JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
30 April 2002 *

In Joined Cases T-195/01 and T-207/01,

Government of Gibraltar, represented by A. Sutton and M. Llamas, Barristers, and W. Schuster, lawyer, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by V. Di Bucci and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of decisions SG(2001) D/289755 and SG(2001) D/289757 of the Commission of 11 July 2001 initiating the procedure provided for by Article 88(2) EC in respect of the Gibraltarian legislation on exempt companies and qualifying companies,

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

composed of: R.M. Moura Ramos, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2002,

gives the following

Judgment

Legal framework

Community provisions

1 Article 87(1) EC provides that, save as otherwise provided, State aid is to be prohibited. In order to ensure the effectiveness of that prohibition, Article 88 EC places on the Commission a specific duty of monitoring aid and, on the Member States, precise obligations intended to facilitate the Commission's task and to prevent the Commission being presented with a *fait accompli*.

2 Thus, pursuant to Article 88(1) EC, the Commission, in cooperation with Member States, is to keep under constant review all systems of aid existing in those States and, where necessary, is to propose to the latter 'any appropriate measures required by the progressive development or by the functioning of the common market'.

3 So far as concerns any plans to grant or alter aid, Article 88(3) EC requires that the Commission is to be informed in sufficient time to enable it to submit its comments. According to the second sentence of that provision, if it considers that

a notified plan is not compatible with the common market, the Commission is to initiate the procedure provided for in Article 88(2) EC. Member States are required not to put their proposed measures into effect until the Commission has adopted a final decision on their compatibility with the common market.

4 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1, hereinafter 'the regulation on State aid procedure'), which entered into force on 16 April 1999, contains the following definitions which are relevant to the present proceedings:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87(1) EC];

(b) "existing aid" shall mean:

(i) ... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

...

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market

and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88(3) EC];

...'

5 According to Article 2(1) and Article 3 of the regulation on State aid procedure, 'any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned'; such plans are not to be 'put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid'. Article 4(4) of that regulation provides that the Commission is to initiate proceedings pursuant to Article 88(2) EC ('the formal investigation procedure') if 'doubts are raised as to the compatibility with the common market' of a notified measure.

6 According to Article 6(1) of that regulation, a 'decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'.

7 According to Article 7(1) of the regulation on State aid procedure, 'the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article'. Where the Commission finds that the notified measure does not constitute aid, it is to record that finding by way of a decision (paragraph 2 of that article). Where the Commission finds that the notified aid is not compatible with the common market, it is to decide that the aid is not to be put into effect (paragraph 5 of that article). Decisions taken pursuant to paragraphs 2, 3, 4 and 5 are to be taken as soon as the doubts referred to in Article 4(4) have been removed (paragraph 6 of that article).

8 As regards non-notified measures, Article 10(1) of the regulation on State aid procedure provides that '[w]here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay'. Article 13(1) of that regulation provides that such examination is to result in a decision, where appropriate, to initiate the formal investigation procedure.

9 Article 11(1) of the regulation on State aid procedure provides that the Commission may adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market. Paragraph 2 of that article authorises the Commission to adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market provided, *inter alia*, that 'according to an established practice there are no doubts about the aid character of the measure concerned'.

10 So far as concerns recovery of aid, Article 14(1) of the regulation on State aid procedure provides that, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary, unless requiring such recovery would be 'contrary to a general principle of Community law'. According to Article 15(1) of that regulation, the powers of the Commission to recover aid are to be subject to a limitation period of 10 years.

11 The procedure regarding existing aid schemes is laid down in Articles 17 to 19 of the regulation on State aid procedure. According to Article 18, where the Commission concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it is to issue a recommendation proposing appropriate measures to the Member State concerned. Where the Member State concerned does not accept the proposed measures, the Commission, pursuant to Article 19(2), may initiate a formal investigation procedure in accordance with Article 4(4).

Status of Gibraltar and the legislation at issue

12 Since Gibraltar is a European territory, within the meaning of Article 299(4) EC, for whose external relations the United Kingdom of Great Britain and Northern Ireland is responsible, the provisions of the Treaty apply to it. However, by virtue of Article 28 of the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty relating to their accession (OJ, English Special Edition 1972 (27 March 1972), p. 5), acts of the institutions of the Community relating, in particular, to the 'harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar', unless the Council decides otherwise. However, it is not disputed that the rules of Community law on competition, including those relating to State aid granted by the Member States, do apply to Gibraltar.

13 The present cases concern two legislative measures applicable to companies, concerning exempt companies and qualifying companies respectively. Exempt companies are not actually present in Gibraltar while qualifying companies have a 'bricks and mortar' presence there and are active in various sectors.

Exempt companies

14 On 9 March 1967, the House of Assembly (hereinafter 'the Legislature') of Gibraltar enacted Ordinance No 2 of 1967, known by its title, the Companies (Taxation and Concessions) Ordinance. That Ordinance was amended in 1969 and 1970, and was amended on 10 further occasions following the accession of the United Kingdom of Great Britain and Northern Ireland, namely in 1974, 1977, 1978, 1983, 1984, 1985, 1987, 1988, 1990 and 1993. In the present proceedings, it is the version of that Ordinance as amended in 1978 and 1983 (hereinafter referred to as 'the exempt companies legislation') that is relevant.

15 In order to qualify for exempt company status, a company must meet the conditions set out in Section 3 of the exempt companies legislation. Those conditions include the prohibition of carrying on or transacting any trade or business in Gibraltar, other than with other exempt companies, and also, according to the information provided at the hearing, with qualifying companies. No Gibraltarian or resident of Gibraltar may hold or be interested in holding any of the shares in an exempt company other than as a shareholder in a public company. Moreover, prior to the 1983 amendment, Section 3 of the exempt companies legislation did not allow Part IX companies, that is to say those companies which were incorporated outside Gibraltar and which establish only a place of business within Gibraltar, to acquire exempt status; those were, in particular, registered branches of foreign companies.

16 According to Section 8 of the exempt companies legislation, subject to some limited exceptions, an exempt company is exempted from payment of income tax in Gibraltar; pursuant to Section 10 thereof, it is liable only to taxation at a fixed sum of GBP 225. In addition, by virtue of Section 9 of the exempt companies legislation, any shares in, loans made to, or debentures held in, an exempt company are exempt from estate duty.

— The 1978 amendment

17 Following the 1978 amendment, Section 9 of the exempt companies legislation provides that the exemption from estate duty extends to any life insurance policy issued by an exempt company and that the value of such policy is not to be taken into account or aggregated with any other property for the purpose of determining the rate at which estate duty is payable in respect of that property. However, life insurance policies issued on the life of any Gibraltarian or resident of Gibraltar are not exempt from estate duty and the value of such policies may be taken into account for the purpose referred to above. Section 9, as amended in 1978, provides that, notwithstanding anything contained in the Stamp Duties Ordinance, no stamp duty is payable on the issue of any life insurance policy which is exempt from estate duty, on any annuity payable by an exempt company or on any dealings by way of mortgage, sale, etc., with such policy or annuity.

— The 1983 amendment

18 The 1983 amendment removed the words 'other than Part IX thereof' (see paragraph 15 above) from Section 3 of the exempt companies legislation, thereby allowing Part IX companies to acquire exempt company status.

Qualifying companies

19 On 14 July 1983, the House of Assembly enacted Ordinance No 24 of 1983, known by its title, the Income Tax (Amendment) Ordinance 1983. That Ordinance introduced the definition of a type of company known as a 'qualifying company', and also certain provisions relating to that type of company, into the text of Ordinance No 11 of 1952, known by its title, the Income Tax Ordinance. The detailed rules for the implementation of those new provisions were adopted by way of the Income Tax (Qualifying Companies) Rules of 22 September 1983. Ordinance No 24, cited above, and the 1983 Rules (hereinafter referred to as 'the qualifying companies legislation') constitute the legislation applicable to qualifying companies at issue in the present proceedings.

20 The conditions for the grant of qualifying company status are, essentially, identical to those set out above for exempt company status.

21 Under Section 41(4) of the Income Tax Ordinance, qualifying companies are liable to tax charged on profits, but the rate must not exceed the rate of corporation tax charged in Gibraltar (currently 35% of profits). There is no legislative provision laying down precisely the actual rate of tax which a qualified company must pay. According to the information in the case-file and provided at the hearing, however, all those companies pay tax at a rate negotiated with the Gibraltar tax authorities of between 2% and 10% of profits. Section 41(4)(b) and (c) of the Income Tax Ordinance also provides that fees payable by a qualifying company to a non-resident person (including directors' fees), and dividends paid to shareholders, are to be taxed at the same rate as that company's profits.

Finally, the Stamp Duty Ordinance provides that stamp duty is not payable on the transfer of shares in a qualifying company, on the issue of life insurance policies or on annuities payable by such companies, or on any sale, mortgage or other dealings relating to such policies or annuities.

Background to the dispute

22 By letter of 12 February 1999, the Commission requested the Permanent Representative of the United Kingdom to the European Union to provide general information on, *inter alia*, five tax schemes in operation in Gibraltar which were already being examined by the Council under the Code of Conduct for Business Taxation (annexed to the Conclusions of the Ecofin Council meeting of 1 December 1997 concerning taxation policy, OJ 1998 C 2, p. 1) and in a group, currently chaired by Ms Primarolo ('the Primarolo Group'), established in 1997 by the Council, comprising national high-level tax experts and a Commission representative.

23 The legislation being examined included the exempt companies legislation and the qualifying companies legislation. The United Kingdom Government provided the requested information by letter of 22 July 1999 and requested a meeting with the relevant Commission services to discuss that legislation.

24 On 23 May and on 28 June 2000, the Commission sent a letter and a reminder, respectively, to the United Kingdom Permanent Representative requesting further information concerning the abovementioned legislation.

25 The Permanent Representation of the United Kingdom replied by letter dated 3 July 2000, enclosing a copy of both the 1967 Ordinance on exempt companies, as amended in 1983, and the version of 1983 Ordinance on qualifying companies in force in 1984.

26 By letter of 14 July 2000 to the Permanent Representative of the United Kingdom, the Commission stated that, on the basis of information which it had in its possession, the exempt companies legislation appeared to constitute an operating aid incompatible with the common market. In order to determine whether it constituted existing aid, it also requested a copy of the Ordinance in the original 1967 version and, pursuant to Article 17(2) of the regulation on State aid procedure, invited the United Kingdom to submit its comments.

27 The Permanent Representation of the United Kingdom replied to the Commission by letters of 3 August and 12 September 2000. In the first of those letters, it provided a copy of the original version of the legislation together with the amendments made in 1969, 1970, 1977 and 1978 and reiterated its request for a meeting with the Commission. In the second letter, it repeated that request and forwarded to the Commission a document drawn up by the Government of Gibraltar setting out the reasons why it considered that the exempt companies legislation did not constitute State aid.

28 A meeting took place in Brussels on 19 October 2000 between the representatives of the United Kingdom Government and the Commission. The United Kingdom Government also invited representatives of the Government of Gibraltar to attend that meeting. A number of replies to questions raised by the Commission during the meeting were formulated by the Government of Gibraltar and submitted to the Commission on 28 November 2000, before being formally transmitted to the Commission by the United Kingdom Government on 8 January 2001.

The contested decisions

29 By decisions SG(2001) D/289755 and SG(2001) D/289757 of 11 July 2001, notified to the United Kingdom Government by letters of the same date, the Commission decided to initiate a formal investigation procedure in respect of the exempt companies legislation and the qualifying companies legislation.

The decision concerning exempt companies

30 In the grounds of decision SG(2001) D/289755, the Commission sets out the main conditions which a company must meet in order to be granted exempt company status and states:

'On the basis of the information transmitted by the United Kingdom authorities, it results that the legislation on exempt companies which was introduced after the accession of the United Kingdom to the European Union appears to contain at least two changes which can be considered as notifiable events under State aid rules...'.

31 As regards the 1978 amendment, the Commission takes the view that that amendment freed exempt companies from their liability to tax by introducing an exemption from stamp duty on the issue of life insurance policies, on annuities payable by them and on any dealings relating to such policies or annuities. As regards the 1983 amendment, the Commission considers that it extended the tax scheme in issue to a new category of undertakings which did not meet the requisite conditions to be eligible to become exempt companies according to the

original 1967 version of the exempt companies Ordinance (namely, branches of overseas companies registered under Part IX of the Gibraltar Companies Ordinance). Those undertakings, where they do become exempt companies, only pay tax at a flat rate of GBP 300 *per annum*. The Commission concludes that, in view of the 'substant[ive] modifications', relating both to the amount of the advantage granted and to the number of potential beneficiaries, 'the exempt companies regime cannot be regarded as an existing but [as] an illegal aid'.

32 After summarising the comments submitted by the United Kingdom Government and the Government of Gibraltar during its preliminary examination, the Commission states that none of those comments dispels its doubts as to their allegations regarding the nature of existing aid of the legislation in issue. Next, it analyses the compatibility of the aid and concludes that it does not appear to fall within the scope of the exceptions laid down in Article 87(3) EC. The Commission states that it hopes to receive the observations of the interested parties on the existence of possible obstacles to the recovery of the aid, 'in the event that [it] would be qualified as being illegal and incompatible' with the common market. The Commission reminds the United Kingdom Government that the procedure provided for in Article 88(3) EC has suspensory effect and that Article 14 of the regulation on State aid procedure provides that unlawful aid may be recovered from the recipient.

The decision concerning qualifying companies

33 In the grounds of decision SG(2001) D/289757, the Commission states that the qualifying companies legislation 'does not seem to fall within' the definition of existing aid set out in Article 1 of the regulation on State aid procedure and that 'it has to be considered at this stage as non-notified aid'.

34 After finding that the qualifying companies legislation appears to constitute aid within the meaning of Article 87(1) EC, the Commission concludes that it could, 'at this stage', be considered as an operating aid, which does not appear to fall within the exceptions provided for in Article 87(3) EC. It then requests the comments of the interested parties on the existence of possible obstacles to the recovery of the aid, 'in the event that [it] would be qualified as being illegal and incompatible with the common market'. The United Kingdom Government is reminded of the suspensory effect of the procedure provided for in Article 88(3) EC and its attention is drawn to the fact that Article 14 of the regulation on State aid procedure provides that illegal aid may be recovered from the recipient.

Procedure

35 By application lodged at the Court Registry on 20 August 2001, registered as Case T-195/01, the Government of Gibraltar brought an action under the fourth paragraph of Article 230 EC for annulment of decision SG(2001) D/289755 ('contested decision I') initiating a formal investigation procedure in respect of the exempt companies legislation.

36 By separate document lodged at the Court Registry on the same date, the applicant brought an application for suspension of operation of contested decision I and for the adoption of interim measures ordering the Commission to refrain from making public the initiation of the abovementioned procedure.

37 By application lodged at the Court Registry on 7 September 2001, registered as Case T-207/01, the applicant brought an action under the fourth paragraph of Article 230 EC for annulment of decision SG(2001) D/289757 ('contested decision II') initiating a formal investigation procedure in respect of the qualifying companies legislation.

38 By separate document lodged at the Court Registry on the same date, the applicant brought an application for the suspension of operation of contested decision II and for the adoption of interim measures ordering the Commission to refrain from making public the initiation of the abovementioned procedure.

39 In response to a request for information sent to the United Kingdom Permanent Representative in the context of the proceedings for interim relief, the United Kingdom Government stated in a letter of 11 October 2001 ('the response of the United Kingdom') that the applicant and the House of Assembly have jurisdiction to propose and enact, respectively, legislation in respect of company taxation matters, which are matters falling within 'defined domestic matters' within the meaning of Section 55 of the Gibraltar Constitution Order 1969. Only matters not falling within that category remain the exclusive responsibility of the Governor of Gibraltar. The ministerial Despatch of 23 May 1969 provides that the Governor may intervene, on behalf of the United Kingdom Government, if such intervention proves necessary to secure compliance, in particular, with international obligations, including those arising under Community law, by the United Kingdom Government. As regards the capacity to bring proceedings in respect of company taxation, the Chief Minister may be instructed to initiate legal proceedings in the name of the applicant, which has the power to bring such actions notwithstanding the division of internal competence in that field between it and the House of Assembly.

40 In its deliberations of 12 November 2001, the Second Chamber, Extended Composition, of the Court of First Instance, to which the main actions had been assigned, decided, on the basis of Article 76a of the Rules of Procedure of the Court of First Instance, as amended on 6 December 2000 (OJ 2000 L 322, p. 4), after hearing the applicant's submissions, to grant the application for an expedited procedure lodged by the Commission on 18 October 2001.

41 By order of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 14 November 2001, the two main actions were joined for the purposes of the remainder of the written procedure, the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

42 By documents lodged on 29 November 2001, the applicant and the Commission, at the request of the Court of First Instance, submitted written observations concerning the possible consequences for the present cases of the judgment of the Court of Justice of 9 October 2001 in Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303 ('*Tirrenia*').

43 By order of 19 December 2001, the President of the Court of First Instance dismissed the applicant's applications for interim relief in Cases T-195/01 R and T-207/01 R.

44 By order of 21 January 2002, the President of the Second Chamber, Extended Composition, of the Court of First Instance granted the Kingdom of Spain leave to intervene in the present cases in support of the forms of order sought by the defendant and initially granted the applicant's request for certain documents in the case to be treated as confidential *vis-à-vis* the intervener.

45 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure.

46 The parties submitted oral argument and answered the questions put by the Court at the hearing on 5 March 2002.

Forms of order sought by the parties

47 The applicant claims that the Court should:

— annul contested decision I and contested decision II;

— order the Commission to pay the costs.

48 The Commission contends that the Court should:

— dismiss the applications as inadmissible;

— in the alternative, dismiss them as unfounded;

— order the applicant to pay the costs.

49 The Kingdom of Spain supports the form of order sought by the Commission.

The admissibility of the applications

50 The Commission, supported by the Kingdom of Spain, raises two objections of inadmissibility. By the first objection, it challenges the applicant's *locus standi*. By the second, it contends that the contested decisions do not produce legal effects and cannot therefore be challenged by an application for annulment.

Locus standi

Arguments of the Commission and of the Kingdom of Spain

51 The Commission and the Kingdom of Spain express doubts as to the applicant's *locus standi* and as to the Chief Minister's power to initiate the present action. They maintain that there is a certain inconsistency between the response of the United Kingdom (see paragraph 39 above) and the position which the United Kingdom adopted in Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, in which the United Kingdom stated that, even as regards defined domestic matters, the competence of the Council of Ministers does not extend to the application to Gibraltar of international conventions, or to the implementation in Gibraltar of international obligations arising under contract, or to the participation of Gibraltar in specialised international bodies. For such matters, a legal action on behalf of the Government of Gibraltar can only be initiated on the instructions of the Governor of Gibraltar. The Commission is content to leave it to the Court to decide whether to pursue the matter further.

Findings of the Court

52 First of all, the fourth paragraph of Article 230 EC provides that '[a]ny natural or legal person' may institute proceedings for annulment. In the present case, it is not disputed that, in British law, the applicant has legal personality and as such must be regarded as a legal person for the purposes of the abovementioned provision.

53 As regards the applicant's competence to initiate the present action, it follows from the response of the United Kingdom (see paragraph 39 above) that under the relevant British law the applicant has competence in the specific field with which the present cases are concerned, namely company taxation, as a 'defined domestic matter'. There is nothing in the documents before the Court to invalidate that response.

54 In those circumstances, the reference by the Commission and by the Kingdom of Spain to *Gibraltar* v *Council*, in which the United Kingdom disputed the *locus standi* of the Government of Gibraltar, is irrelevant, since that case concerned air transport within the Community and was therefore fundamentally different from the present case.

55 Consequently, the first objection of inadmissibility must be dismissed in the light of the documents before the Court, without there being any need for the Court to examine that question of admissibility more closely of its own motion.

The legal nature of the contested decisions

Arguments of the Commission and of the Kingdom of Spain

56 The Commission maintains that the contested decisions have no legal effects. Unlike the decisions which formed the subject-matter of Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 ('*Cenemesa*') and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145 ('*Italgrani*'), the contested decisions do not contain any definitive conclusions as to whether the alleged aid is new aid or existing aid and as to whether it is compatible with the common market. Consequently, they do not automatically require compliance with the obligation to suspend the relevant measures provided for in Article 88(3) EC. They merely bring to the notice of the United Kingdom the effect of that provision should it be applicable. The question as to whether the legislation at issue, should it constitute aid, must be regarded as new aid or as existing aid therefore remains open.

57 The Commission further states that it has adopted no decision ordering the Member State provisionally to recover the aid, pursuant to Article 11(2) of the regulation on State aid procedure. It merely invited the United Kingdom and other interested parties to submit observations on the question whether recipients of the aid may have acquired legitimate expectations of such a kind as to prevent recovery 'in the event that this aid would be qualified as being illegal and incompatible'.

58 Although it acknowledges that the principle established in *Cenemesa* and *Italgrani* was approved by the Court of Justice in *Tirrenia*, the Commission considers that that judgment does not state that every decision initiating the formal investigation procedure necessarily produces legal effects. Like *Cenemesa* and *Italgrani*, *Tirrenia* proceeds on the basis that the Commission had classified

the measure in issue as new aid. In that context, the Commission refers, in particular, to paragraph 59 of *Tirrenia*, which concerns a decision to initiate the procedure under Article 88(2) EC in relation to a measure in the course of implementation and 'classified as new aid'. In the present case, conversely, the Commission has taken no such decision and has not declared the aid illegal.

59 Furthermore, in *Tirrenia* the Commission referred in its formal letter to the Italian authorities only to the question of the existence and compatibility with Community law of the aid which had been the subject of complaints. At no time did the Commission express doubt as to whether the alleged aid was new aid. On the contrary, it clearly stated that in its view the aid in question was new aid and must be cancelled. It requested the Italian authorities to confirm within 10 days that the aid had been suspended and reminded them of the need for such a measure in order to prevent any subsequent distortion of the market. The Commission added that it could refer the matter directly to the Court of Justice, in accordance with Article 88(2) EC, if the Italian Republic did not comply with the decision to suspend the aid. In a subsequent letter, the Commission stated that it intended to adopt a decision requiring the Italian Republic to suspend the aid.

60 In the present case, on the other hand, the Commission did not adopt a decision to suspend the alleged aid or state that it intended to do so: nor did it threaten to refer the matter directly to the Court of Justice if the alleged aid were not suspended. It has not taken any of those steps for the simple reason that it has still not determined whether the alleged aid was new aid or existing aid. One of the questions which the formal investigation procedure will have to answer is whether the alleged measures constitute new aid. According to the Commission, it is only when that question has been answered that it will be possible to state clearly whether Gibraltar is required to suspend the alleged aid.

61 The Commission further states that, in *Tirrenia*, the Court of Justice held that the decision to initiate the formal investigation procedure produced autonomous

legal effects, since it implied that the Commission '[did] not intend to examine the aid in the context of the permanent examination of existing aid schemes' (paragraph 58). Thus, according to the Court of Justice, from the Commission's point of view, the aid had been 'unlawfully implemented, in disregard of the suspensory effect, in relation to new aid, which follows from the last sentence of Article 88(3) EC' (paragraph 58). Still according to the Court of Justice, that decision implied 'at the very least a significant element of doubt as to the legality of that measure which... must lead the Member State to suspend payment' (paragraph 59).

62 The Commission emphasises that the decisions contested in the present case cannot be assimilated to the decision adopted in *Tirrenia*. In the present case, the Commission did not state, nor did it arrive at the conclusion, that the aid was implemented illegally; furthermore, the contested decisions do not mean that it does not intend to examine the aid 'in the context of the permanent review of existing aid schemes'. The Commission has not yet arrived at a stage at which it can say with certainty that the measures in question are new or existing. If they are existing, they will then have to be examined in the context of the scheme for existing aid, while if they are new, they must be suspended. However, in order to determine the applicable scheme, it is necessary to have more complete information.

63 The Commission acknowledges that the contested decisions in the present case give rise to doubt as to the legality of the measures in issue (it refers to paragraph 59 of *Tirrenia*). However, that doubt can logically arise at any stage of the procedure, where the question as to whether the alleged aid is new aid or existing aid is raised.

64 According to the Commission, it is therefore not correct to consider, on the basis of *Tirrenia*, that every decision initiating the formal investigation procedure necessarily implies a decision finding that the aid under examination is new aid. Each decision must be assessed on the basis of its content. The contested decisions

in the present actions do not arrive at a definitive conclusion as to whether the measures in question can be regarded as new aid or as existing aid. They merely set out the elements which tend to support the conclusion that the measures constitute new aid and invite the interested parties to submit their observations. That is the only way in which the Commission can obtain full information from as many sources as possible.

65 At the hearing, the Commission stated that by initiating the formal investigation procedure, as it did by means of the contested decisions, without conferring a legal classification on the measures in question, it adopted an 'innovative' procedural approach. That approach is no less consistent with the applicable regulations.

66 The Commission maintains that to decide otherwise would amount to finding that it cannot initiate the formal investigation procedure without first determining whether the measure in issue, if it is aid at all, constitutes new or existing aid. The possibility of obtaining information from the Member State concerned is not always sufficient. The Commission may in at least some cases need information from third parties in order properly to assess this question, just as it needs such information in order to determine whether the aid is compatible with the common market. In the present case, in particular, where determination of whether the alleged aid is new aid depends on its economic effects or on developments in the market, it is economic operators who constitute the best sources of information.

67 The Kingdom of Spain essentially endorses the Commission's reasoning.

Findings of the Court

68 It is necessary to ascertain the criteria which distinguish a decision to initiate the formal investigation procedure and to assess whether the contested decisions fulfil those criteria or whether, as the Commission claims, they must be regarded as procedural innovations which differ in nature from a 'classic' decision initiating that procedure.

69 In that regard, the initiation of the formal investigation by the Commission is provided for, pursuant to Article 88 EC and to Article 4(4) of the regulation on State aid procedure, and also to Articles 13, 16 and 19(2) of that regulation, in four possible situations which are exhaustively listed, namely: for the purpose of examining new notified aid, for the purpose of examining 'possible unlawful aid', in the event of misuse of aid within the meaning of Article 1(g) of that regulation, and where a Member State rejects the appropriate measures proposed by the Commission in respect of an existing aid scheme.

70 In the present case, the last two possibilities must be precluded at the outset. Nor was the national legislation in issue notified in accordance with Article 88(3) EC, since its notification to the Primarolo group — set up by the Council and composed, in particular, of national experts — cannot be treated as formal notification to the Commission for the purposes of the Community rules on State aid. Consequently, the question whether the procedural approach chosen by the Commission in the present case should be classified as the initiation of the formal examination procedure, with the legal effects that step implies, can be examined solely in relation to the category of 'possible unlawful aid'.

71 Under Article 4(4) and Article 6(1) of the regulation on State aid procedure, any formal investigation procedure must be initiated by a decision which includes a 'preliminary assessment' by the Commission as to the character of the measure in issue as aid and must set out the doubts which exist concerning its compatibility with the common market. Pursuant to Article 7 of the regulation on State aid procedure, the formal investigation procedure may be closed by a decision finding that the measure in issue does not constitute aid (paragraph 2), by a positive decision declaring the aid compatible with the common market (paragraph 3), by a conditional positive decision (paragraph 4) or by a decision declaring the aid incompatible with the common market (paragraph 5).

72 Those provisions allow the Commission to examine, from all possible aspects, the character of the State measure in question which may constitute new aid or the amendment of existing aid in order to overcome its doubts as to the compatibility of the measure with the common market in the course of the formal investigation (see *Tirrenia*, paragraph 45). The Commission is even required to initiate that procedure, pursuant to Article 4(4) of the regulation on State aid procedure, if the initial analysis of the measures in issue has not enabled all the difficulties raised by the assessment of the measure in question to be overcome (see Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 52, Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 166, and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 42).

73 At the end of the preliminary state of the investigation into a State measure, the Commission thus has three choices: it may decide that the State measure at issue does not constitute State aid, or it may decide that that measure, although constituting aid, is compatible with the common market, or it may decide to initiate the formal investigation procedure (*Gestevisión Telecinco* v *Commission*, paragraph 55, and Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757, paragraph 28).

74 It follows from the foregoing that the formal investigation procedure can only be initiated by a 'decision' within the meaning of the fourth paragraph of Article 249 EC and that that decision must contain a 'preliminary assessment' of the character of the State measure in issue. That assessment is an inherent element of the decision initiating the procedure.

75 As to whether the acts contested in the present case satisfy those criteria, each of them states by way of introduction that the Commission 'has decided to initiate the procedure laid down in Article 88(2) [EC]'. Furthermore, each contains a 'preliminary assessment' of the exempt companies legislation or the qualifying companies legislation.

76 Thus, in contested decision I, the Commission states that, on the basis of the information communicated by the United Kingdom authorities, it appears that the legislation in issue 'appears to contain at least two changes which can be considered as notifiable events' (point 9). The Commission concludes that, having regard to those 'substant[ive] modifications', the exempt companies legislation cannot be regarded as existing aid but must be regarded as unlawful aid (point 16). It further states that the observations submitted by the United Kingdom Government and the Government of Gibraltar are not sufficient to dispel its doubts as to the nature of the legislation in issue as existing State aid (points 34 and 35) and, last, that the aid does not appear to qualify for any of the exceptions provided for in Article 87(3) EC (point 48).

77 In contested decision II, the Commission states that the legislation in issue 'does not seem to fall' within the definition of existing aid and 'has to be considered at this stage as a non-notified aid' (point 1). The Commission notes that the legislation appears to constitute aid within the meaning of Article 87(1) EC (point 17) and concludes that it can, 'at this stage', be considered as an operating aid, which does not appear to qualify for the exceptions provided for in Article 87(3) EC (points 23 and 24).

78 Consequently, in spite of the argument which the Commission bases on what it claims to be a procedural innovation, the contested decisions, far from being characterised by a complete absence of preliminary legal assessment, are indeed decisions initiating the formal investigation procedure within the meaning of the regulation on State aid procedure and the relevant case-law.

79 The finding that the Commission provisionally concluded that the legislation in issue constitutes unlawful aid that is incompatible with the common market is not invalidated by the invitation (in point 49 and point 25 of the contested decisions, respectively) to interested parties to express their views on the possible recovery of the aid 'in the event that [it] would be qualified as being illegal and incompatible' with the common market. That merely constitutes a precautionary reminder that a final decision, adopted at the close of the formal investigation and in the light of the observations submitted by the interested parties, might contain a different legal classification from the preliminary assessment made in the decision initiating the procedure.

80 It was in regard to a decision to initiate the formal investigation procedure in respect of allegedly unlawful aid that the Court of Justice held in *Tirrenia* that '[r]egarding aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, the contrary classification as new aid, even if provisional, adopted by the Commission in its decision to initiate the procedure under Article 88(2) EC in relation to that aid, has independent legal effects' (paragraph 57). Such a decision, according to the Court of Justice, 'implies that the Commission does not intend to examine the aid in the context of the permanent examination of existing aid schemes provided for by Article 88(1) EC and Articles 17 to 19 of the regulation on procedure in State aid cases' (paragraph 58) and 'necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries, particularly as regards the pursuit of its implementation' (paragraph 59). The Court of Justice further held:

'Whereas, until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the measure is being lawfully carried out as an existing aid, after its adoption there is

at the very least a significant element of doubt as to the legality of that measure which... must lead the Member State to suspend payment, since the initiation of the procedure under Article 88(2) EC excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued' (paragraph 59).

81 That reasoning of the Court of Justice related to a decision of the Commission to initiate the formal investigation procedure in which the Member State was neither ordered to suspend implementation of the measures referred to, in accordance with Article 11(1) of the regulation on State aid procedure (paragraph 55), nor ordered provisionally to recover the aid which had already been paid (Article 11(2) of the regulation on State aid procedure). Contrary to the Commission's argument, therefore, the fact that it did not make use of the possibilities provided for in Article 11 has no relevance to the classification of the legal nature of a decision to initiate the formal investigation procedure.

82 Consequently, even though the classification of the aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the formal investigation procedure and though the mere initiation of that procedure does not have the same immediately binding character as a suspension injunction addressed to the Member Sate concerned (*Tirrenia*, paragraphs 58 and 60), the fact that the Commission chose to initiate the formal investigation procedure and provisionally classified the legislation in issue as new aid, instead of following the procedure in respect of possible existing aid, has legal effects such as those described by the Court of Justice in *Tirrenia*.

83 Furthermore, in spite of the provisional nature of the legal assessments which it contains, each decision to initiate the formal investigation procedure, such as the contested decisions in the present case, is definitive in so far as the Commission's choice in initiating that procedure produces effects at least until it is closed.

84 First, even a final decision of the Commission which, after classifying the State measures in issue as new aid, declares the aid compatible with the common market, does not have the consequence of regularising *ex post facto* the implementing measures which would have to be deemed to have been adopted in breach of the prohibition laid down in the final sentence of Article 88(3) EC (*Cenemesa*, paragraph 23).

85 Second, the decision initiating the procedure may, in any event, be invoked before a national court (*Tirrenia*, paragraph 59) and thus exposes the beneficiaries of the measure in issue and territorial entities such as the applicant to the risk that the national court will order suspension of the measure and/or recovery of the payments made, in order to ensure compliance with the last sentence of Article 88(3) EC, since the direct effect of the prohibition on implementation of the proposed measure laid down in that article extends to all aid which has been implemented without being notified (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 8, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 39). Those beneficiaries and territorial entities therefore run a higher economic and financial risk than if the formal investigation procedure had not been initiated. It is particularly for that reason that the decision to initiate that procedure is liable to affect their legal situation (see, by analogy, Case T-46/92 *Scottish Football* v *Commission* [1994] ECR II-1039, paragraph 13).

86 It follows that the procedural choice made by the Commission must be amenable to judicial review in a case such as this. The initiation of the formal investigation procedure produces the legal effects described above, while, in the context of the examination of existing aid, the legal situation does not change until such time as the Member State concerned accepts proposals for appropriate measures or the Commission adopts a final decision (*Tirrenia*, paragraph 61).

87 Accordingly, the second plea of inadmissibility cannot be upheld either.

88 The applications must therefore be declared admissible.

Substance

89 In support of its applications for annulment, the applicant raises pleas which are broadly similar in both cases. The first plea alleges breach of the duty to state reasons. The second plea alleges infringement of the rights of defence of the applicant and of the United Kingdom. By its third plea, the applicant complains that the contested decisions are incompatible with Article 88 EC and Article 1 of the regulation on State aid procedure. The fourth plea alleges breach of the principle of proportionality. The fifth plea alleges breach of the principles of legal certainty and legitimate expectations.

90 In the circumstances of the present case, it is appropriate to rearrange those pleas and to begin by examining together the pleas alleging, respectively, infringement of Article 88 EC and Article 1 of the regulation on State aid procedure and breach of the principles of proportionality, legal certainty and legitimate expectations.

The pleas alleging, respectively, infringement of Article 88 EC and Article 1 of the regulation on State aid procedure and breach of the principles of proportionality, legal certainty and legitimate expectations

Arguments of the parties

91 With regard to the exempt companies legislation, the applicant maintains that the Commission has committed a manifest error of assessment in finding that the

1978 and the 1983 amendments constituted 'substant[ive] modifications' to a non-notified aid scheme. In thus classifying them and, as a consequence, in classifying the entire exempt companies legislation as a 'new aid scheme', ignoring the Community law context in which those measures were adopted at the time and without carrying out an economic analysis, the Commission has given an excessively broad and arbitrary meaning to the concept of new aid.

92 As regards the 1978 amendment, the applicant claims that it merely gave legislative recognition to what was an existing common practice and did not, therefore, have any specific effect. As regards the 1983 amendment, the applicant argues that the Commission omitted to carry out an economic analysis of the impact of that amendment on competition and on trade in the single market.

93 The applicant takes the view that the Commission has, in any event, infringed the principle of proportionality by classifying the exempt companies tax scheme in its entirety as new aid, despite the fact that the 1978 and 1983 amendments are separable from the 1967 scheme.

94 As regards the qualifying companies legislation, the applicant maintains that the Commission erred in law in not classifying it as an existing aid scheme. According to the applicant, the legislation dates from 1983, from a period when it was far from clear either to the Commission, to Member States or, above all, to economic operators whether, and to what extent, State aid rules were to be systematically applied to national legislation on company taxation. The legislation in issue thus predates by 10 years the liberalisation of capital movements and by 15 years the clarification of the concept of State aid made by the Commission in its notice, published on 10 December 1998, on the application of State aid rules to measures relating to business taxation (OJ 1998 C 384, p. 3).

95 The qualifying companies legislation was notified to the Primarolo Group by the United Kingdom Government even before the publication of the abovementioned Commission notice of 1998. According to the applicant, that notice contains the first comprehensive, albeit not exhaustive, definition of 'fiscal State aid' and can be regarded more as a policy statement as to future Commission action in this area rather than as a 'clarification' of the applicable legislation.

96 Furthermore, the fact that the provisions of Community law applicable to State aid may evolve by virtue of the decisions of the Commission and of the Community Courts is recognised in Article 1(b)(v) of the regulation on State aid procedure (see paragraph 4 above). The qualifying companies legislation constitutes a measure, as provided for by that provision, which became aid only subsequently. By failing to regard that legislation as existing aid, the Commission is applying, with hindsight, the relatively refined State aid criteria of 2001 to the different legal and economic situation which prevailed in 1983. The applicant makes reference, in that regard, to the Irish company tax scheme which, it claims, was initially not classified as aid, although the Commission's view subsequently changed and reflected the gradual tightening of Community disciplines regarding such tax incentive schemes (see the Commission's proposal for appropriate measures concerning the International Financial Service Centre and the Shannon customs-free airport zone (OJ 1998 C 395, p. 14) and its proposal for appropriate measures concerning Irish corporation tax (OJ 1998 C 395, p. 19)).

97 The applicant maintains that the Commission also infringed the principle of proportionality by applying the rules provided for new aid to the qualifying companies tax legislation. Such treatment has dramatic economic consequences. That significant damage is disproportionate to any Community interest which might be served by the initiation of a procedure, particularly in view of the diminutive size of Gibraltar's economy and the necessarily insignificant impact of

the legislation in issue on competition and on international trade. The Commission would have taken a more equitable approach if it had considered the qualifying company legislation either under the Code of Conduct for Business Taxation, under Articles 96 EC and 97 EC or under the procedure applicable to existing aid.

98 Last, the Commission is alleged to have infringed the principles of legal certainty and legitimate expectations by waiting 18 years and 23 years respectively before challenging the legislation in issue, which was enacted in 1967 and 1983, and by not carrying out its investigation into the legislation within a reasonable time. The conformity of the legislation with Community law was never doubted by the Commission before February 1999. That prolonged failure to act on the part of the Commission gave rise to legitimate expectations on the part of Gibraltar. Furthermore, the Commission's investigations should be subject to a limitation period. Thus, pursuant to Article 15 of the regulation on State aid procedure, any individual aid granted under an aid scheme 10 years before the Commission takes action must be deemed to be existing aid. Applying that rule, the Commission should have regarded the legislation in issue as existing aid schemes. In any event, the Commission infringed the principles of legitimate expectations and of legal certainty by allowing an excessively long period to elapse after opening its investigation into the legislation. The preliminary investigation began on 12 February 1999; however, the formal investigation procedure was not initiated until two and a half years later, on 11 July 2001. In the course of the preliminary investigation, the Commission remained inactive for 10 months and then again for 12 months.

99 The Commission argues, with regard to the exempt companies legislation, that the real question is whether the 1978 and the 1983 amendments are substantive, inasmuch as they concern the substance of the aid, rather than its scale (Opinion of Advocate General Fennelly in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, at I-8859, points 62 and 63). The Commission is thus required not to carry out an economic analysis of the effect of the amendment but merely to examine the legislative provisions in question. An examination must be carried out as part of a formal investigation

procedure where there are no *prima facie* grounds for the conclusion that the amendments referred to did not make substantive amendments to the scheme in issue.

100 There were *prima facie* grounds, at this stage, for the conclusion that both the amendments referred to in the contested decision made substantive amendments to the scheme. The 1978 amendment freed the companies covered by the scheme from liability for a tax; even though that tax was widely evaded, the fact remains that a new exemption was granted. The 1983 amendment made access to the scheme available to a whole new and potentially very large category of undertakings. The fact that not many of those undertakings have chosen to make use of that possibility does not affect the substantive nature of the amendment. The evidence in the possession of the Commission was thus at least sufficient to justify it in initiating the procedure in order to carry out a full inquiry. Furthermore, the applicant will have the opportunity in the course of the formal investigation procedure to put forward the arguments it submitted before the Court.

101 The Commission acknowledges that the applicant's arguments concerning the minor character of the amendments made to the previously existing scheme, and the possible restriction of new aid to those aspects of the scheme which have been altered, are legitimate and relevant. Those arguments should be taken into account in the assessment of the scheme, not on any ground of proportionality, but because they address the substantive nature of the amendment and its consequences. However, they do not justify preventing the Commission from actually assessing the scheme. For the remainder, the Commission submits that certain of the considerations invoked by the applicant may relate to whether recovery should be ordered and others may be relevant to the compatibility of the measure with the common market.

102 As regards the qualifying companies legislation, the Commission maintains that it had no intention of making a definitive finding as to whether the alleged aid was new aid or existing aid. It is during the investigation procedure that that issue

must be explored. However, there were *prima facie* grounds, at that stage, for the conclusion that the measure constituted aid within the meaning of Article 87 EC from the outset. The evidence in the possession of the Commission was thus at least sufficient to justify it in initiating the procedure in order to carry out a full inquiry.

103 The applicant would be able to put forward its arguments in the course of the formal investigation procedure. According to the Commission, there are arguments to be made, in particular, over the extent to which the activities of undertakings benefiting from the qualifying companies scheme were open to international competition, since the undertakings concerned are active in a broad spectrum of businesses, including financial services, ship repair, motor vehicles, telecommunications and gambling. An analysis must therefore be made of the various activities carried on by those companies and of the market conditions in 1983 and subsequently. None the less, at this stage the very fact that qualifying companies must do business outside Gibraltar suggests that they are engaged in international trade.

104 The Kingdom of Spain essentially supports the substantive arguments put forward by the Commission.

Findings of the Court

— Contested decision I concerning the exempt companies tax scheme

105 As to whether the Commission was justified in initiating the formal investigation procedure or whether it should have examined the State measure in issue in the

context of the permanent review of existing State aid systems provided for in Article 88(1) EC and in Articles 17 to 19 of the regulation on State aid procedure, it should be observed, first of all, that in the present case the procedure was initiated because the Commission had serious doubt as to the classification of that scheme as 'possible unlawful aid' and as to its compatibility with the common market. Unlawful aid is defined in Article 1(f) of the regulation on State aid procedure as 'new aid put into effect in contravention of Article [88(3) EC]'.

106 It is common ground that the original 1967 tax scheme — on the assumption that it can be classified as an 'aid scheme' — in any event constituted 'existing aid' within the meaning of Article 1(b)(i) of the regulation on State aid procedure when the United Kingdom acceded to the Community on 1 January 1973.

107 Contested decision I expressly states that that original scheme was the subject of two amendments, in 1978 and in 1983. Those amendments are classified as substantive, so that 'the exempt companies legislation cannot be regarded as an existing but an illegal aid' (point 16 of the decision). Furthermore, the decision refers to all exempt companies existing in Gibraltar and not only to the companies affected by the 1978 and 1983 amendments (point 38).

108 The Commission therefore provisionally considered that both amendments, adopted after the United Kingdom's accession to the Community, changed the original tax scheme in its entirety into a system of new aid.

109 Under Article 1(c) of the regulation on State aid procedure, 'alterations to existing aid' are to be regarded as new aid. According to that unequivocal

provision, it is not 'altered existing aid' that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid.

110 That analysis is confirmed by Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraphs 13 and 16, where the Court of Justice held that measures 'to... alter aid' must be regarded as new aid and that 'plans to... alter aid' cannot be put into effect before the procedure has resulted in a final Commission decision.

111 Accordingly, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.

112 In the present case, the Commission itself stated, in point 12 of contested decision I, that the 1978 amendment introduced an exemption from stamp duty on the issue of life insurance policies by exempt companies, on annuities payable by exempt companies and on certain transactions relating to such policies or annuities, the advantage thus granted to exempt companies not having been available under the original legislation. In points 13 and 14 of that decision, the Commission states that the 1983 amendment extended eligibility for the tax scheme in issue to a new category of undertakings which had not previously satisfied the requirements of the original 1967 scheme.

113 According to the Commission's own reasoning, therefore, the two amendments in issue are mere additions to the original 1967 scheme which, first, extended the exempt operations to a single category of additional operations, namely life insurance, and, second, added a single category of companies to the beneficiaries of the tax exemption, namely branches of certain companies. On the other hand,

there is no evidence in the case-file that those developments affected the intrinsic functioning of the initial tax scheme as regards the other operations and categories of company. The 1978 and 1983 amendments must therefore be regarded as severable elements of the original 1967 tax scheme, so that — on the assumption that they may be classified as aid — they cannot alter the character of existing aid of the original scheme.

114 That analysis is not contradicted by *Namur-Les assurances du crédit* (cited above, paragraph 28), where the Court of Justice held that whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it. Although it is true that in the present case the 1978 and 1983 amendments were inserted into the original 1967 legislation, the fact remains that those amendments are severable from the original scheme. In *Namur-Les assurances du crédit* the question of the severable nature of the amendment was not raised and the Court of Justice did not adjudicate on that point.

115 It follows from the foregoing that in initiating the formal investigation procedure in respect of the whole of the exempt companies legislation and in provisionally classifying that scheme as new aid in its entirety, the Commission infringed Article 88 EC and Article 1 of the regulation on State aid procedure. Accordingly, contested decision I must be annulled in its entirety, without there being any need to consider the other pleas and arguments put forward against it.

116 Furthermore, the partial annulment of that decision, confined to the introduction of the amendments in issue into the original scheme, is precluded, since the Court cannot substitute itself for the Commission and decide that there are grounds for maintaining the formal investigation procedure in relation only to the 1978 and 1983 amendments.

— Contested decision II concerning the qualifying companies tax scheme

117 The qualifying companies tax scheme dates from 1983 and was therefore enacted after the accession of the United Kingdom to the Community: accordingly, it cannot be regarded as 'existing aid' within the meaning of Article 1(b)(i) of the regulation on State aid procedure.

118 Furthermore, the Commission's choice of the formal investigation procedure instead of the existing aid procedure can be criticised by the Court only on the basis of the pleas and arguments put forward by the applicant in support of the form of order which it seeks. However, none of the arguments or pleas put forward by the applicant in the present dispute is really directed against the Commission's presentation of the elements of fact and of law or against its preliminary legal assessment in contested decision II, on the basis of which it reached the provisional conclusion that the scheme in issue constitutes new aid and is incompatible with the common market.

119 The applicant confines its pleadings to a description of historical developments, the uncertain legal situation existing in 1983, the subsequent liberation of movements of capital and the clarification of the concept of aid of a fiscal nature which was only provided towards the end of the 1990s. Furthermore, it merely states, generally, that the rules on State aid constitute a 'living law' and that the concept of aid changes over time, a phenomenon which is recognised by Article 1(b)(v) of the regulation on State aid procedure. Last, it maintains that it would be sensible and fair to conclude that, in 2001, the 1983 qualifying companies legislation constitutes 'existing' aid, while to classify it as 'new' would be wholly illogical and contrary to the normal and usual meaning of the applicable Community provisions.

120 It must be held that those general arguments are not capable of establishing that the 1983 tax scheme must, owing to its intrinsic characteristics, be classified as an existing aid scheme.

121 Furthermore, the Court of Justice held in Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraphs 45 to 48, that the answer to the question whether aid is new cannot depend on a subjective assessment by the Commission. Thus, in 1999 the Court of Justice condemned the conduct of the Commission in regard to a national law dating from 1979 which had been classified by the Commission as existing State aid for 'reasons of practical expediency', which included the Commission's own doubts, which had extended over 14 years, concerning the classification of that law as State aid. The Court of First Instance therefore finds whether a specific State measure is to be classified as existing aid or as new aid must be determined without reference to the time which has elapsed since the measure in question was introduced and independently of any previous administrative practice.

122 In so far as the applicant maintains that the tax scheme in issue must be classified as existing aid because it was brought to the knowledge of the Primarolo group, it has already been held (paragraph 70 above) that that notification cannot be treated as formal notification to the Commission for the purposes of the Community rules on State aid.

123 As regards the reference to the Commission's two proposals for appropriate measures concerning the Irish corporation tax scheme, the factual and legal situation forming the background to those proposals is quite different from the situation prevailing in the present case. Those proposals therefore do not serve as a precedent for classifying the tax scheme at issue in the present dispute as existing aid.

124 The applicant further emphasises the small size of Gibraltar, and claims that the impact of the scheme in issue on competition within the common market and on trade between Member States has always been marginal, since the number of qualifying companies registered in Gibraltar after 18 years during which the scheme has been in force is only 150. Nor has the Commission, it alleges, carried out an economic analysis of that impact.

125 It must be pointed out that that argument contains no figures relating to the volume of the tax measures in issue or on the size of the companies benefiting from it in terms of turnover and advantages. It is sufficient to point out, therefore, that it is settled case-law that the relatively low amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected (see Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, paragraph 77, and the case-law cited there). Furthermore, in order for the classification as State aid to be upheld, it is sufficient that the State measures in issue 'threaten' to distort competition and are 'capable' of having an impact on trade between Member States.

126 Consequently, in the absence of information on the part of the applicant, the finding made in contested decision II (point 14) that the qualifying companies benefiting from the scheme in issue are liable, actually or potentially, to trade with companies in other Member States, all the more so because they are not normally allowed to trade in Gibraltar, has not been validly contested.

127 Moreover, the Commission correctly contended that the formal investigation procedure, in so far as it allows the economic operators concerned to be involved in the procedure leading to the adoption of the final decision, constitutes the

appropriate procedural framework for the economic analysis which the applicant would have it carry out.

128 As regards the argument that the initiation of the formal investigation procedure will cause irreparable harm to Gibraltar's position as an international financial centre, since the risk that the tax scheme in issue will be abolished represents a real threat to the economic viability of Gibraltar, it is sufficient to observe (see paragraphs 72 and 121 above) that the Commission is required to initiate the formal investigation procedure if, after provisionally classifying the measure in issue as new aid, it experiences serious difficulties in assessing its compatibility with the common market. The economic risks caused by the decision to initiate that procedure of which the applicant complains cannot of themselves affect the legality of such a decision. Consequently, this argument must be rejected.

129 In so far as the applicant relies, last, on the principles of proportionality, legitimate expectations and legal certainty, it follows from the foregoing that the mere fact that for a relatively long period the Commission did not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, if it does constitute aid (*Piaggio*, paragraphs 45 to 47). As the Commission correctly stated, any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid paid in the past (Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 16 and 17, and Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraphs 16 and 17).

130 The same applies to the limitation period provided for in Article 15 of the regulation on State aid procedure, which does not in any way express a general principle whereby new aid is transformed into existing aid but merely precludes recovery of aid established more then 10 years before the Commission first intervened.

131 It follows from the foregoing that the pleas alleging infringement of Article 88 EC and Article 1 of the regulation on State aid procedure and breach of the principles of proportionality, legal certainty and legitimate expectations must be rejected in so far as they relate to the action against contested decision II.

132 It is therefore necessary to examine the other pleas put forward in support of this action.

The plea alleging breach of the obligation to state reasons

Arguments of the applicant

133 The applicant submits that Article 253 EC establishes the principle that acts adopted by the Community institution must be based on a sufficiently precise statement of reasons which discloses in a clear and unequivocal fashion the reasoning followed by the institution concerned. Unlike regulations, which are of general application, decisions, which are addressed to specific persons, require a detailed statement of reasons.

134 Decisions of the Commission in the field of State aids have particularly important effects for Member States, regions and local authorities and also for private undertakings. They are economic by nature and therefore demand economic

reasons relating to the impact of the measure on competition and on trade, in both qualitative and quantitative terms.

135 The applicant maintains that, in point 1 of contested decision II, the Commission chose to express its decision in hesitant language which is far from clear and which completely fails to state why the qualifying companies legislation does not constitute an existing aid scheme. A more detailed statement of reasons was required because the legislation in issue had formed part of Gibraltar's legal order for 18 years without being challenged by the Commission and because the question whether State aid rules were to be systematically applied to the company taxation scheme was by no means resolved in 1983.

Findings of the Court

136 As the Commission correctly observed, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose the reasoning followed by the Commission. In that regard, it is necessary to have regard not only to the wording of the measure in issue but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

137 In order to assess the scope of the obligation to state the reasons for a decision to initiate the formal investigation procedure, it is appropriate to recall that, according to Article 6 of the regulation on State aid procedure, when the Commission decides to initiate the formal investigation procedure, its decision may be confined to summarising the relevant issues of fact and law, to including a preliminary assessment as to the character of the State measure in issue as aid and to setting out the doubts as to its compatibility with the common market.

138 Article 6 of that regulation also provides that the decision to initiate the procedure must give the interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties to be aware of the reasoning which led the Commission provisionally to conclude that the measure in issue might constitute new aid incompatible with the common market.

139 Accordingly, the defects which, the applicant alleges, exist in the statement of reasons cannot be regarded as an infringement of Article 253 EC. The allegedly hesitant form of words used in contested decision II accurately reflects the doubts which led the Commission to initiate the formal investigation procedure. Otherwise, the decision sets out the characteristics of the tax scheme forming the subject-matter of the formal investigation procedure and states that, in the light of the evidence available to it at that stage, the Commission provisionally concludes that the scheme amounts to aid incompatible with the common market.

140 Consequently, this plea must be rejected

The plea alleging breach of the rights of defence of the applicant and of the United Kingdom

Arguments of the applicant

141 The applicant maintains that any person who may be adversely affected by the adoption of a decision must be placed in a position in which he may effectively

make known his views of the evidence against him which the Commission has taken as the basis for the decision (Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraph 42). That principle also extends to any person who is directly and individually concerned by such a decision (Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraphs 26 and 41). The Commission has infringed the applicant's rights of defence, since it adopted contested decision II without any discussion with the applicant and without allowing it to express any views whatsoever.

142 The applicant states that, since the United Kingdom's response to the Commission of 3 July 2000, the Commission discontinued its investigation into the qualified companies legislation while pursuing its parallel investigation into the exempt companies legislation. In doing so, the Commission unilaterally put an end to any possibility for an exchange of views on the status of the qualifying companies legislation. Furthermore, the Commission did not seek to involve the applicant in the administrative proceedings and refused to deal directly with it.

143 The applicant maintains that the arguments put forward in relation to the infringement of its rights of defence also apply, *mutatis mutandis*, in respects of the rights of defence of the United Kingdom.

Findings of the Court

144 In that regard, it is sufficient to observe that the Court of Justice held in *Commission* v *Sytraval and Brink's France* (paragraphs 58 and 59) that there exists no basis for the imposition of an obligation on the Commission to conduct an exchange of views and arguments with a complainant during the preliminary

stage of an investigation into State aid. That reasoning also applies in respect of all the parties concerned and all the Member States, on which the applicable provisions confer no right to be involved in an exchange of views during the preliminary investigation stage preceding the decision to initiate the formal investigation procedure. Only the Commission has the power to order the Member State concerned to 'provide... information' (Article 2(2), Article 5(1) and (2) and Article 10(2) of the regulation on State aid procedure). It follows that the Member States and the parties concerned cannot require that the Commission hear their views so that they can influence the 'preliminary assessment' which leads the Commission to initiate the formal investigation procedure.

145 Accordingly, the Commission was not required to give the applicant or the United Kingdom the opportunity to express its views during the preliminary investigation stage.

146 In any event, it is apparent from the documents before the Court that the applicant and the United Kingdom were actually able to state their case during the preliminary procedure: after sending the Commission a number of letters relating to the exempt companies legislation and the qualifying companies legislation, the United Kingdom sent the Commission, on 12 September 2000, a document from the Government of Gibraltar setting out the reasons why the Government of Gibraltar considered that the exempt companies legislation did not fall within the scope of the Community rules on State aid; the applicant was also able to attend a meeting held by the Commission on 19 October 2000, at which the abovementioned document was discussed. Although the applicant's involvement was apparently limited to the exempt companies legislation, there is no reason to suppose that the United Kingdom and the applicant would have been prevented from commenting on the qualifying companies legislation too, if they had thought it appropriate.

147 Accordingly, this plea must also be rejected.

148 As none of the pleas directed against contested decision II has been upheld, the application in Case T-207/01 must be dismissed.

Costs

149 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In Case T-195/01, as the Commission has been unsuccessful in its pleadings and the applicant has applied for costs, the Commission must be ordered to pay the costs. In Case T-207/01, as the applicant has been unsuccessful in its pleadings and the Commission has also applied for costs, the applicant must be ordered to pay the costs.

150 In Joined Cases T-195/01 R and T-207/01 R, as the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

151 Contrary to the application submitted by the applicant at the hearing, it is not appropriate to apply Article 87(3) of the Rules of Procedure, since the present case cannot be classified as exceptional and since the costs which the Commission has caused the applicant to incur cannot be regarded as having been caused unreasonably or vexatiously.

152 Under Article 87(4) of the Rules of Procedure, the Kingdom of Spain must be ordered to bear its own costs in both cases.

On those grounds,

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

hereby:

1. In Case T-195/01:

(a) Annuls decision SG (2001) D/289755 of the Commission of 11 July 2001 initiating the procedure laid down in Article 88(2) EC in respect of the Gibraltar exempt companies legislation;

(b) Orders the Commission to pay the costs incurred by the Government of Gibraltar and to bear its own costs, with the exception of the costs of the interlocutory proceedings in Case T-195/01 R, which shall be paid in their entirety by the Government of Gibraltar;

(c) Orders the Kingdom of Spain to bear its own costs;

2. In Case T-207/01:

(a) Dismisses the application;

(b) Orders the Government of Gibraltar to pay the costs incurred by the Commission and to bear its own costs, including those incurred in the interlocutory proceedings in Case T-207/01 R;

(c) Orders the Kingdom of Spain to bear its own costs.

Moura Ramos Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 30 April 2002.

H. Jung R.M. Moura Ramos

Registrar President