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

15 June 2000 *

In Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98,

Mauro Alzetta, resident of Montereale Valcellina (Italy), and 31 other applicants, a list of whom is annexed, represented by A. Pili, of the Pordenone Bar, and by A. Barone and G. Pezzano, of the Rome Bar, with an address for service in Luxembourg at the Chambers of L. Schiltz, 2 Rue du Fort Rheinsheim,

Masotti Srl, established in Feletto Umberto (Italy), and 30 other applicants, a list of whom is annexed, represented by R. Petiziol and A. Pergolese, of the Udine Bar, 6 Via Ginnasio Vecchio, Udine (Italy),

Anna Maria Baldo, resident of Cervignano del Friuli (Italy), and the 53 other applicants, a list of whom is annexed,

and

Amedeo Museo, resident of Rivignano (Italy),

represented by V. Cinque and L. Candriella, of the Udine Bar, 34 Via Morpurgo, Udine,

* Language of the case: Italian.

Sutes SpA, established in Udine (Italy), and the 33 other applicants, a list of whom is annexed,

Fabris Carlo & C. Snc, established in Pavia di Udine (Italy),

Franco D'Odorico, resident of Capoformido (Italy),

Fiorindo Birri, resident of Manzano (Italy),

Maria Cecilia Framalicco, resident of Ampezzo (Italy),

and

Autotrasporti di Viola Claudio & CSNC, established in Cerpeneto-Pozzuolo del Friuli (Italy),

represented by C. Mussato, of the Udine Bar, 4 Via Dante, Udine,

and

Pietro Stagno, resident of Trieste (Italy),

Fabrizio Cernecca, resident of Trieste,

Trasporti e Spedizioni Internazionali Cossutta Snc, established in Trieste,

Giuseppe Camaur, resident of Cormons (Italy),

Cointra Transport and Trade Co. Srl, established in Ronchi dei Legionari (Italy),

Autotrasporti Silvano Zottich, established in Trieste,

Zootrans Snc, established in Passagio di Betona (Italy),

Pauletic Antonio Succ. di Pauletic Igor, resident of Trieste,

represented by M. Clarich and A. Giadrossi, of the Trieste Bar, 17 Via XXX Octobre, Trieste,

applicants,

supported by

Italian Republic, represented by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by

O. Fiumara and, at the hearing, by G. Aiello, Avvocati dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

intervener,

v

Commission of the European Communities, represented by P.F. Nemitz and P. Stancanelli, of its Legal Service, acting as Agents, assisted by M. Moretto, of the Venice Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region (OJ 1998 L 66, p. 18),

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

composed of: R.M. Moura Ramos, President, R. García-Valdecasas, V. Tiili, P. Lindh and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 15 September 1999,

gives the following

Judgment

Legal framework and facts giving rise to the dispute

1 The applicants are road haulage contractors, established in the Friuli-Venezia Giulia Region, which have been granted State aid under a regional aid system not notified to the Commission. It is common ground that most of them are small firms engaged solely in local or regional transport with a single vehicle. In its Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region (OJ 1998 L 66, p. 18, "the contested decision") the Commission declared part of that aid to be incompatible with the common market and ordered the recovery of the aid plus interest.

Legal framework

2 The general provisions on State aid set out in Articles 92 of the EC Treaty (now, after amendment, Article 87 EC) and 93 and 94 of the EC Treaty (now Articles 88 EC and 89 EC) apply within the field of transport, subject to the

special provisions of Article 77 of the EC Treaty (now Article 73 EC), which state that aids meeting the needs of coordination of transport or representing reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

3 Article 2 of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ, English Special Edition, 1970 (II), p. 360), as last amended by Council Regulation (EC) No 543/97 of 17 March 1997 (OJ 1997 L 84, p. 6), which is based on Article 75 of the EC Treaty (now, after amendment, Article 71 EC) and Articles 77 and 94 of the Treaty, confirms that Articles 92 to 94 of the Treaty are to apply in the field concerned. The regulation also lays down certain special rules on the aid in question in so far as they relate specifically to activities in that sector. It thus sets out the cases in and conditions on which Member States are entitled to adopt coordination measures or impose obligations inherent in the concept of a public service which involve the granting of State aid pursuant to Article 77 of the Treaty.

4 Regarding the coordination of transport, Article 3(1)(d) of Regulation No 1107/70 authorises, until the entry into force of Community rules on access to the transport market, aid granted as an exceptional and temporary measure in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems, and thus to contribute towards meeting the needs of the transport market more effectively.

5 In the course of introducing a common transport policy, the international road haulage market was partially liberalised within the Community by Council Regulation No 1018/68 of 19 July 1968 on the establishment of a Community quota for the carriage of goods by road between Member States (OJ 1968 L 175, p. 13), which introduced a quota system in 1969. In 1991 and 1992, for example, the Community quota consisted of 47 094 and 65 936 authorisations distributed among the various Member States in accordance with a specific formula. The Italian Republic was allocated 5 550 authorisations in 1991 and 7 770 in 1992. Community authorisations permitted their holders to carry goods between Member States for a period of one year. This system was kept in force up to

1 January 1993, the date on which this activity was fully liberalised by Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ 1992 L 95, p. 1).

6 Regarding the market for the carriage of goods within a Member State, Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1989 L 390, p. 3) made cabotage, that is to say, the carriage of goods within one Member State by a carrier established in another Member State, subject, with effect from 1 July 1990, to a transitional system in the form of a progressively increasing Community quota. The total initial quota consisted of 15 000 cabotage authorisations valid for a period of two months, allocated among the Member States according to a given formula. Within this framework, 1 767 authorisations were allocated to the Italian Republic. Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1) provided for the continuance of this transitional system, in the form of a total initial Community quota of 30 000 authorisations (including 3 520 for the Italian Republic), increasing by 30% a year until the definitive introduction of the full liberalisation of cabotage activities with effect from 1 July 1998.

The aid in dispute

7 Articles 4, 7 and 8 of Friuli-Venezia Giulia Regional Law No 28 of 18 May 1981, on action to promote and develop transport of concern to the Friuli-Venezia Giulia Region and the carriage of goods by road for hire or reward ('Law No 28/1981'), provided for certain aid for road haulage contractors established within that region.

8 The system introduced by Law No 28/1981 was replaced by Regional Law No 4 of 7 January 1985 on action to promote and develop transport of concern to the Friuli-Venezia Giulia Region and the carriage of goods by road for hire or reward (Annex 113 to the application in Case T-313/97, 'Law No 4/1985'). Articles 4 to 6 of Law No 4/1985 introduced a system of regional aid that was essentially identical to the system set up by Law No 28/1981.

9 These laws provided for three measures in favour of road haulage contractors established in the Friuli-Venezia Giulia Region:

(a) annual financing, over a maximum period of ten years, of up to 60% (for individual contractors) and 70% (for cooperatives and groups) of the reference rate laid down by Ministerial Decree, of interest on loans contracted for the purpose of (Articles 4 of Laws No 28/1981 and 4/1985):

— developing the contractor's infrastructure (construction, purchase, expansion, completion and modernisation of premises required for its operations, including those to be used for the warehousing, storage and handling of goods);

— purchasing, developing and renewing fixed and movable equipment, together with internal and road transport vehicles;

(b) financing the cost of leasing, for a period of three or five years, new vehicles, trailers and semi-trailers and their swap-bodies, suitable for the operation of road haulage, together with the installations, machinery and equipment for

the use, maintenance and repair of vehicles and for the handling of goods, up to the level of 25% (for individual contractors) and 30% (for cooperatives and groups) of the purchase price of the assets. This aid, laid down in Article 7 of Law No 28/1981 and Article 5 of Law No 4/1985, was reduced to 20% and then to 15% of the purchase price by subsequent regional laws;

(c) annual financing, for groups and other forms of association, of up to 50% of investment to be used for the construction or purchase of installations and equipment required in pursuing the aims of the group or association, or contributing to the operation and development of service centres for housing, maintenance and repair of vehicles or related facilities and equipment (Article 8 of Law No 28/1981 and Article 6 of Law No 4/1985).

10 According to information sent to the Commission by the Italian authorities on 18 November 1996 the amount of credits earmarked for the aid referred to in Article 4 of Law No 4/1985, for the period from 1985 to 1995, amounted to ITL 13 000 million (EUR 6.7 million), and 155 applications had been received. On average, the level of aid disbursed ranged from 13% to 26% of the cost of the loans and interest. The budget for the period 1981 to 1985 was ITL 930 million (EUR 0.4 million), and 14 applications had been accepted during this period (section II of the contested decision).

11 According to the same source, the budget allocated for the aid covered by Article 5 of Law No 4/1985 amounted to ITL 23 300 million (EUR 11.8 million) for the period from 1985 to 1995, and 1 691 applications had been accepted, with an average financing rate of around 19%, over that period. In 1993, 83 applications had been accepted and the level of aid was 10%. From 1981 to 1985, 305 applications had been received and aid amounting to ITL 5 790 million (EUR 2.9 million) had been disbursed (contested decision, section II).

12 According to the information sent by the Italian Government to the Commission after the initiation of the administrative procedure, aid granted under Article 6 of Law No 4/1985 was for investment in the combined transport sector (section II, seventh paragraph, of the contested decision). According to the contested decision (point VIII, seventh paragraph), that aid was between 10% to 15% of the total amount of aid allocated.

13 The allocation of the above aid was suspended with effect from 1 January 1996. Moreover, following the adoption of the contested decision, the Friuli-Venezia Giulia Region abrogated the system of aid laid down by Law No 4/1985 and adopted the necessary measures to recover the aid disbursed (see the Region's letters notifying the applicants of that decision, dated from September to December 1997, annexed to the applications).

Administrative procedure and content of the contested decision

14 Having learned of the existence of Law No 4/1985 when examining another case pertaining to State aid provided for by a later regional law, the Commission, by letter of 29 September 1995, asked the Italian authorities to forward all the legislation, documents, information and data needed to assess the compatibility with the common market of the system of aid set up by Law No 4/1985. In that letter, the Commission stated that, in the absence of a reply or in the event of an inadequate reply, it would adopt a final decision on the basis of the information in its possession. On that occasion, it also reminded the Italian authorities that Member States are required to communicate in advance any plans that might institute or modify aid and that they cannot implement the measures planned before the procedure has resulted in a final decision.

15 Following an exchange of correspondence with the Italian authorities, the text of Law No 4/1985 was provided to the Commission during a meeting on 18 July

1996, and further information was provided on 18 November 1996. At a meeting with the Commission on 13 February 1997, the Italian authorities again claimed, *inter alia*, that road hauliers in the Friuli-Venezia Giulia Region were at a competitive disadvantage compared with those in Austria, Croatia and Slovenia.

16 By letter of 14 February 1997 the Commission informed the Italian Government of its decision to initiate the procedure provided by Article 93(2) of the Treaty in respect of the system of aid for commercial road hauliers laid down by Law No 4/1985 and Law No 28/1981 (OJ 1997 C 98, p. 16). It asked the Italian authorities and interested third parties to submit their observations and furnish all documents, information and data required in order to examine the compatibility of the aid in question with the common market. The Commission received the Italian Government's observations on 3 April 1997 (supplementary report by the Friuli-Venezia Giulia Region annexed to the letter of 27 March 1997 from the Italian Republic's Permanent Representation, hereinafter referred to as the 'supplementary report'). The applicants did not submit observations.

17 On 30 July 1997, the Commission closed the proceeding by adopting the contested decision. The operative part of that decision is worded as follows:

'*Article 1*

Subsidies granted under Laws No 28/1981 and No 4/1985 ... up to 1 July 1990 to companies exclusively engaged in transport operations at local, regional or national level do not constitute State aid within the meaning of Article 92(1) of the Treaty.

Article 2

The subsidies not covered by Article 1 of this Decision constitute aid within the meaning of Article 92(1) of the Treaty and are illegal since they were introduced in breach of Article 93(3).

Article 3

The subsidies for financing equipment specifically adapted for, and used solely for, combined transport constitute aid within the meaning of Article 92(1) of the Treaty but are compatible with the common market by virtue of Article 3(1)(e) of Regulation (EEC) No 1107/70.

Article 4

The subsidies granted from 1 July 1990 onwards to companies engaged in transport operations at a local, regional or national level and to companies engaged in transport operations at an international level are incompatible with the common market since they do not fulfil any of the conditions for derogation provided for in Article 92(2) and (3) of the Treaty, or the conditions provided for in Regulation (EEC) No 1107/70.

Article 5

Italy shall abolish and recover the aid referred to in Article 4. The aid shall be reimbursed in accordance with the provisions of domestic law, together with

interest, calculated by applying the reference rates used for assessment of regional aid, as from the date on which the aid was granted and ending on the date on which it is actually repaid.

...'

18 In the statement of reasons for the contested decision, the Commission makes a distinction between the market for the national, regional and local carriage of goods by road, on the one hand, and the market for the international carriage of goods by road, on the other (point VII, third to eleventh paragraphs, of the contested decision).

19 Since the former market had been closed to competition until the entry into force on 1 July 1990 of Regulation No 4059/89, which introduced cabotage quotas, the Commission argues that aid granted before that date to haulage firms operating solely at national, regional or local level could not affect intra-Community trade and therefore did not constitute State aid within the meaning of Article 92(1) of the Treaty. On the other hand, aid granted after that date was State aid within the meaning of that provision in that it might have affected trade between Member States.

20 As regards the market for international carriage, the Commission observes that it was opened to intra-Community competition from 1969, when Regulation No 1018/68 came into force. It argues that 'the aid provided for under Laws No 4/85 and No 28/81 strengthens the financial position and hence the scope of commercial haulage companies in the Friuli-Venezia Giulia Region *vis-à-vis* their

competitors since... 1969 for [undertakings] engaged in international transport and may accordingly affect trade between Member States' (section VII, final paragraph, of the contested decision).

21 Turning to the question whether the aid thus classified as State aid might be the subject of a derogation, the Commission considers that aid for the funding of equipment to be used for combined haulage may benefit from the exemption provided by Article 3(1)(e) of Regulation No 1107/70 regarding aid designed to facilitate the development of combined means of transport. As to the other aid in question (hereinafter referred to as the 'aid in question' or the 'aid in dispute'), it could not benefit from the derogation provided by Article 3(1)(d) of Regulation No 1107/70, because there was no situation of excess capacity and no reorganisation plan for the sector. In the same way, the derogations referred to in Article 92(3)(a) and (c) of the Treaty, for aid to promote the economic development of certain areas, are not applicable because there is no regional development plan covering all sectors of the region's economy, and the territory of the Friuli-Venezia Giulia Region as a whole is not part of the areas qualifying for the exemptions. The derogations provided by Article 92(3)(c) of the Treaty in favour of sectoral aid would not apply to the aid in question in that they are not accompanied by any action aimed at an objective of common interest such as a restructuring plan for the sector. Furthermore, aid for leasing operations associated with the purchase of new vehicles is operating aid (point VIII, 13th paragraph, of the contested decision).

22 The Commission concludes that 'the aid granted under Laws No 28/81 and No 4/85 to commercial road haulage companies in the Friuli-Venezia Giulia Region engaged in national transport operations from 1 July 1990 onwards, as well as for those engaged in international transport operations, is incompatible with the common market within the meaning of Article 92 of the Treaty' (section VIII, last paragraph, of the contested decision).

Procedure

23 By applications lodged at the Registry of the Court of First Instance on 2 December 1997 (Case T-298/97), 11 December 1997 (Cases T-312/97 and T-313/97), 16 December 1997 (Case T-315/97), 19 December 1997 (Case T-600/97 to T-607/97), 2 January 1998 (Case T-1/98), 5 January 1998 (Cases T-3/98 to T-6/98) and 26 January 1998 (Case T-23/98), the applicants brought the present actions for the annulment, in whole or part, of the contested decision.

24 By application lodged with the Registry of the Court of Justice on 28 October 1997, the Italian Republic brought an action for annulment of the contested decision and, in the alternative, annulment of Article 5 in that it orders recovery of aid granted from 1 July 1990 onwards (Case C-372/97). By order of 24 November 1998 the Court stayed proceedings until the delivery of the judgment of the Court of First Instance in the present case, pursuant to Article 47, third paragraph, of the EC Statute of the Court of Justice.

25 The Friuli-Venezia Giulia Region also brought an action for annulment of the contested decision, by application lodged with the Registry of the Court of First Instance on 10 November 1997 (Case T-288/97). The objection on grounds of inadmissibility raised by the Commission against this action was dismissed by judgment of the Court of 15 June 1999 in Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871. Those proceedings are continuing.

26 By order of 16 June 1998, the President of the First Chamber, Extended Composition, ordered, at the Commission's request and after hearing the other parties, the joinder of Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 for the purposes of the written procedure, the hearing and judgment.

27 By document lodged with the Registry of the Court on 28 May 1998, the Italian Republic sought leave to intervene in the dispute in support of the form of order sought by the applicants. The President of the Fourth Chamber, Extended Composition, gave leave to intervene by order of 29 September 1998. The Italian Republic submitted its statement in intervention on 24 November 1998. The applicants in Cases T-315/97, T-1/98 and T-3/98 to T-6/98 submitted their written observations on this statement on 5 March 1999. The Commission submitted its written observations on the statement in its rejoinder.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and, as measures of organisation of procedure, asked the parties to reply to certain questions in writing. The applicants in Cases T-315/97, T-1/98 and T-3/98 to T-6/98, together with the Commission, replied to those questions on 13 August 1999, and the Italian Government replied on 1 September 1999.

29 The parties presented oral argument and replied to the questions put by the Court at the hearing on 15 September 1999.

Forms of order sought

30 In Case T-298/97, the applicants claim that the Court should:

— as a preliminary measure, suspend the operation of the contested decision;

— annul the contested decision;

— alternatively, annul Article 5 of the decision requiring the recovery of aid granted from 1 July 1990 onwards, plus interest;

— order the Commission to pay the costs.

31 In Case T-312/97, the applicants claim that the Court should:

— annul Articles 2, 4 and 5 of the contested decision;

— alternatively, annul the decision to the extent that it requires the recovery of aid granted from 1 July 1990 onwards, plus interest;

— as a further alternative, annul the contested decision to the extent that it requires the recovery of aid granted, plus interest, from the applicants;

— as a final alternative, annul the contested decision to the extent that the amount of aid to be recovered must, as regards the applicants, be increased by the amount of interest accrued as of the date of the request for recovery and, in any event, by the interest prescribed;

— order the Commission to pay the costs.

32 In Cases T-315/97, T-1/98, T-3/98 to T-6/98, the applicants claim that the Court should:

— annul the contested decision in part in so far as it adversely affects the applicants' legitimate interests and rights;

— alternatively, annul the decision to the extent that it requires the recovery of aid granted from 1 July 1990 onwards, plus interest;

— as a further alternative, annul the contested decision to the extent that it requires the aid to be recovered to be increased by the amount of interest;

— as a final alternative, hold that the amounts to be recovered will be charged to the Italian State, which is alone responsible for the illegality;

— order the Commission to pay the costs.

33 In Cases T-313/97 and T-23/98, the applicants claim that the Court should:

— annul the contested decision;

— alternatively, annul that decision to the extent that it requires the recovery of subsidies granted from 1 July 1990 onwards, plus interest thereon;

— as a further alternative, annul that decision by restricting the obligation to make recovery to the difference between gross aid granted and the benefit in fact obtained, calculated by deducting from the gross subsidy the tax payable thereon, while also cancelling the obligation to pay the interest or, at least, recalculating that interest — given that it has not been proved that the recipients have acted in bad faith — and take into account not the date of grant of the aid but [in accordance with the provisions of Article 2033 of the (Italian) Civil Code] the date of applying to the Court;

— order the defendant to pay the costs.

34 In Cases T-600/97 to T-607/97, the applicants claim that the Court should:

— annul the contested decision;

— alternatively, annul the contested decision to the extent that it requires the recovery of aid granted from 1 July 1990 onwards, plus interest;

— as a further alternative, annul the decision in that it requires the amount of aid to be recovered to be increased by the amount of interest.

35 In the joined cases, the Italian Government, intervening in support of forms of order sought by the applicants, argues that the Court of First Instance should:

— annul the contested decision in its entirety;

— alternatively, annul the decision in so far as it requires the recovery of aid granted, plus interest;

— order the Commission to pay the costs.

36 The defendant claims that the Court should:

— dismiss the applications in their entirety;

— order the applicants to pay the costs.

The application for suspension of the contested decision

37 According to Article 104(3) of the Rules of Procedure of the Court of First Instance, any application to suspend the operation of a measure of an institution must be made by separate document.

38 It follows that an application for a suspension made in the same document as the principal action is inadmissible (Case 108/63 *Merlini* v *High Authority* [1965] ECR 1, 9, and order in Case T-107/94 *Kik* v *Council and Commission* [1995] ECR II-1717, paragraph 38).

39 In the present case, the application for suspension of the contested decision, contained in the application for annulment in Case T-298/97, must therefore be declared inadmissible.

Lack of competence of the Court of First Instance over claims that the amounts to be recovered should be charged to the Italian State and that the amount to be repaid should be limited

40 In Cases T-313/97, T-1/98 and T-3/98 to T-6/98 the applicants claim, in the alternative, that the Court of First Instance should make the repayment of the aid granted the responsibility of the Member State concerned, it being solely responsible for any irregularity arising from the failure to give notice of the system of aid in question.

41 The applicants in Cases T-313/97 and T-23/98 ask the Court of First Instance, in the alternative, to limit the amount of aid to be repaid by deducting from the gross amount of aid the amount of tax for which they are liable. They also ask the Court to rule that there is no obligation to pay interest or, in the alternative, that interest is to run only from the date of the demand for repayment, in accordance with Article 2033 of the Italian Civil Code.

42 Within the framework of the power of annulment conferred by Article 173 of the EC Treaty (now, after amendment, Article 230 EC), it is not for the Community judicature to issue directions to Community institutions or Member States on whatever ground or to substitute itself for the Community institutions. It is for the institution concerned, under Article 176 of the EC Treaty (now Article 233 EC), to adopt the measures required to give effect to a judgment delivered in an action for annulment, exercising, subject to review by the Community Court, the discretion which it has for this purpose, complying with both the operative part and grounds of the judgment it is required to comply with and the provisions of Community law (see in particular Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 18, and Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, paragraph 42, and Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 52).

43 In this case, the Court does not therefore have power to order the Member State concerned to reimburse any aid unlawfully granted to the applicants by the Friuli-Venezia Giulia Region.

44 Moreover, the Court cannot substitute itself for the Member State concerned in determining the procedures for the recovery of aid and take account where appropriate of national tax deductions in order to restore the previous situation (see below, paragraph 89). Nor is it for the Court to substitute itself for the Commission as regards the decision whether to recover aid plus interest.

45 The above claims must therefore be declared inadmissible.

The claims for annulment

The scope of the Italian Government's intervention

46 In its rejoinder, the Commission observes, first, that the forms of order sought by the applicants in the various joined cases and by the Italian Republic are inconsistent. Certain applicants are asking primarily for annulment of Articles 2, 4 and 5 of the contested decision. Others, as well as the Italian Government, are asking for annulment of the decision in full.

47 The Commission therefore request that the Italian Government be required to specify which of the applicants it intended to support.

48 In this respect, it suffices to find that, after the parties have been heard, the Italian Government was given leave to intervene in support of the submissions of all the applicants in the present cases, by order of the President of the Fourth Chamber, Extended Composition, of 29 September 1998.

49 There is therefore no further need to define the scope of the Italian Government's intervention, and the defendant's request must therefore be rejected.

The substance of the applications for annulment

50 In support of their application for annulment, the applicants rely essentially on several pleas in law. They will be grouped and considered as follows: first, breach of Article 92(1) of the Treaty and failure to state reasons; second, breach of Article 92(3) of the Treaty and of Article 3(1)(d) of Regulation No 1107/97 as well as failure to state reasons; third, misclassification of the aid in dispute as new aid; and fourth, breach of the principles of protection of legitimate expectations and proportionality, as well as failure to state reasons concerning the recovery of aid.

Alleged breach of Article 92(1) of the Treaty and failure to state reasons

— Arguments of the parties

51 The applicants submit that the contested decision is vitiated by an error of law, a manifest error of assessment and an inadequate statement of reasons regarding the application of Article 92(1) of the Treaty.

52 The Commission merely mentions the simple possibility that trade between Member States might be affected, without demonstrating the existence of a real, concrete risk of distortion of competition. There are inadequate grounds for the contested decision in that regard.

53 In Case T-312/97, the applicants consider that the mere fact that an aid might affect trade and/or distort competition does not suffice to render that aid incompatible with the common market. Article 92(1) of the Treaty applies only if the aid in question affects trade between Member States (Case 52/76 *Benedetti* [1977] ECR 163, paragraph 2 of the operative part) and strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade (Case C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 40).

54 All the applicants argue that in this particular case the aid in dispute is not such as to affect trade between Member States and distort competition, for three reasons. Firstly, the amount of aid is too low. Secondly, the recipient undertakings normally operate within the boundaries of the regional territory. Thirdly, the aid has a 'compensatory' function in a situation of objective competitive disadvantage.

55 In the first place, the very low total amount of the aid in question proves that they cannot affect trade and competition. Such aid should logically be treated in the same way as '*de minimis*' aid, which is exempted from the obligation of notification, referred to in point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises adopted by the Commission on 20 May 1992 (OJ 1992 C 213, p. 2), later amended as to that point by the notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) and replaced by the Community guidelines on State aid for small and medium-sized undertakings of 23 July 1996 (OJ 1996 C 213, p. 4). The Community guidelines of 20 May 1992 (point 1.6) in fact wrongly exclude aid granted in the transport sector from their sphere of application on the ground that they are subject to special rules.

56 The applicants in Case T-312/97 state that the case-law cited by the Commission, to the effect that the low amount of aid granted to small enterprises does not in

principle mean that trade is not affected, in fact establishes a presumption that such aid is compatible with Community law, unless otherwise proved (Case C-142/87 *Belgium* v *Commission*, the '*Tubemeuse*' case [1990] ECR I-959, paragraph 43, and Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 24). In the present case, the Commission reversed the onus of proof.

57 The applicants in Cases T-313/97 and T-23/98 observe that the total amount of aid disbursed to more than 300 undertakings between 1 July 1990 and 31 December 1995 was only ITL 17 billion, from which should be deducted the amount of aid for combined transport that the Commission declared compatible with the Treaty. In addition, from this amount should be deducted all tax levied on the aid granted, which represented around 70% of the amount of the aid.

58 The applicants in Case T-298/97 stress the negligible amount of the aid and the low number of recipients. The Commission had not taken account of those factors, especially the fact that 80% of the recipients of aid granted since 1981 were very small undertakings engaged in local or regional haulage with a single vehicle. In the contested decision, the Commission stated that 2 202 applications were accepted from 1981 to 1995, without checking on the number granted during the relevant period, i.e. from 1990 to 1995. In addition, it based its assessment, in a general and indistinctive manner, on global data for 1985 to 1995, which is an error of reasoning that invalidates the assessments set out in the contested decision. In particular, in the case of the aid provided for by Article 5 of Law No 4/1985 regarding leasing operations, applications approved between July 1990 and December 1995 certainly amount to less than half the total number of 1 691 approved applications indicated by the Commission for the 1985/1995 period, taking into account the very sharp fall in those applications in the later years of that period.

59 Secondly, almost all the recipients of the aid in question operate within the region. In that context, the Commission failed to prove the existence of a risk that the aid would affect trade and competition. In particular, it failed to establish that certain Community undertakings holding a cabotage authorisation had been adversely affected by the aid in dispute. It merely found that since 1 July 1990 undertakings in the Friuli-Venezia Giulia Region have, in principle, been competing against any other Italian or Community haulage contractor engaged in cabotage in Italy, without even demonstrating that Community operators in fact had access to the Italian market, which would at least presuppose that the Community quota had not been taken up in full. In fact, that quota had been taken up in full and any competition would accordingly have been ruled out.

60 The Commission should have produced the same evidence for undertakings operating on the international transport market up to the end of the quota system on 31 December 1992, in particular taking into account the fact that Friuli-Venezia Giulia Region road hauliers hold only a marginal part of this market, so that the effect of the aid in question on that market would have been insignificant. Those hauliers only rarely engage in international transport because of the transit restrictions laid down by the Republic of Austria ('ecopoints', ecological, non-noisy vehicles, maximum weight since 1994) and contractual practices in the industry of the region concerned (ex-works sales, with the foreign buyer being responsible for transportation; choice of a foreign haulage operator even when goods are sold free to destination).

61 Furthermore, in Case T-312/97, the applicants point out that, contrary to what has been stated by the Commission, the circumstance that most of the undertakings granted the aid in question operate solely at local level is wholly pertinent, since the means of transport used in international transport differ in their specifications from those used in domestic transport. Moreover, a specific authorisation is necessary for international transport.

62 According to the applicants in Case T-298/97, the fact that the Community quota was taken up in full shows that the market had not been affected by the aid in question. Since, moreover, the Commission has not verified whether or not this quota had affected competition, it was not in a position to determine the volume of trade and extent of competition on the relevant market or to establish that the aid in question had affected them.

63 In this connection, all the applicants submitted at the hearing that, according to the Commission report on the implementation of Regulation No 3118/93 of 4 February 1998 [COM (1998)] 47 final], cited by the Commission in its written replies to the Court's questions, liberalisation of the cabotage market had had an extremely limited impact on trade. In 1995, cabotage accounted on average for under 0.3% of the flow of traffic at national level. Italian hauliers held 4% of the cabotage market in the Community and the Friuli-Venezia Giulia Region accounted for 4% of the Italian market.

64 Thirdly, according to all the applicants, the aid in question was not such as to affect trade between Member States and distort competition, in that, on the contrary, it allowed the competitive position of road hauliers in the Friuli-Venezia Giulia Region to be aligned financially with that of their competitors. The former are at a disadvantage compared with road hauliers established in other Member States owing to higher discount rates and, compared with operators established in other regions of Italy, to a geographical position exposing them to competition from Austrian, Croat and Slovenian road hauliers, which benefit *inter alia* from State aid and lower taxation.

65 In Cases T-298/97, the applicants claim that compensatory aid is prohibited only when its aim is to favour Community undertakings over those established in other Member States, but not when it is objectively justified by economic reasons such as the need to counteract competition from imports from third countries enjoying a preferential situation (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1998] ECR 219, and Case C-56/93 *Belgium* v

Commission [1996] ECR I-723). In the present case, the aid in question met the need to avoid erosion of the very small portion of the international transport market held by road hauliers of the Friuli-Venezia Giulia Region, to the benefit of Austrian, Croatian and Slovenian operators enjoying the advantage of a preferential situation that could not be eliminated by bilateral agreements.

66 On the subject of discount rates, the applicants in Cases T-313/97 and T-23/98 claim that Spain was the only country with higher rates than those in Italy. Not until 1990 and in the first two months of 1991 did the rates in the United Kingdom exceed the rates in Italy. As to the weakness of the Italian lira from 1992, this was not such as to counterbalance the gap between official discount rates. Furthermore, unlike discount rates, currencies fluctuate rapidly.

67 In Cases T-312/97, T-315/97, T-1/98 and T-3/98 to T-6/98, the applicants submit that, contrary to what is stated by the Commission, distortion of competition arising from the preferential position of Austrian, Slovenian and Croat hauliers did not affect all Community operators equally. It has a greater effect in Italy and more specifically on the Friuli-Venezia Giulia Region, because of its geographical position, which forces road hauliers established there to make substantial investments in order to comply with Austrian regulations and thus prevents them from being competitive. The market share of Italian undertakings in the Community transport sector is accordingly in steady decline.

68 The Commission has failed to prove that the aid in question was of such a nature as to affect intra-Community trade, it not having specified the evidence on which it relies. A decision not indicating the market situation in question, the share of the undertaking receiving aid in this market, the pattern of trade in the products in question between Member States and the undertaking's exports does not satisfy

the requirement to state reasons for the decision (Joined Cases 296/82 and 318/92 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 24).

69 The Italian Republic, intervening in support of the applicants, argues that the aid in question does not affect trade between Member States and is not such as to distort competition. It adopts the applicants' arguments on the minimal size of the aid, the fact that its recipients tend to be small or very small undertakings operating solely at local level, the disadvantageous geographical position of the Friuli-Venezia Giulia Region, and the need to defend the very small share in the international transport market held by undertakings established in this region against competition from Austrian, Croat and Slovenian road hauliers enjoying State aid and advantages that could not be eliminated by bilateral agreements. In addition, regarding international transport, the Commission had not taken account of the fact that the market share held by Friuli-Venezia Giulia Region road hauliers was so marginal that the aid in question had only an insignificant effect.

70 For its part, the Commission submits that the conditions for the application of Article 92(1) of the Treaty are satisfied in this case. Firstly, the relatively small amount of aid or the relatively small size of the undertaking which receives it do not as such exclude the possibility that intra-Community trade might be affected and competition distorted (*Tubemeuse*, paragraph 43, and *Italy* v *Commission*, paragraph 24, cited above).

71 In this particular instance, the presence of many small-sized undertakings is characteristic of the market for the carriage of goods by road, so that even modest State action in favour of some of those undertakings might well have substantial repercussions for the other undertakings and affect both intra-Community trade and competition. This is the reason why the sector has been specifically excluded from the scope of the *de minimis* rule on State aid. Furthermore, because of the

intensity, duration and extent of eligible costs, the level of the aid in question would normally be regarded as such as to lead to a distortion of competition, even in less sensitive sectors.

72 The Commission rejects the argument put forward by the applicants in Cases T-312/97, T-313/97 and T-23/98 to the effect that it should have taken account of the effect of tax levied on the aid in question. This argument, which was not advanced during the administrative procedure, is inadmissible in this case pursuant to the rule that pleas raised in an action must be consonant with those made during the administrative procedure. In any event, the argument is unfounded.

73 Secondly, the circumstance that most of the undertakings receiving the aid in question operate solely at local, regional and national level does not mean that the aid might not affect trade and competition. These undertakings had access to the cabotage market, which was open to Community competition with effect from 1 July 1990. Furthermore, they had access to the international transport market, since the vehicles used at local level could in most cases be used for this type of transport as well.

74 Furthermore, the capacity of transport undertakings in the Friuli-Venezia Giulia Region might have been maintained or increased by the granting of the aid in question, which would reduce the opportunities for undertakings established in other Member States to engage in cabotage in Italy. They might have applied for and obtained authorisations to engage in cabotage in any Member State and refrained from performing this type of service on the Italian market. In those circumstances, the exhaustion of the Community quota did not mean that the aid in dispute might not distort competition and adversely affect trade between Member States.

75 Thirdly, the Commission rejects the argument that the aid in question did not strengthen the financial position of the recipient undertakings but simply offset a

competitive disadvantage. Friuli-Venezia Giulia Region road hauliers are not at a disadvantage by comparison with their competitors because they are established in this region. As regards the restrictions laid down by the Republic of Austria, since 1972 there have been agreements between the Member States of the European Free Trade Area (EFTA) and the Community which also include provisions on road transport. Austria, moreover, introduced the system of 'ecopoints' not unilaterally but on the basis of an agreement with the Community offering special advantages for the Italian Republic, in view of its geographical proximity. The competitive conditions for transport carried out in Italy by Croat and Slovenian undertakings depend on bilateral agreements concluded between the Italian Republic and the Republics of Croatia and Slovenia, as well as the monitoring of the implementation of those agreements. Furthermore, since the disadvantages alleged by the applicants affect all Community hauliers, they cannot justify the granting of State aid as compensation.

— Findings of the Court

76 It is necessary to reject the restrictive interpretation of Article 92(1) of the Treaty proposed by the applicants in Case T-312/97, to the effect that only aid having an actual effect on trade between Member States and distorting competition is covered by this provision.

77 This purely literal interpretation is incompatible with the system for monitoring State aid introduced by Article 92 et seq. of the Treaty. As part of its assessment of new aid, which pursuant to Article 93(3) of the Treaty is to be notified to the Commission before implementation, the Commission is in fact called on to review whether that aid might affect trade between Member States and distort competition.

78 A real effect on trade between Member States or distortion of competition do not have to be established in the context of the constant review of existing aid under Article 93(1) and (2) of the Treaty, when the Commission is required to verify, particularly in the event of a change in the competitive situation, whether the existing aid is still compatible with the Treaty and, where appropriate, to require the immediate discontinuance of the aid that has become incompatible (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 15 and 20).

79 Lastly, if a new aid has been granted without prior notification having been given, the Commission is not required to establish whether the aid has a real effect on trade and competition. According to well-established case-law, such a requirement would favour Member States which grant aid in breach of the obligation to notify, to the detriment of those which do notify aid at the planning stage (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 32 and 33, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 67).

80 An analysis of the case-law confirms that aid is State aid for the purpose of Article 92(1) of the Treaty if it threatens to distort competition and is capable of affecting trade between Member States. In the *Tubemeuse* judgment, cited above (paragraphs 35 to 40), the Court of Justice accepted that the aid granted to SA des Usines à Tubes de la Meuse-Tubemeuse, whose exports outside the Community when the contested decision was adopted accounted for some 90% of its turnover, satisfied those conditions on the ground that, in the context of that case, the company's object was to concentrate on other markets and 'that it was thus reasonably foreseeable, that it would redirect its activities towards the internal Community market'. Similarly, as there was no trade between Member States at the time when the aid was disbursed, the Court of First Instance (Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraphs 139 and 141) held that the Commission was required, at the time of

this payment, to consider 'the foreseeable effects' of the aid on competition and intra-Community trade (see also Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 12).

81 Moreover, concerning State aid, the conditions under which trade between Member States is effected and competition is distorted are as a general rule inextricably linked. Confirming its earlier case-law (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 25, 44 and 45), the Court stated in the *Philip Morris* v *Commission* judgment, cited above (paragraph 11), that 'when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' (see also the Opinion of Advocate General Capotorti in that case, at p. 2697; similarly, see *Spain* v *Commission,* cited above, paragraph 40, and *Vlaams Gewest* v *Commission,* cited above, paragraph 50).

82 In the present case, the Commission developed a similar line of reasoning in the contested decision. First of all it found that the aid in question reduced the normal costs of undertakings in a specific sector (commercial road haulage), in a specific region (the Friuli-Venezia Giulia Region), which might engender a distortion of competition (section VI, last paragraph, of the contested decision). It concluded that 'where the position of companies in a particular sector involved in trade between Member States is strengthened, this trade must be considered to be affected within the meaning of Article 92(1) of the Treaty' (section VII, last paragraph, of the contested decision).

83 It is therefore necessary to examine whether these assessments are well founded in the light of the circumstances of the case and the various complaints advanced by the applicants.

84 In the first place, as regards what is claimed to be the trivial amount of the aid in dispute and the relatively small size of the beneficiary undertakings, the Court of First Instance, called on to decide a similar question in *Vlaams Gewest* v *Commission*, cited above, stated (paragraph 46) that 'where the benefit [granted to an undertaking in a sector characterised by intense competition] is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article 92(1) of the Treaty applies to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States'. Regarding the latter aspect, it explained that 'even aid of a relatively small amount is liable to affect trade between Member States where, as here, there is strong competition in the sector in which the recipient operates' (paragraph 49). As already pointed out (see paragraph 81 above), the Court based this finding on the fact that when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid (paragraphs 48 to 50 of the judgment; see also *Tubemeuse*, cited above, paragraph 43; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27; and *Spain* v *Commission*, cited above, paragraph 42).

85 In addition, contrary to what is claimed by the applicants in Case T-312/97, the judgment of 28 April 1993, *Italy* v *Commission*, cited above, does not establish any presumption that State aid disbursed to small or medium-sized undertakings is compatible with the common market. It merely defines the scope of the Commission's power of assessment of such aid, stating that 'the specific interests of small and medium-sized undertakings warrant greater flexibility on the part of the Commission in assessing the compatibility of aid with the Treaty' (paragraph 24 of the judgment).

86 In this respect, the Commission correctly points out that the small size of the recipient undertakings and the relatively small amount of aid allocated do not mean that there is no effect on competition and trade where, as in the road haulage sector, the presence of a large number of small-sized undertakings is a feature of the market structure. The effects on competition and trade of even relatively modest aid may not be negligible, and such aid cannot be regarded as of little importance. In this respect, the fourth paragraph of the notice of 6 March

1996 on *de minimis* aid, which is 'of interest primarily to small and medium-sized enterprises', excludes the transport sector from its scope of application.

87 Furthermore, in view of the market structure described in the preceding paragraph and the multiplicity of eligible operations, the Commission cannot be required to take account of the precise amount of aid granted and the precise number of recipients, as contended by the applicants in Cases T-313/97 and T-23/98, since it has been established that over the period in question hauliers in the Friuli-Venezia Giulia Region benefited from aid that was capable of strengthening their competitive position and thus affecting competition and intra-Community trade.

88 As regards the applicants' argument that, when assessing the effect of the aid on competition and trade between Member States, the Commission should have deducted tax levies from the amount of aid allocated, the Court must first of all reject the Commission's objection that the argument is inadmissible because it had not been raised during the administrative procedure. In the absence of any explicit provision to that effect in the Treaty (or in its implementing measures), the possibility of relying on a plea in the course of an action for annulment under Article 173, fourth paragraph, of the Treaty cannot be restricted by the application of an alleged rule that the grounds stated during the administrative procedure must be the same as those stated in the proceedings before the Community Court (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 64).

89 On the merits, the applicants' argument must be rejected. The Commission is not empowered, under the State aid monitoring system established by the Treaty, to take into consideration the incidence of tax on the amount of financial aid allocated when it assesses whether it is compatible with the Treaty. Such charges are not levied specifically on the aid itself but are levied downstream, and apply to the aid in question in the same way as to any income received. They cannot therefore be relevant when assessing the specific effect of the aid on trade and competition and, in particular, when estimating the benefit obtained by the recipients of such aid by comparison with competing undertakings which have

not received such aid and whose income is also liable to tax. Furthermore, the Commission does not as a general rule have the data needed to assess the effect of tax on the benefit obtained by the recipient undertaking. In principle, that assessment occurs only when aid unduly paid is recovered in accordance with procedures under national law, and therefore falls solely within the competence of the authorities of the Member State concerned (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 83).

90 In the light of all the above considerations, the complaint based on the relatively small amount of the aid in question cannot be upheld.

91 As regards, second, the applicants' argument that most of the undertakings receiving the aid in question operate solely at local level, it should be borne in mind that, according to well-established case-law, an aid may be of such a nature as to affect trade between Member States and to distort competition even if the recipient undertaking that is competing with producers from other Member States does not itself export. A situation of this kind may also arise when there is no over-capacity in the particular sector: where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State (Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19; *Italy* v *Commission*, cited above, paragraph 27; *Spain* v *Commission*, cited above, paragraph 40; and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 47 to 49).

92 In this particular case, contrary to what the applicants allege, the quota schemes in force on the international haulage market from 1969 to 1993 and on the cabotage market from 1990 to 1998 allowed the introduction of an effective competitive situation within the limit of the quotas laid down, which was capable of being affected by the grant of the aid in question. By virtue of the relevant provisions of Regulations Nos 1018/68, 4059/89 and 3118/93, Community authorisations issued in the carrier's name and usable only for one vehicle were

granted under national quotas, for a period of one year in the case of international transport and two months for cabotage. During those periods of validity, holders of an international transport authorisation or a cabotage authorisation were entitled to transport goods without limitation, with one vehicle, between Member States of their choice or within any Member State.

93 In those circumstances, in the contested decision (section VII) the Commission could rightly reject the argument put forward by the Italian Government during the administrative procedure, namely that over 80% of recipients are very small undertakings engaged solely in local transport, by pointing out that the local nature of an activity is not a criterion that necessarily ruled out an effect on intra-Community trade as from the partial opening up of the cabotage market to competition on 1 July 1990.

94 Likewise, as concerns international transport, which was partially opened up to Community competition from 1969 and fully liberalised from 1 January 1993, in the contested decision (section VII, tenth and eleventh paragraphs) the Commission rejected the Italian Government's objection that hauliers from the Friuli-Venezia Giulia Region play only a small part in international transport, and can therefore be regarded as having little significant effect on competition. Having pointed out that the limited nature of the competition cannot preclude the application of Article 92(1) of the Treaty in the road haulage sector, it correctly stated that the aid in question strengthens the financial position and hence the scope of commercial haulage companies in the Friuli-Venezia Giulia Region *vis-à-vis* their competitors and may accordingly affect trade between Member States.

95 In this connection, there is no basis for the applicants' argument that the Commission should have established that Community undertakings had been adversely affected by the granting of the aid in dispute or, at least, that the

Community quota had not been exhausted. The Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and threatens to distort competition. It does not have to define the market in question or analyse its structure and the ensuing competitive relationships (*Philip Morris* v *Commission*, cited above, paragraphs 9 to 12).

96 Even assuming that the Community quota had been exhausted, this factor would not necessarily lead to the conclusion that the aid in question had no effect on the market and intra-Community trade. In view of the free choice given by quota schemes to holders of Community authorisations as regards the Member States within which they may engage in cabotage or between which they may provide international haulage services, exhaustion of the quotas would in any event not furnish any information as to the use made of them, in particular in the case of cabotage in Italy and international haulage from or to Italy or, more specifically, the Friuli-Venezia Giulia Region.

97 In consequence, the essentially local activity of most recipients of the aid in question and the existence of quota schemes were not such as to prevent the aid from having an effect on trade between Member States and on competition.

98 In the third place, it is necessary to examine the applicants' argument that the aid in question does not come within the scope of Article 92(1) of the Treaty because it aimed to offset the alleged competitive disadvantage of the recipient undertakings.

99 Contrary to the applicants' interpretation, the judgments in *Van der Kooy and Others* v *Commission* cited above (paragraphs 28 to 30) and of 29 February 1996 in *Belgium* v *Commission* cited above (paragraphs 10, 39 and 66) lay down

the rule that an advantage conferred on an undertaking with a view to correcting an unfavourable competitive situation is not a State aid within the meaning of Article 92(1) of the Treaty if it is justified by economic criteria and if it does not discriminate between economic operators established in different Member States. The Court of Justice held that a preferential tariff granted by a State-controlled company does not constitute aid within the meaning of Article 92(1) of the Treaty if, in the context of the market in question, it is objectively justified by economic reasons such as the need to withstand competition from other sources of energy on the same market (*Van der Kooy and Others* v *Commission,* cited above, paragraph 30) or from imports from non-member countries in order to retain an existing substantial clientele (*Belgium* v *Commission*, cited above, paragraph 39). In other words, in the former case the Court determined whether the preferential tariff in question had been fixed in the light of economic criteria, in applying the well- established case-law that, in classifying a measure as State aid, it is necessary to determine whether a private operator would have entered into the transaction on the same terms (see, for example, Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 51, and the Opinion of Advocate General Fennelly, Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 19). In the latter case the Court determined whether this preferential tariff conferred an advantage on the recipient undertakings over competitors established in other Member States.

100 In addition, according to well-established case-law, the fact that a Member State seeks to approximate, by unilateral measures, conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid (Case 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraphs 20 and 21; *Italy* v *Commission* [1974] cited above, paragraphs 36 to 39; and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 21).

101 It follows that, in the present case, the aid in dispute can be justified neither by the existence of higher discount rates in Italy nor by competition from operators established in Austria, Croatia or Slovenia. To the extent that the aid gives their recipients an advantage over road hauliers established in other regions of Italy or in other Member States, they are State aid within the meaning of Article 92(1) of

the Treaty and are liable, as has already been held, to affect trade between Member States and distort competition.

102 In any event, since, in the light of the Commission's objections, there is insufficient evidence to support the applicants' arguments as to the competitive situation, it has not been proved that the interest rates applicable in Italy or the position of Austrian, Croatian and Slovenian road hauliers place road hauliers established in the Friuli-Venezia Giulia Region in an unfavourable competitive position.

103 Lastly, the complaint that the statement of reasons for the contested decision is inadequate in regard to the application of Article 92(1) of the Treaty must also be rejected.

104 It is settled law that the statement of reasons must disclose in clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the Community Court to exercise its supervisory jurisdiction and for the persons concerned to know the reasons for the measure adopted so that they can defend their rights. The measure must be assessed in the light of the context and all the legal rules governing the matter in question. Although the Commission is not required to respond, in the statement of reasons for a decision, to all the issues of fact and law raised by the persons concerned during the administrative procedure, it must none the less take account of all the relevant factors of the case (Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 89, 94 and 95).

105 In the present case, it follows from the above arguments that, in the contested decision, the Commission stated, concisely but clearly, the reasons why the aid in question is such as to affect trade between Member States and distort competition. It also refuted the objections raised by the Italian Government during the administrative procedure.

106 On all these grounds, the pleas alleging breach of Article 92(1) of the Treaty and inadequacy of the statement of reasons must be rejected.

Breach of Article 92(3)(a) and (c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70, and failure to state reasons

— Arguments of the parties

107 All the applicants submit that, in finding that the aid for the lease-purchase of new vehicles and other aid in question did not satisfy the conditions laid down in order to benefit from the derogations provided for in Article 92(3)(c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70, the Commission infringed those provisions and failed to give an adequate statement of reasons for the contested decision on this point.

108 In Cases T-298/97, T-312/97, T-313/97, T-315/97, T-1/98, T-3/98 to T-6/98 and T-23/98, the applicants claim that the aid in dispute was planned as a temporary remedy for the structural difficulties due to the over-use of old equipment and of manpower, with a serious risk to safety. That aid thus did not aim to increase overall capacity but to restructure the sector with a view to improving the quality of services. It was intended to promote the development of certain activities and did not affect trading conditions 'to an extent contrary to the common interest' within the meaning of Article 92(3)(c) of the Treaty. Furthermore, given the serious structural difficulties, that aid aimed to contribute towards meeting more effectively the needs of the transport market, as referred to in Articles 3(1)(d) of Regulation No 1107/70.

109 According to the applicants in Cases T-312/97, T-315/97, T-1/98 and T-3/98 to T-6/98, the aid in question did not increase transport capacity, as the cabotage authorisations in the quota were valid only for a specific vehicle and could not be transferred.

110 All the applicants claim that the contested decision is not supported by any evidence with regard to the classification of the leasing aid as operating aid and the alleged incompatibility of that aid in question with the common interest.

111 In Cases T-315/97, T-1/98 and T-3/98 to T-6/98, the applicants state that the aid in question is aid for investment to be used for the creation of infrastructure (construction, purchase and expansion of premises), the increase and replacement of fixed and mobile equipment and the renewal of transport vehicles.

112 According to the applicants in Case T-312/97, that aid was not operating aid as its purpose was not to improve the financial position of the recipient undertakings but to put them on an equal competitive footing, in particular, with road hauliers established in Austria, Croatia and Slovenia.

113 In Case T-298/97, the applicants observe that the aid in question supports a pre-planned restructuring of the commercial road haulage sector, by facilitating the modernisation of equipment. That aid is justified by safety requirements and the campaign against air and noise pollution.

114 In Cases T-312/97, T-313/97, T-315/97, T-1/98, T-3/98 to T-6/98 and T-23/98, the applicants submit that the aid was part of a specific restructuring process that was needed to ensure safety and to protect the environment. The process had been initiated by the Friuli-Venezia Giulia Region, which had drawn up the first integrated regional transport plan in 1988 in order to modernise and rationalise the whole transport system.

115 In Cases T-313/97 and T-23/98, the applicants indicate that, according to the supplementary report, which was dismissed by the Commission during the administrative procedure, a restructuring plan was being drawn up to enable the undertakings concerned to adapt their road fleets to the safety and environmental protection standards laid down by the regulations of neighbouring States.

116 In Cases T-312/97, T-313/97 and T-23/98, the applicants consider that the existence of a plan and/or a restructuring process was not required by Community regulations in order for the application of a derogation from the prohibition of State aid.

117 In Cases T-600/97 to T-607/97 the applicants complain that the Commission failed to give detailed consideration to the applicability of the derogations laid down by Article 92(3)(a) and (c) of the Treaty to the aid in question. In citing objective 2 (converting the regions, frontier regions or parts of regions seriously affected by industrial decline) and objective 5b (reform of the common agricultural policy, promoting the development of rural areas) of the structural funds, as defined by Article 1 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and other existing financial instruments (OJ 1998 L 185, p. 9), the applicants complain that the Commission did not take account

of the fact that a major part of the regional territory is in areas of industrial decline (objective 2) and disadvantaged areas (objective 5b).

118 The Italian Government considers that the aid in question should be granted a derogation by virtue of Article 3(1)(d) of Regulation No 1107/70, and because it is aid for the purposes of Article 92(3)(c) of the Treaty.

119 Lastly, all the applicants, together with the Italian Government, submit that the Commission has not stated reasons for the contested decision but has merely expressed doubts as to the compatibility of the leasing aid for the acquisition of new vehicles (section VIII, sixth paragraph).

120 The Commission argues, first, that the conditions laid down by Article 3(1)(d) of Regulation No 1107/70, namely the existence of over-capacity leading to serious structural difficulties in the transport sector and the existence of a development plan, have not been met in this case.

121 Secondly, in the absence of a restructuring plan, it was not possible to determine whether the disputed aid was of common interest which might offset its distortion of competition and trade, as required by Article 92(3)(c) of the Treaty. Furthermore, leasing aid for the acquisition of new rolling stock constitutes operating aid.

122 In Cases T-600/97 to T-607/97, the Commission submits that, in the contested decision (section VIII), it considered the applicability to the aid in question of the derogations provided for by Article 92(3)(a) and (c) of the Treaty.

123 Thirdly, the contested decision is not vitiated by an inadequate or lack of statement of reasons. All the objections formulated by the Italian Government during the administrative procedure are in fact examined in it.

— Findings of the Court

124 Even assuming, as argued by the applicants, that the aid in question is part of a specific process for restructuring the sector concerned, characterised by over-exploitation of old equipment, with a view particularly to improving safety, and that the aid has not increased overall transport capacity, assertions which have not been proved, the aid does not meet the criteria in Article 3(1)(d) of Regulation No 1107/70 and Article 92(3) of the Treaty under which a derogation may be granted.

125 In the first place, Article 3(1)(d) of Regulation No 1107/70 solely authorises, subject to certain conditions, aid granted with a view to eliminating, as part of a reorganisation plan, excess capacity causing serious structural problems.

126 In this case, there is no evidence in the file to show that such excess capacity exists. On the contrary, according to the contested decision (section VIII, third paragraph), in their observations on the decision to initiate the procedure the Italian authorities stated that in the Friuli-Venezia Giulia Region there was 'no problem of excess capacity in the sector... but, rather an undercapacity in vehicle

fleet of about 20% as compared to real needs — in other words, an excessive work load is being placed on existing equipment and personnel in the Region'. This statement, which has not been contradicted by the Italian Government, is corroborated by the argument that it advances, in common with the applicants, to the effect that the contested aid aims to remedy structural difficulties arising from over-use of equipment and personnel.

127 Furthermore, it must be observed that the aid systems in question in no way refer to the need to avoid increasing the capacity of the sector and impose no condition in order to avoid such an increase.

128 In the second place, regarding derogations for sectoral aid covered by Article 92(3)(c) of the Treaty, it should be pointed out that the contested aid in this case does not come within the scope of the Community arrangements laying down, according to the objective pursued, guidelines which the Commission observes when implementing this provision (for example, the guidelines for aid to small and medium-sized enterprises, cited above, which exclude from its scope of application aid disbursed in the transport sector). Aid not covered by one of these arrangements may none the less enjoy a derogation, if its purpose is to facilitate the development of certain activities but does not adversely affect trading conditions to an extent contrary to the common interest, in accordance with Article 92(3)(c) of the Treaty.

129 The Community judicature has interpreted this provision as meaning that economic assessments made when applying it must be conducted in a Community context, which means that the Commission is under an obligation to examine the impact of an aid on competition and intra-Community trade. It is for the Commission, during this examination, to weigh the beneficial effects of aid against its adverse effects on trading conditions and the maintenance of undistorted competition (judgments in *Philip Morris* v *Commission*, cited above, paragraphs 24 and 26, *Spain* v *Commission*, cited above, paragraph 51, *British Airways and Others* v *Commission*, cited above, paragraphs 282 and 283).

130 It should be borne in mind that Article 92(3) of the Treaty confers on the Commission a wide discretion to allow aid by way of derogation from the principle in Article 92(1) that State aid is incompatible with the common market. The Commission's examination entails consideration and appreciation of complex economic facts and conditions. Since the Community judicature cannot substitute its own assessment of the facts, especially in the economic field, for that of the originator of such a decision, the Court must confine itself to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment or misuse of powers (see, for example, the judgments in *Philip Morris*, cited above, paragraphs 17 and 24; *Tubemeuse*, cited above, paragraph 56; the judgment, *Italy* v *Commission* [1991] cited above, paragraph 34, and Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 63).

131 In this instance it is apparent from the file that, contrary to the parties' assertions, in the course of the administrative procedure the Italian authorities have not provided any definite evidence of a specific, detailed plan for the restructuring of the road haulage sector. On the contrary, the authorities stated that no restructuring plan was necessary for the immediate future and, moreover, merely alluded to possible measures to rationalise the sector, in particular through measures designed to encourage mergers and incentives for combined and intermodal transport, soon to be adopted by the regional authority (supplementary report, point 2-4, second paragraph).

132 In those circumstances, the Commission, without exceeding the limits of its power of assessment, was able to take the view that it did not have information at its disposal enabling it to establish that the aid in question supported an action in the common interest, for example a restructuring plan.

133 Furthermore, the Commission rightly observed that some of the aid in dispute, such as leasing aid for the acquisition of rolling stock in order to renew the existing fleet, described as old in the supplementary report, was operating aid, to which the derogation set out in Article 92(3)(c) of the Treaty does not apply (*Siemens* v *Commission* judgment cited above, paragraphs 77 and 78). Since the replacement of old vehicles is a cost that all road hauliers normally have to bear if they are to continue offering services on the market on competitive conditions, that aid artificially strengthened the financial position of the recipient undertakings to the detriment of their competitors.

134 In the third place, as regards derogations for aid promoting the economic development of certain regions, referred to in Article 92(3)(a) and (c) of the Treaty, suffice to note that the applicants do no more than affirm that part of the territory of the Friuli-Venezia Giulia Region is eligible for a structural measure in pursuance of objectives 2 and 5b. They do not advance any argument to contest the statement of reasons for the contested decision to the effect that even if two thirds of the regional territory were part of areas that are disadvantaged and in industrial decline, as contended by the Italian Government during the administrative procedure, the aid in question could nevertheless not be granted a derogation on the ground that it is regional aid because, on the one hand, it is not covered by a regional development plan and, on the other, the Friuli-Venezia Giulia Region is not part of the regions that can benefit from such a derogation under Article 92(3)(a) and (c) of the Treaty. In those circumstances, the contested decision cannot be regarded as vitiated on that point.

135 On all those grounds, the pleas alleging breach of Article 92(3)(a) and (c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70 and failure to state reasons must be dismissed.

Misclassification of the aid as new aid

— Arguments of the parties

136 The applicants, supported by the Italian Government, argue that the aid in question should be treated as existing aid because it was provided for by laws preceding the liberalisation of the sector concerned.

137 The Commission argues, on the other hand, that the aid in question cannot be treated as existing aid, because it was introduced after the Treaty came into force; there was no examination or authorisation, whether explicit or implicit, by it of that aid. The aid for international road hauliers since 1981 and the aid for undertakings engaged in local, regional or national activity since 1 July 1990 is therefore new aid covered by Article 92(1) of the Treaty.

138 The fact that laws establishing State subsidies were enacted during the period in which those subsidies were not classified as aid covered by Article 92(1) of the Treaty does not mean that the subsidies are to be classified as existing aid. Once such subsidies, granted under laws enacted after the entry into force of the Treaty, are covered by Article 92(1) of the Treaty, they can be implemented only after they have been submitted to the Commission for examination in accordance with Article 93(3) of the Treaty. The Member State concerned is then required to suspend their implementation and notify the Commission of their proposed adoption.

139 In the present case, the laws establishing the aid in question should have been notified to the Commission, as provisions establishing new aid, when those laws were passed in 1981 and 1985, as the international road transport market had been open to intra-Community competition since 1969, irrespective of the classification of the aid disbursed to the undertakings.

140 Moreover, even if it is accepted that before liberalisation of the cabotage market aid granted to local road hauliers was comparable to 'existing' State aid within the meaning of Article 93(1) of the Treaty — which the Commission disputes — that aid should none the less have been notified in advance pursuant to Article 93(3) of the Treaty when this market was opened up. The liberalisation of that market with effect from 1 July 1990 put the recipients in competition with other Community undertakings and substantially altered the effects of the contested aid on intra-Community trade and competition. This fact, far from being regarded as an insignificant change to an existing aid, should be treated as equivalent to the establishment or modification of an aid.

— Findings of the Court

141 It is necessary to determine whether aid granted under an aid system established before a market was opened up to competition is to be regarded, with effect from the date of that liberalisation, as new aid or as existing aid.

142 According to established case-law, existing aid is aid introduced before the Treaty came into force or before the accession of the Member State concerned to the

European Communities and aid which has been properly put into effect under the conditions laid down in Article 93(3) of the Treaty (*Banco Exterior de España*, cited above, paragraph 19, and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 48).

143 Likewise, a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, since at the time of its establishment it did not come within the scope of Article 92(1) of the Treaty, which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition.

144 Contrary to the Commission's claims, that liberalisation, which is not attributable to the competent authorities of the Member State concerned, cannot be regarded as a material alteration to the aid system, and therefore subject to the obligation to notify it under Article 93(3) of the Treaty. On the contrary, liberalisation is a precondition for the applicability of Treaty provisions on State aid in some specific sectors, such as the transport sector, which was initially closed to competition.

145 In the present case, as the international road haulage sector had been opened up to competition by Regulation No 1018/68 with effect from 1969, the systems of aid in question, established in 1981 and 1985, came within the scope of Article 92(1) of the Treaty from the time of their introduction and should therefore be regarded as new systems of aid which should thus have been notified to the Commission pursuant to Article 93(3) of the Treaty.

146 On the other hand, as the cabotage market was liberalised by Regulation No 4059/89 only from 1 July 1990, the systems of aid in question did not, at the time of their introduction in 1981 and 1985, come within the scope of Article 92(1) of the Treaty, as regards aid granted in the local, regional or national transport sector.

147 It follows that aid to undertakings engaged solely in such a type of transport must be classified as existing aid and can be the subject, if at all, only of a decision finding it incompatible as to the future.

148 Pursuant to Article 93(1) and (2) of the Treaty and in accordance with the principle of legal certainty, the Commission is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine. That aid can, therefore, lawfully be implemented as long as the Commission has not found it to be incompatible with the common market (Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 23 and 25, and *Banco Exterior de España*, cited above, paragraph 20).

149 The third plea, alleging misclassification of the aid in question as new aid, must therefore be upheld in so far as it relates to aid granted to undertakings engaged solely in local, regional or national transport.

150 The contested decision must therefore be annulled in so far as Article 2 thereof declares aid granted with effect from 1 July 1990 to undertakings engaged solely in local, regional or national transport to be illegal, and in so far as Article 5 requires recovery of that aid.

Breach of the principles of protection of legitimate expectations and proportionality, and failure to state reasons for the recovery of the aid in question, plus interest

— Arguments of the parties

151 As regards the date from which the contested decision requires recovery of the aid granted in the international transport sector, the applicants in Case T-298/97 and the Italian Government state, firstly, that Article 4, to which Article 5 of the contested decision refers in providing for the recovery of aid incompatible with the Treaty, unequivocally finds that aid paid from 1 July 1990 is incompatible with the common market, and that article does not therefore have to be interpreted in the light of the grounds for that decision.

152 Moreover, all the applicants, supported by the Italian Government, claim that the contested decision infringes the principle of protection of legitimate expectations, in that it requires aid granted from 1 July 1990 onwards to be recovered. In fact, the recipient undertakings relied on the lawfulness of the aid established and paid out over many years.

153 The applicants in Case T-298/97 argue that the recipient undertakings' expectations had been strengthened by the fact that the cabotage market was liberalised during the period of implementation of the disputed regional laws and that a considerable period had elapsed between this liberalisation and the Commission's initiation of the proceedings. Furthermore, as the notice of 24 November 1983 (OJ 1983 C 318, p. 3) on the obligation to notify aid under Article 93(3) of the Treaty, cited by the Commission, predated the approval of Law No 4/1985, that notice is of only minor significance. Lastly, the case-law of the Court of Justice to the effect that a diligent economic operator must be in a

position to ascertain that the procedure provided for by Article 93(3) of the Treaty has been observed is not applicable in this instance, because most of the recipients were small firms which cannot be criticised for not having a precise and comprehensive knowledge of the decisions of national and Community authorities concerning the aid in question.

154 In Case T-312/97, the applicants observe that the lawfulness of aid granted in the national transport sector before 1 July 1990 had created a legitimate expectation in the lawfulness of all the aid in question, including that in the international transport sector. As the same vehicles could be used for both types of transport, it is difficult to single out aid paid for vehicles engaged in international transport.

155 According to the applicants in Cases T-312/97, T-315/97, T-1/98 and T-3/98 to T-6/98, the case-law on the subject of the protection of legitimate expectations is inconsistent. On the one hand, it apparently affirms the principle that national regulations which ensure the protection of legitimate expectations and legal certainty at the time of recovery of illegal aid do not conflict with Community law. On the other, it none the less allows the Commission to require that aid to be recovered.

156 Furthermore, all the applicants consider that the contested decision, in imposing an obligation to recover the aid in dispute, infringes the principle of proportionality. That aid had an insignificant effect on the position of the recipient undertakings, and hence the Community had no interest in restoring the prior situation. Furthermore, their reimbursement would place a very heavy burden on the recipient undertakings probably causing many of them to disappear from the market and so giving rise to serious employment and social crisis, making such recovery impossible in practice. The repayment of the aid would ultimately merely restore a situation of serious imbalance to the detriment

of road hauliers in the Friuli-Venezia Giulia Region, already penalised by their geographical location. Lastly, the contested decision states no grounds in that regard.

157 The Commission maintains, in the first place, that the operative part of the contested decision is equivocal and must be interpreted in the light of the grounds on which it is based. It is clear from such an interpretation that the obligation to recover aid applies to aid paid to undertakings engaged in international transport since 1981.

158 In the second place, undertakings receiving aid cannot, save in exceptional circumstances, plead legitimate expectations as to the lawfulness of that aid unless it has been granted in compliance with the procedure laid down by Article 93(3) of the Treaty.

159 In this instance, the Commission points out that in the Notice of 24 November 1983, cited above, it informed any recipients of State aid of its intention to recover systematically aid granted in breach of the obligation of prior notification.

160 Furthermore, there is no basis whatsoever for the argument that the lawfulness of subsidies granted in the national transport sector up to 1 July 1990 created legitimate expectations in the lawfulness of all aid granted because it was difficult to distinguish such subsidies from those granted in the international transport sector. The argument might also be used to claim that the reverse is true, namely that since the aid allocated to undertakings engaged in international transport should have been declared incompatible from 1981 onwards, the difficulty of distinguishing it from the aid granted in the national transport sector should have induced the recipient undertakings to consider the latter aid also to be

incompatible with the common market. In fact, the recovery of aid paid before 1 July 1990 concerns only aid granted to undertakings which have provided international transport services on the basis of a specific licence.

161 In the third place, the Commission argues that the recovery of illegally granted State aid and the reimbursement of interest on the amounts paid do not conflict with the principle of proportionality, as the sole purpose of those measures is to restore the previously existing competitive situation.

— Findings of the Court

162 It is first necessary to interpret the operative part of the contested decision as regards the extent of the obligation to recover aid granted illegally in the international transport sector.

163 It is settled law that the operative part of a measure is indissociably linked to the statement of reasons and, when it has to be interpreted, account must be taken of the reasons that led to its adoption (Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1999] ECR II-1739, paragraph 104, and Case T-136/94 *Eurofer* v *Commission* [1999] ECR II-263, paragraph 171).

164 In the present case, even though Article 4 of the operative part is worded equivocally as regards which aid to undertakings engaged in international transport is declared incompatible with the common market, that article must be interpreted, in the light of the reasons for the contested decision, as referring to aid granted to undertakings engaged in local, regional or national transport with

effect from 1 July 1990, and to aid to undertakings engaged in international transport operations (section VIII, last paragraph).

165 Moreover, that interpretation is clear from a reading of the operative part which, taken as a whole, is not ambiguous: Article 2, when read in combination with Article 1, declares illegal aid granted under the aid systems established by Law No 28/1981 and Law No 4/1985 to undertakings engaged in international transport and, with effect from 1 July 1990, to undertakings engaged in local, regional or national transport, because the aid had not been notified to the Commission as required by Article 93(3) of the Treaty. Article 3 finds that some of the aid is compatible with the common market (namely, aid for combined transport) as it can benefit from a derogation (in this instance under Regulation No 1107/70). Article 4 lists among the illegal aid referred to in Article 2 aid that is incompatible with the common market because it does not fulfil the conditions for derogation. In the scheme of the operative part, the illegal aid in question is therefore aid that has not been declared compatible with the common market in Article 3, that is to say, in the international transport sector, aid granted since the introduction of the aid systems in question.

166 In those circumstances, Article 5 of the operative part, which refers to aid declared by Article 4 to be incompatible with the common market, must be understood as requiring the recovery of aid granted with effect from 1 July 1990 to undertakings engaged in local, regional or national transport, and of aid granted to undertakings engaged in international transport since the introduction of the aid systems in question.

167 Moreover, it should be pointed out that aid granted to undertakings engaged in local, regional or national transport is not required to be repaid, because, as has already been held in paragraphs 146 to 150 above, it is existing aid, which may only be held incompatible *ex nunc*.

168 The Court must therefore verify whether the contested decision, in requiring the recovery of aid allocated to undertakings engaged in international transport, plus interest, is compatible with the principles of proportionality and protection of legitimate expectations on which the applicants rely, and whether sufficient reasons have been given.

169 As regards, firstly, the alleged breach of the principle of proportionality, it should be observed that, as the elimination of an illegal aid through recovery of the amount of aid disbursed plus interest is the logical consequence of a finding that this aid is incompatible with the common market, its sole purpose being to restore the previously existing situation, that obligation cannot in principle be disproportionate to the objectives of Articles 92, 93 and 94 (*Tubemeuse*, cited above, paragraph 66; *Spain* v *Commission*, cited above, paragraph 75; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47; *Belgium* v *Commission*, cited above, paragraph 68; and the judgment in *Siemens* v *Commission* cited above, paragraph 96). It is for the Member State concerned, when recovering the aid, to determine the procedures for its recovery in such a way as to restore the competitive situation previously existing, without detracting from the effectiveness of Community law.

170 In the present case, the applicants have not put forward any specific evidence to show that the obligation to reimburse individual aid granted to undertakings engaged in international transport is, in view of the effect of that aid on competition, manifestly disproportionate to the objectives of the Treaty.

171 As for the complaint of breach of the principle of legitimate expectations, it should be pointed out that only exceptional circumstances can legitimately be the

foundation for recipients' expectations that aid is lawful. Furthermore, recognition of such legitimate expectation presupposes in principle that the aid has been granted in compliance with the procedure laid down by Article 93 of the Treaty. A diligent economic operator should normally be able to determine whether that procedure has been complied with (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16, and *Spain* v *Commission*, cited above, paragraph 51; Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69).

172 In the present case, as has already been held (see above, paragraph 145), there was no notification of the systems of aid in question, which, to the extent that they provide for the granting of aid to undertakings engaged in international transport, are new systems of aid subject to the obligation of notification. The mere fact that the applicants are small undertakings does not justify a legitimate expectation on their part as to the lawfulness of the aid in issue, when they have not satisfied themselves that the procedure laid down by Article 93(3) of the Treaty has been observed. Furthermore, the fact that the aid allocated to undertakings engaged in local, regional or national transport was existing aid cannot justify an expectation, on the part of undertakings engaged in international transport, in the lawfulness of the procedure adopted for the aid granted to them. Unlike the cabotage sector, which was gradually opened to competition only from 1 July 1990, the international transport market was opened to competition from 1969. It follows that the obligation to notify the systems of aid in question, established in 1981 and 1985, could not, in so far as they provided for the grant of aid in this sector, in principle escape the notice of a diligent economic operator.

173 In those circumstances, the applicants have not put forward any exceptional circumstance of such a kind as to create legitimate expectations in the lawfulness of the aid paid to undertakings engaged in international transport.

174 It has not, therefore, been established that the obligation to return that aid is in breach of the principle of protection of legitimate expectations.

175 Moreover, the question whether the statement of reasons for a measure satisfies the requirements of Article 190 of the EC Treaty (now 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 (see, for example, Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230).

176 In the present case, as the obligation to recover the amount of aid plus interest is the logical consequence of the finding of illegality of that aid, the contested decision contains an adequate statement of reasons in that, having established that the aid in question distorts competition, within the Community, between commercial road haulage undertakings in the Friuli-Venezia Giulia Region and those established outside that region (section VI, eighth paragraph), it finds that action to recover that aid is necessary in order to restore the 'fair conditions of competition' which existed before the aid was granted (section IX, second paragraph).

177 In consequence, the pleas alleging infringement of the principles of protection of legitimate expectations and proportionality, and failure to state reasons for the recovery of the aid in question, must be dismissed.

178 The present action must therefore be upheld only to the extent that it seeks annulment of Article 2 of the contested decision, in so far as that article declares illegal aid granted after 1 July 1990 to undertakings engaged in local, regional or national transport, and annulment of Article 5 of the decision in so far as it orders reimbursement of that aid.

Costs

179 Under Article 87(3) of the Rules of Procedure, the Court may order that costs be shared or that each party is to bear its own costs if each party succeeds on some and fails on other heads. As the applicants have succeeded on some and failed on other heads they must be ordered to bear their own costs. The Commission will bear its own costs.

180 The Italian Republic must bear its own costs in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. **Annuls Article 2 of Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region in so far as it declares illegal aid granted after 1 July 1990 to undertakings engaged exclusively in local, regional or national transport;**

2. **Annuls Article 5 of Decision 98/182 in so far as it requires the Italian Republic to recover that aid;**

3. **Dismisses the remainder of the application;**

4. **Orders each party to bear its own costs.**

Moura Ramos García-Valdecasas Tiili

Lindh Mengozzi

Delivered in open court in Luxembourg on 15 June 2000.

H. Jung R.M. Moura Ramos

Registrar President