that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for initiating proceedings, is subsidiary to the criteria of publication or notification of the measure (see Case C-122/95 *Germany* v *Commission* [1998] ECR I-973, paragraph 35).

34 Although publication is not a condition for the applicability of decisions of the Commission terminating a procedure for the review of aid under Article 93(2) of the Treaty, in accordance with a consistent practice announced by the Commission itself, particularly in its letter of 27 June 1989 to the Member States, published in *Droit de la concurrence dans les Communautés européennes* (volume IIA, 'Règles applicables aux aides d'État', 1995), and in the *Twentieth Report on Competition Policy* (1990, paragraph 170), those decisions are published in the *Official Journal of the European Communities*.

35 The decision at issue was published on 1 December 1995. Moreover, it must be observed that in the present case the applicant could legitimately expect the decision to be published in the *Official Journal of the European Communities*, having regard to the abovementioned practice and to the fact that the Commission had specifically confirmed, by letter of 4 August 1995, that the decision would be published within the next few weeks (see, to that effect, *Germany* v *Commission*, cited above, paragraphs 36 and 37).

36 In those circumstances, the assertions by the Commission and the interveners that the applicant had sufficient knowledge of the contested decision on 19 June 1995, the date of the transmission by fax of the press release, are irrelevant for the purpose of determining the starting point of the period prescribed for initiating proceedings. There are no grounds for applying in this case the criterion of the day on which the measure came to the applicant's knowledge, as provided for by way of an alternative in the fifth paragraph of Article 173 of the Treaty. As it is common ground that the applicant was not notified of the decision earlier, the Court concludes that it is the date of publication which marked the starting point of the period prescribed for initiating proceedings (see *Germany* v *Commission*, cited above, paragraph 39).

37 It follows that the plea of inadmissibility on the ground that the present action is out of time must be dismissed as unfounded.

Substance

38 The applicant puts forward four pleas in law in support of its application for the annulment of the contested decision. The first plea alleges breach of the right to a fair hearing. The second alleges insufficiency of the reasons given for the decision. The third alleges manifest errors in the decision. Finally, the fourth alleges infringement by the Commission of Article 92(1) and other provisions of the Treaty.

39 The Court finds that several of the arguments raised in connection with the second, third and fourth pleas seek in essence to show that the Commission was mistaken in concluding that the payment of certain amounts to Ferries Golfo de Vizcaya by the Basque authorities formed part of a normal commercial agreement and were not connected with an operating subsidy to that company. In those circumstances, it is appropriate first to examine the plea alleging infringement of Article 92(1) of the Treaty on the ground that the Commission was wrong in finding that the 1995 agreement did not constitute State aid within the meaning of Article 92(1). It is therefore appropriate to examine together, by reclassifying them, the arguments exchanged between the parties in so far as they relate to the plea of infringement of Article 92(1).

The plea alleging infringement of Article 92(1) of the Treaty

Arguments of the parties

40 In connection with its fourth plea put forward as a ground for annulment, the applicant complains that the Commission misapplied Article 92(1) in that it did not attempt to ascertain whether the massive purchases of travel vouchers by the Spanish authorities strengthened the market position of Ferries Golfo de Vizcaya as compared with that of its competitors (see Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11). The applicant observes that the classification of a measure as State aid does not depend on the profitability or viability of

the undertaking receiving it, contrary to what is to be inferred from the grounds of the contested decision. Moreover, the applicant contends that the undertaking to purchase travel vouchers for several years necessarily strengthens the position of the recipient undertaking by enabling it, for example, to organise at no risk tariff promotion campaigns with the object or effect of enticing customers of its competitors.

41 The applicant contends that the social objective of the 1995 agreement, relied upon before the Commission, is only a disguise and that, in any case, the social character of the State intervention is not sufficient to prevent it from the outset from being categorised as aid for the purposes of Article 92(1) of the Treaty. On this point the applicant cites Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 20 and 21. In addition, even if the social objective were regarded as genuine, which the applicant denies, the fact would remain that the arrangements adopted were not necessary for the attainment of that objective. In the applicant's submission, the organisation of travel of a 'social' character does not necessarily mean that it should involve a single mode of transport, in this case carriage by sea, and be assured by a single undertaking.

42 In the context of its second plea, alleging that the contested decision is insufficiently reasoned, the applicant states that the decision does not show the existence of specific projects necessitating the purchase of travel vouchers several years in advance. It therefore questions whether the vouchers which the Basque authorities undertook to purchase for the period from 1995 to 1998 would actually be used. The applicant points out that it previously expressed the fear that the purchase of vouchers by the authorities in the framework of the original agreement was a manifest sham and a disguised subsidy. It stresses that, according to the practice of shipping companies, an authority wishing to buy travel vouchers does not need to conclude an agreement of the type in question. It is sufficient to purchase them when a specific project has been planned because tariffs always provide for special prices for groups and negotiated prices can always be envisaged.

43 As regards the actual existence of the projects referred to by the Basque authorities, the applicant criticises the references in the decision to 'experience of other similar social programmes' and to the keen interest shown by 'those evacuated to the United Kingdom during the Spanish Civil War'. The applicant expresses doubt as to the social programmes which are said to have served as a comparison in the Commission's assessment, and as to the number of former exiles to the United Kingdom who are still alive and who might wish to visit the place of their temporary exile by using the shipping line operated by the applicant's competitor.

44 The applicant also submits that the Commission was wrong in concluding that the elements which caused concern as likely to constitute State aid had been deleted from the 1995 agreement. The applicant states that the first such element, that is to say, the purchase of travel vouchers in advance for a period of three or four years, was not deleted and also appears in the new agreement.

45 The applicant criticises the uncertainty arising from the formulation of the ground relating to the existence of a normal commercial relationship between Ferries Golfo de Vizcaya and the Provincial Council of Biscay, which is regarded by the applicant as an essential ground in the general scheme of the contested decision.

46 It contends that the Commission should not have referred solely to the social objective pursued or alleged by the Member State concerned, without regard to the effect which the sums paid have on competition (see Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 26 to 28, and Case 290/83 *Commission* v *France* [1985] ECR 439). The applicant also disputes the Commission's analysis of the development of competition between the two shipping lines in question. According to the applicant, the relevant question is not whether Brittany Ferries made losses after the opening of a new route subsidised by the Spanish authorities. The question is rather whether the absence of aid would have led to the disappearance of the competing undertaking or, in the present case, to a decision not to set up such an undertaking (see *Philip Morris* v *Commission*, cited above, and Case 40/85 *Belgium* v *Commission* [1986] ECR 2321).

47 In the context of the third plea, alleging manifest errors on the part of the Commission, the applicant adds that the review which the Court is required to carry out of the contested decision, which finds that the new agreement does not constitute State aid, concerns the interpretation and application of the concept of State aid referred to in Article 92 of the Treaty. As the Commission does not have exclusive competence in this matter, judicial review cannot be limited to manifest errors of assessment (see Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, paragraph 54).

48 At the hearing the applicant put forward a further argument based on the terms of the 1995 agreement, which it claims came to its notice only a few days before the hearing, after the Commission, at the Court's request, had produced the full text of the agreement to the Court. The applicant observes that, in order to meet the objections to the 1992 agreement, the new agreement merely reduced the unit price of each travel voucher so as not to exceed the commercial tariff published for the transport services in question. However, in so far as the number of vouchers purchased by the Spanish authorities rose from 26 000 to 46 500, the total subsidy granted to Ferries Golfo de Vizcaya under the 1995 agreement was even slightly higher than that provided for under the 1992 agreement, as it amounted to PTE 985 500 000. Accordingly, the applicant disputes the Commission's conclusion that the modifications in the agreement between the authorities and Ferries Golfo de Vizcaya were such as to eliminate the elements of State aid found by the Commission in the original agreement.

49 The Commission, for its part, denies that it has infringed Article 92(1) of the Treaty as alleged and maintains that the contested decision clearly set out the reasons leading to the conclusion that the new agreement did not constitute State aid. The first reason consists in the actual assessment of the agreement in question, which no longer includes the five aspects previously complained of by the decision initiating the Article 93(2) procedure, as liable to incorporate elements of State aid. The viability of Ferries Golfo de Vizcaya is only one of the elements which were examined by the Commission and helped to determine its decision. Furthermore, the data supplied by the applicant itself confirms the viability of that undertaking.

50 The defendant points out that, on the initiation of the review procedure, it took the view that the elements capable of constituting State aid represented 7% of the operating costs of the recipient undertaking. In view of the suspensory effect attaching to any decision initiating the procedure, and of the fact that the sums already paid had been frozen and their repayment guaranteed, in reality Ferries Golfo de Vizcaya operated during all the years in question without the support of State aid. Furthermore, the Commission states that the market in shipping between northern Spain and the south of England has doubled and that the two operators have almost equal market shares. It follows that the opening of the new route has not led to a fall in demand to the applicant's disadvantage.

51 The Commission expresses doubts as to the admissibility of several of the applicant's arguments put forward at the stage of the reply. It states that the applicant has shown itself to be incapable of sustaining its plea that the decision is not sufficiently reasoned. The complaints that the Commission did not concern itself with the effect on competition of large long-term purchases of travel vouchers and failed to find that one aspect of the original agreement of which it had previously complained was still to be found in the 1995 agreement cannot be regarded as amplifications of that plea. Nor are they amplifications of the applicant's further plea of manifest error. As they are new arguments, the defendant suggests that the Court rule that they are inadmissible.

52 With regard to the similar social programmes mentioned in the decision, the Commission confirms that the experience taken into consideration does not relate to the sea-ferry routes between Spain and England, but to programmes existing in the United Kingdom and also in Spain, and involving, *inter alia*, transport between the Iberian peninsula and Latin America. The supplementary reference to veterans of the Spanish Civil War is justified by the fact that their association duly appeared in the procedure. The defendant also contends that, by questioning whether the vouchers purchased in advance would actually be used, the applicant is calling in issue the good faith of the responsible authorities, which had provided the Commission with the necessary forecasts. Consequently the applicant is going beyond

the matter of the reasoning of the measure and embarking on that of its proper implementation, which raises specific problems and in connection with which the Commission and the complainants, if any, each play their part.

53 In reply to a question put by the Court at the hearing, the defendant pointed out that its original position, as expressed in the decision initiating the procedure under Article 93(2) of the Treaty, had been adopted in 1993 on the basis of the information available to it at the time, and was not in the nature of a final assessment regarding the existence of State aid to Ferries Golfo de Vizcaya. The Commission added that, when the new agreement was examined, the Spanish authorities supplied it with credible information concerning cultural and social programmes such as those of Inserso (National Institute for Social Services), which justified the advance purchase of large numbers of travel vouchers by the authorities. That information, which was not included in the Commission file when it ruled on the 1992 agreement, caused it to alter its initial assessment concerning the nature of the large-scale purchases of vouchers.

54 The Kingdom of Spain, intervening in support of the form of order sought by the Commission, submits that the elements necessary for a finding of the existence of State aid within the meaning of Article 92(1) of the Treaty are not present in this case. At the hearing the Kingdom of Spain identified the three conditions essential to the concept of State aid which, in its opinion, are not fulfilled in this case: no advantage has been accorded, the agreement does not favour a specific undertaking and competition has not been distorted.

55 No advantage was accorded to Ferries Golfo de Vizcaya because, according to the new agreement, the travel vouchers were purchased for less than the market price. This represents normal practice, the discount granted by the seller being the *quid pro quo* for the buyer's undertaking to purchase a large number of tickets for several years.

56 According to the Kingdom of Spain, the Basque authorities had no intention of favouring a specific undertaking. The intervening Government points out that there was only one operator in a position to provide the transport services demanded by the provincial authorities for the benefit of people residing in their territory. As the port served by the applicant's line is outside the territory of Biscay and at a considerable distance from it, the claim that the Provincial Council ought to have signed the agreement in question with the applicant must be rejected.

57 The Kingdom of Spain also denies that the conclusion of such an agreement led to distortions of competition. First, the amounts paid by the authorities to Ferries Golfo de Vizcaya under the original agreement represented hardly more than 5 to 7% of the investment necessary for starting up the new shipping line. Consequently, it cannot be said that the line would not have been set up without the intervention of the Spanish authorities. Second, the intervening Government claims that the Santander-Plymouth route was not seriously affected by the opening of the Bilbao-Portsmouth route. The fact that the applicant suffered no losses and even increased its market shares in the first few years after the opening of the new route shows that the main result of the opening has been an increase in demand.

58 The Spanish Government also confirms that for several years the Basque authorities have implemented a policy of assisting travel by low-income groups, and the cultural and social programmes referred to in this case are only one example among others which it mentioned at the hearing. The agreement with Ferries Golfo de Vizcaya is therefore not exceptional. It forms part of a general action plan pursued also by other regional communities and at national level.

59 The intervener Ferries Golfo de Vizcaya contends that the Basque authorities' undertaking to purchase in advance certain quantities of travel vouchers to be used within a certain period is a commercial transaction which is completely normal in the business of shipping companies. The intervener refers to reservation agreements with operators known as 'ITX', who also purchase in advance large numbers of tourist tickets and consequently receive volume discounts. The discounts

granted to these commercial operators vary between 5 and 30% of the published tariff, depending on the volume and duration of their commitment. The reduction of approximately 15% laid down in the agreement with the Provincial Council is appropriate and conforms with normal practice in agreements of that kind.

60 The intervening company rejects the applicant's suggestion that, to obtain a volume discount, it is not necessary for the provincial authorities to buy in advance vouchers to be used in the organisation of their cultural and social travel arrangements. The authorities receive larger discounts in so far as they enter into a long-term commitment. Furthermore, they can ensure that the necessary places for carrying out their programmes will be available and thus avoid additional costs.

61 With regard to the actual existence of a demand capable of justifying the purchase agreement in question, Ferries Golfo de Vizcaya explained at the hearing that the provincial authorities' programmes form part, in particular, of the Inserso holiday programme for the elderly, mentioned in the press release published by the Commission on 7 June 1995. Approximately 50% of the total number of vouchers purchased by the public authorities have been used already by the categories of persons covered by those programmes. It is possible to defer use of the vouchers, but they are valid only for crossings during the low season.

62 The sums it received under the agreements with the Basque authorities are too small to have any real impact on its viability. When the new service was opened in 1993 the income from the agreement with the authorities represented 3.6% of the company's turnover. In view of its operating costs for the same year, it was clear that the opening of the Bilbao-Portsmouth route did not depend on the income in question. Moreover, the sale of vouchers was suspended from November 1993 to

1995. According to the intervener, the income generated by the new agreement was even smaller as it represented approximately 5.1% of turnover in 1995 and 4% in 1997.

63 In addition, the intervener maintains that the reference in the decision to its viability confirms that the Commission did in fact consider whether the Provincial Council of Biscay acted according to the criterion of a private operator who wishes to purchase large numbers of travel vouchers for several years. In the context of a normal commercial relationship, the viability of the other contracting party is a relevant factor. Furthermore, the intervener states, if the applicant had offered a ferry service from the port of Bilbao, the intervener could have competed with it for the sale of vouchers to the provincial authorities. However, its ferry service is based on the port of Santander in another region.

Findings of the Court

64 As the Commission and the interveners contend that some of the applicant's arguments in support of its application are inadmissible, it is necessary first of all to verify whether all the arguments grouped together in the context of the ground of annulment at present under consideration can be taken into account by the Court.

65 Under the first paragraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

66 In the present case the Court considers that the arguments which in substance are closely connected with the plea alleging infringement of Article 92(1) of the Treaty, cannot be regarded as new pleas for the purpose of the Rules of Procedure, although they were put forward for the first time in the reply. It is common ground that the applicant raised the abovementioned plea in the application initiating the proceedings and that it adduced at that stage legal and factual arguments

capable of supporting that plea. The arguments concerning the failure to analyse the effect on competition of long-term purchases of large numbers of vouchers and the element of the original agreement which was objected to but retained in the 1995 agreement are in reality amplifications of a plea which has already been raised. Consequently, the Community court will allow them to be submitted at the stage of the reply (see Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 125).

67 It is true that certain arguments were formally presented in the application in the context of the other grounds for annulment put forward. These arguments must *a fortiori* be declared admissible, as the Commission had the opportunity to reply to them at the stage of the defence. Any errors of characterisation made by a party, whether noted or not by the opposing parties, cannot prevent the Court from taking account, when assessing the merits of a plea which has been properly raised, of all the arguments relating to it.

68 The Commission and the interveners contend that the arguments put forward by the applicant at the hearing, based on the terms of the 1995 agreement, ought to have been set out in the application. That agreement is a public document to which the applicant could easily have obtained access before bringing the action.

69 On this point it must be observed, first, that the arguments put forward at the hearing are also closely connected with the plea alleging infringement of Article 92(1) of the Treaty. Second, the Court observes that there is nothing in the file to show that the applicant actually obtained the text of the 1995 agreement before it was placed in the file in the present case. In those circumstances, and without there being any need to examine the reasons for which the applicant was not in possession of the document in question, which however it had sought to obtain from the Commission, it must be held that the arguments based on examination of the text of the agreement are founded on matters which came to light in the course of the procedure and that therefore they must be declared admissible.

70 With regard to the merits of the present plea, it is common ground that, in the contested decision, the Commission did not rule on the question whether the alleged subsidy to Ferries Golfo de Vizcaya was compatible with the common market, but that it merely interpreted and applied to the present case the concept of State aid in the sense contemplated in Article 92(1) of the Treaty. In explaining its decision to terminate the procedure which had been initiated under Article 93(2) of the Treaty, the Commission expressly concluded that 'the new agreement, which will be in force from 1995 to 1998, does not constitute State aid'.

71 In determining whether an agreement whereby a public authority undertakes to purchase certain services from a specific undertaking for a number of years falls within the scope of Article 92(1) of the Treaty, it must be borne in mind that the aim of Article 92 is to prevent trade between Member States from being affected by advantages given by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods (see *Italy* v *Commission*, cited above, paragraph 26, and Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8). It follows that a State measure in favour of an undertaking, which takes the form of an agreement to purchase travel vouchers cannot be excluded in principle from the concept of State aid in the sense contemplated in Article 92 of the Treaty, merely because the parties undertake reciprocal commitments.

72 That interpretation of the Treaty was moreover adopted by the Commission in its decision of 29 September 1993 initiating the procedure under Article 93(2) in relation to the aid scheme set up by the original agreement. Even though, according to the Spanish Government, the payment to Ferries Golfo de Vizcaya represented the *quid pro quo* for the travel vouchers purchased by the regional authorities, the Commission took the view that the 1992 agreement incorporated elements of State aid because the agreed conditions of the transaction did not conform with those of a normal commercial transaction. In order to establish the advantage given to the recipient company by the authorities, the Commission stressed certain aspects of that agreement (see paragraph 6 above).

73 It is clear from the reasoning of the contested decision in question and from the Commission's arguments expounded in the course of these proceedings that the change in its assessment with regard to the existence of State aid to Ferries Golfo de Vizcaya is based on two main considerations. First, the elements of the original agreement which caused concern were all deleted from the 1995 agreement, which could therefore be regarded as a normal commercial transaction. Second, the Spanish authorities sufficiently established, by providing evidence that the cultural and social programmes which they organise for persons residing in the province of Biscay are genuine, a real need to conclude the purchase agreement in question, so that travel vouchers could be distributed to the persons covered by those programmes.

74 The first point to be considered, therefore, is whether, as the Commission claims, the agreement no longer contains the elements which had led it to conclude that the original agreement fell within the scope of Article 92(1) of the Treaty. On this point the Court finds that certain elements, such as the payment by the authorities of a unit price for the vouchers higher than the published commercial price and the variation in the total subsidy depending on the company's positive or negative operating results, have been deleted from the text of the 1995 agreement. However, as the applicant pointed out, the new agreement still provides for the purchase of a predetermined number of travel vouchers for several years and, in spite of the reduction in the reference unit price, it gives Ferries Golfo de Vizcaya an overall income which is not only equivalent, but even slightly higher than that stipulated in the original agreement.

75 In view of those circumstances, the fact that the terms of the 1995 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 known as 'ITX', is not sufficient to establish that the purchase of travel vouchers by the Provincial Council of Biscay is in the nature of a normal commercial transaction.

76 The file produced before the Court does not support the conclusion that the number of travel vouchers specified in the 1995 agreement was determined by an increase in the actual needs felt by the authorities, which are claimed to have

required the purchase of a total of 46 500 vouchers to be used on the Bilbao-Portsmouth route in the period 1995-1998, whereas originally there was only a need for a total of 26 000 vouchers for 1993-1996. Furthermore, the advantage capable of strengthening the competitive position of Ferries Golfo de Vizcaya is not eliminated merely because the recipient undertaking is required to supply a greater quantity of transport services in return for a relatively unchanged financial benefit. As the travel vouchers purchased by the Spanish authorities can be used only in the low season, the improved service supplied by the undertaking does not in principle entail significant additional costs for it and, consequently, the effects of the new agreement on competition and trade between Member States are the same as those which could be attributed to the 1992 agreement.

77 It is settled case-law that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43, Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraphs 40 to 42, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] II-717, paragraph 48). In the present case, the aid in question affects trade between Member States because the undertaking which receives it provides transport between towns situated in different Member States and competes with shipping lines established in other Member States (see *Vlaams Gewest* v *Commission*, cited above, paragraph 52). That being so, the interveners' observations to the effect that the income generated by the agreement with the public authorities amounts to a small percentage of the annual turnover of Ferries Golfo de Vizcaya are not relevant to the question whether the State measure in question is covered by the concept of State aid as referred to in Article 92(1) of the Treaty.

78 Similarly, where financial aid granted by the public authorities strengthens the position of an undertaking in relation to its competitors, it falls within the scope of Article 92. It is clear from the case-law that the capacity of aid to strengthen the recipient's competitive position is assessed by reference to the advantage given to the recipient, and it is unnecessary to take account of the operating results of its competitors (see *Philip Morris* v *Commission*, cited above, paragraphs 10 and 11, and *Belgium* v *Commission*, cited above, paragraphs 22 and 23).

79 The Commission's second main consideration in deciding that the 1995 agreement does not constitute State aid must be taken to be that the organisation of specific programmes, in so far as they entail the use of the Bilbao-Portsmouth sea route by various groups of local people, can constitute objective proof that the Spanish authorities have a real need to purchase a certain number of travel vouchers from Ferries Golfo de Vizcaya. However, as the Court has already found in paragraph 76 above, it is not clear from the file that the total number of travel vouchers purchased by the Provincial Council of Biscay under the 1995 agreement was fixed by reference to the Council's actual needs. On the contrary, it appears from the file that, in order to maintain the payment under that agreement at a level equivalent to that of the payment provided for by the original agreement, it was necessary, in view of the reduction in the reference unit price, to increase considerably the total number of travel vouchers to be purchased by the authorities.

80 The Court finds itself all the more compelled to conclude that the 1995 agreement is not a normal commercial transaction because, as the applicant has observed, the sums paid to Ferries Golfo de Vizcaya under the original agreement, which the parties suspended following the Commission's decision of 29 September 1993, remained available to the recipient undertaking until the conclusion of a new agreement enabled it to set off its debts against its claims on the Provincial Council of Biscay.

81 Furthermore, it must be observed that the cultural and social aims pursued by the Spanish authorities play no part in the characterisation of the 1995 agreement in the light of Article 92(1) of the Treaty. According to settled case-law, Article 92(1) makes no distinction according to the causes or aims of the aid in question, but defines it in relation to its effects (see *Italy* v *Commission*, cited above, paragraph 27, *France* v *Commission*, cited above, paragraph 20, and *FFSA and Others* v *Commission*, cited above, paragraph 195). Those aims may none the less be taken into account by the Commission when, in exercising its power of constant review under Article 93 of the Treaty, it rules on the compatibility with the common market of a measure already categorised as State aid and verifies whether that measure

falls within the derogations provided for by Article 92(2) and (3) (see the order in Case T-189/97 *Comité d'Entreprise de la Société Française de Production and Others* v *Commission* [1998] ECR II-335, paragraph 40).

82 In the light of all the foregoing considerations, the Court finds that the Commission's conclusion that the 1995 agreement does not constitute State aid is based on a misinterpretation of Article 92(1) of the Treaty. Consequently, the decision terminating the review procedure initiated in relation to aid granted to Ferries Golfo de Vizcaya is vitiated by an infringement of that provision and must be annulled.

83 It is therefore unnecessary to examine the other pleas relied upon by the applicant in support of its application.

Costs

84 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. As the Commission has been unsuccessful, it must be ordered to pay the costs as applied for by the applicant.

85 Under the first subparagraph of Article 87(4), the Member States which intervened in the proceedings are to bear their own costs. Under the third subparagraph of the same paragraph, the Court may order an intervener other than the States which are parties to the EEA Agreement, the Member States, the institutions and the EFTA Surveillance Authority, to bear their own costs. The Court considers that, in the circumstances of this case, the intervener Ferries Golfo de Vizcaya must bear its own costs.

On those grounds,

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

hereby:

1. **Annuls the Commission's decision of 7 June 1995 terminating the review procedure initiated under Article 93(2) of the EC Treaty (aid in favour of Ferries Golfo de Vizcaya SA), notified to the Spanish Government on 11 July 1995 and published in the *Official Journal of the European Communities*;**

2. **Orders the Commission to pay the costs;**

3. **Orders the Kingdom of Spain and Ferries Golfo de Vizcaya SA to bear their own costs.**

Vesterdorf Bellamy Moura Ramos

Pirrung Mengozzi

Delivered in open court in Luxembourg on 28 January 1999.

H. Jung B. Vesterdorf

Registrar President