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

15 June 2005 *

In Case T-17/02,

Fred Olsen, SA, established in Santa Cruz de Tenerife (Spain), represented by R. Marín Correa and F. Marín Riaño, lawyers,

applicant,

v

Commission of the European Communities, represented by J. Buendía Sierra, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

supported by

Kingdom of Spain, represented by N. Díaz Abad, abogado del Estado, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of the Commission Decision of 25 July 2001 relating to State aid file No NN 48/2001 — Spain — Aid to the Trasmediterránea shipping company (OJ 2002 C 96, p. 4),

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S.S. Papasavvas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 July 2004,

gives the following

Judgment

Legal framework

I — *Community law*

A — *Regulation (EEC) No 3577/92*

1 Article 2(4) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) defines public service obligations as obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

2 Article 4 of Regulation No 3577/92 states that whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners. Moreover, Member States shall be limited to requirements concerning ports to be served,

regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel. Where applicable, any compensation for public service obligations must be available to all Community shipowners.

3 Article 6(2) of Regulation No 3577/92 provides in particular that cabotage with regard to the Canary archipelago shall be temporarily exempted from the implementation of Regulation No 3577/92 until 1 January 1999.

B — *Regulation (EC) No 659/1999*

4 According to Article 4(3) 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) 'where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) [EC], it shall decide that the measure is compatible with the common market'.

5 According to Article 26(1) of Regulation No 659/1999:

'The Commission shall publish in the *Official Journal of the European Communities* a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) ... The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.'

C — *Community guidelines on State aid to maritime transport*

6 Point 9 of the Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5) lays down the conditions and procedures, on the basis of which the reimbursement of operating losses incurred as a direct result of fulfilling certain public service obligations does not constitute State aid within the meaning of Article 87(1) EC. It provides, however, that 'exceptions [to those conditions and procedures] may be justified, such as in the case of island cabotage involving regular ferry services'. Nevertheless, it indicates that in those instances measures must be notified and that the Commission will assess them under the general State aid rules.

D — *Communication on services of general economic interest in Europe*

7 According to paragraph 14 of the Communication from the Commission on services of general interest in Europe (OJ 2001 C 17, p. 4):

'Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. ... [I]f the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations'.

8 Under paragraph 22 of the Communication from the Commission on services of general interest in Europe:

'Member States' freedom to define [services of general economic interest] means that Member States are primarily responsible for defining what they regard as [such] services ... on the basis of the specific features of the activities. This definition can only be subject to control for manifest error. They may grant special or exclusive rights that are necessary to the undertakings entrusted with their operation, regulate their activities and, where appropriate, fund them. ... Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally. The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article 86(2) [EC] to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts) ... This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment.'

II — *Spanish law*

A — *Royal Decree No 1876/78*

9 Article 1 of Real Decreto No 1876/78 of 8 July 1978 setting the regime for the provision of maritime services of national interest (BOE No 1876/78 of 10 August 1978, p. 18761, hereinafter 'Royal Decree No 1876/78') authorises the Spanish Minister of Transport and Communications to conclude with the company Trasmediterránea, SA (hereinafter 'Trasmediterránea'), a contract to govern the maritime services of national interest.

10 Under Article 2 of Royal Decree No 1876/78 the contract must in any event comply with the fundamental principles of the specifications annexed to the said decree (hereinafter the 'specifications').

11 According to fundamental principle No 5 of the specifications, any change in the services covered by the contract must be authorised by the contracting administration.

12 Fundamental principle No 25 of the specifications provides for an accounting mechanism called the 'State account', which makes it possible to determine the contributions of public funds needed to ensure the economic and financial equilibrium of the contract. These contributions are recorded in the State account, which consists of an 'operations' section and an 'investment' section. Each of these two sections comprises a 'revenue' sub-section and an 'expenditure' sub-section, themselves made up of various items.

13 For instance, in accordance with fundamental principle No 25, A, sub-section a), of the specifications, the revenue of the 'operations' section of the State account comprises primarily the following:

'1. Receipts generated by traffic — the company shall be financed primarily by the rates paid by users of the services. [The contracting administration] shall set, by reference to market criteria, the rates to be charged ... for the [services provided on] the routes shown in the schedule of services.

...

3. State contributions (operations) — The sums paid by the State in the form of subsidies allocated for each financial year in order to balance item A) of the State account shall be considered as revenue for the purposes of settling that account and shall be shown in the general State budget'.

14 In accordance with fundamental principle No 25, A, sub-section b), of the specifications, the expenditure of the 'operations' section of the State account comprises primarily the following:

'1. Expenses relating to traffic and to operation of the company's vessels and those relating to the chartering of vessels, in accordance with the approved contracts, including the maintenance of social rights granted previously.

...

5. General administrative expenses arising from operation of the maritime services of national interest, including those relating to the maintenance of social rights previously recognised.

...

7. Remuneration of the company — In order to meet its obligations under this contract, the company shall have the appropriate resources and the necessary grants for carrying out the essential technical restructuring of operations and to achieve the economic viability needed to ensure that the services are adequately provided. To

that effect, the remuneration of the company shall consist of a percentage of the receipts comprising revenues from operation of the service and from catering, this percentage being set each year on the basis of the ratio between State contributions for operations on the one hand and total operating expenditure on the other, after deduction of the remuneration itself.

The percentages to be applied [are inversely proportional to the said ratio].'

15 In accordance with fundamental principle No 25, B, sub-section a), of the specifications, the revenue of the 'investment' section of the State account consists of the State contributions. Under that provision, 'the sums paid by the State in the form of subsidies allocated for each financial year in order to balance [the "investment" section] of the State account shall be considered as revenue for the purposes of settling that account and shall be shown in the general State budget'.

16 Fundamental principle No 26 of the specifications provides as follows:

'The amount of State contributions shall be paid in advance in four quarterly instalments followed by adjustment of interest upon settlement of the account. If a surplus emerges when the State account for a given financial year is settled ... , that surplus shall remain at the disposal of the company and shall be recorded as a receipt in the account for the subsequent year ... If on the other hand a deficit emerges as a result of such settlement, the State shall compensate the company by paying it the amount of the said deficit from the general State budget for the subsequent year'.

17 Fundamental principle No 28 of the specifications provides that every four years the company shall draw up an investment plan, setting in particular the objectives for staff policy. This plan is submitted to the government for approval.

B — *Royal Decree No 1466/1997*

18 Real Decreto No 1466/1997 of 19 September 1997 (BOE, 20 September 1997, p. 27712, hereinafter 'Royal Decree No 1466/1997') sets the legal framework for regular maritime cabotage routes of general interest in Spain except for regular maritime cabotage routes between the islands of the Canary archipelago, which come under the exclusive jurisdiction of the Autonomous Community of the Canaries.

C — *Decree No 113/1998*

19 Decree No 113/1998 of the Consejería de Turismo y Transportes de la Comunidad Autónoma de Canarias (Tourism and Transport Board of the Autonomous Community of the Canaries) of 23 July 1998 establishes the public service obligations on the regular inter-island maritime cabotage routes of the Autonomous Community of the Canaries (*Boletín Oficial de Canarias*, 29 July 1998, p. 8477, hereinafter 'Decree No 113/1998').

20 The annex to Decree No 113/1998 provides for five shipping routes and defines the links to be maintained between the different islands, frequencies, regularity, the

technical characteristics of the vessels used and the maximum rates that may be charged. The routes in question are:

— route 1: Santa Cruz de Tenerife — Las Palmas de Gran Canaria with Morro Jable and vice versa;

— route 2: Valle Gran Rey — Playa Santiago — San Sebastián Gomera — Los Cristianos and vice versa;

— route 3: Los Cristianos — San Sebastián Gomera — Valverde — Santa Cruz de La Palma and vice versa;

— route 4: Santa Cruz de Tenerife — Las Palmas de Gran Canaria — Puerto del Rosario — Arrecife and vice versa;

— route 5: Santa Cruz de Tenerife — Santa Cruz de La Palma and vice versa.

Facts

I — *Contract of 1978*

21 By notarised act of 4 September 1978 the Spanish State and Trasmediterránea concluded a contract governing the operation and provision of maritime services of national interest for a period of 20 years beginning on 1 January 1978 (hereinafter the 'contract of 1978'), in accordance with Royal Decree No 1876/78 and the

specifications annexed thereto. Under that contract Trasmediterránea operates the public services in question on behalf of the State for a limited period under the tutelage of the contracting administration and subject to inspection and supervision by that administration.

22 The contract of 1978, which was subject to tacit renewal for a period of two years, was rescinded by the contracting administration on 19 May 1995. It expired on 31 December 1997.

23 The Spanish authorities settled the contract of 1978 and, under Law No 4/2001 of 24 April 2001 (BOE, 25 April 2001, p. 15021), allocated an exception credit of 15 560 625 000 Spanish pesetas (ESP) (equivalent to EUR 93 521 239.77) to offset the deficit arising from operation of the maritime services of general interest for the 1997 financial year (hereinafter the 'subsidy for 1997') and to settle definitively the rights and obligations under the contract (hereinafter the 'settlement subsidy').

24 The subsidy for 1997 and the settlement subsidy offset, in particular, expenses associated with three plans for restructuring the staff of Trasmediterránea.

25 In particular, the subsidy for 1997 offsets an expense of ESP 2.201 billion (EUR 13 228 276.42) charged to the 'operations' section of the State account for the 1997 financial year in connection with restructuring plans for the periods 1990-1994 and 1995-1997. The charging of the expenses associated with the restructuring plan for the period 1990-1994 is the result of spreading these expenses over several financial years, as approved by the Intervención General de la Administración del Estado (General State Inspectorate, hereinafter the 'IGAE'). The charging of the expenses associated with the restructuring plan for the period 1995-1997 to the

State account for the 1997 financial year, which was not approved by the IGAE, is covered by the express authorisation of the contracting administration, according to which that restructuring plan reduces the annual State contribution to the 'operations' section of the State account.

26 The settlement subsidy offsets, in particular, the expenses associated with the restructuring plan for the period 1996-1997, amounting to ESP 2.624 billion (EUR 15 770 557.62). This sum was charged to the 'operations' section of the State account at the time of settlement on the basis of two decisions taken by the contracting administration dated 26 October 1998 and 25 February 1999.

II — *The applicant's complaints and the proposal for appropriate measures regarding the contract of 1978*

27 The applicant is a Spanish shipping company operating shipping routes between the islands of the Canary archipelago in competition with Trasmediterránea. It lodged several complaints with the Commission about the contract of 1978. As a result of these complaints, the Commission opened a procedure to examine that contract.

28 In the course of that procedure, the Commission sent a letter dated 3 December 1997 to the Spanish authorities, in which it argued that the payments from the general State budget to offset the annual operating deficit were likely to constitute State aid. It stated that the conditions in which compensation granted on account of an operating deficit directly linked to the performance of public service obligations may avoid being classified as State aid did not appear to be fulfilled in the case at issue.

29 It then asserted that such aid was also not covered by the exemptions provided for in Article 92(2) and (3) of the EC Treaty (now, after amendment, Article 87(2) and (3) EC).

30 Lastly, it indicated that 'the exemption under Article 90(2) of the EC Treaty (now, after amendment, Article 86(2) EC) [was] not applicable, as the services in question [did] not meet the criterion of services of general economic interest because there [were] other companies in competition with [Trasmediterránea] on some or all of the routes'. It added that 'the application of the State aid rules [did] not obstruct, in law or in fact, the operation of the services in question in so far as, in accordance with the rules on public aid, a call for tenders is required'.

31 Consequently, the Commission called on the Spanish authorities, in application of Article 93(1) of the EC Treaty (now Article 88(1) EC), to take the appropriate measures to bring the arrangements under the contract of 1978 into line with Community legislation, and in particular with the rules on public service contracts (hereinafter the 'proposal for appropriate measures').

32 In response to the proposal for appropriate measures, the Spanish authorities sent the Commission a letter dated 21 January 1998 in which they indicated, in essence, that they had concluded a new contract with Trasmediterránea as a result of an award procedure based on Royal Decree No 1466/1997 (hereinafter the 'contract of 1998'). They also stated that the contract of 1998 and the clarifications provided to the Commission regarding Royal Decree No 1466/1997 should be regarded as the appropriate measures.

33 The contract of 1998 does not cover maritime services between the islands of the Canary archipelago, which come under the sole jurisdiction of the authorities of the Autonomous Community of the Canaries.

III — *Provisional arrangements for the routes between the islands of the Canary archipelago*

34 By letter dated 18 December 1997 Trasmediterránea asked the Canaries Government for authorisation to provide, from the first quarter of 1998 onwards, the inter-island services that it was operating until 31 December 1997 under the contract of 1978.

35 By a decision taken on the same day, the authorities of the Canaries granted Trasmediterránea provisional authorisation to provide the services that it was operating between the islands of the Canary archipelago under the contract of 1978. That decision stated that any deficits resulting from the provision of these services could be covered when the necessary funds were transferred for that purpose from the general State budget to the Government of the Canaries. This provisional authorisation was subsequently renewed by decisions of 30 March, 11 June and 9 October 1998. These four authorisations form the regime under which Trasmediterránea provided the services giving rise to the subsidy for 1998 (hereinafter the 'provisional arrangements'). The decision of 9 October 1998 indicated that the authorisation to provide these services had been granted until the routes were finally awarded in accordance with the procedure laid down in Decree No 113/1998.

36 In reply to a question from the Court, the intervener indicated, without in essence being contradicted by the applicant in this regard, that the services offered by Trasmediterránea under the provisional arrangements were similar to the services laid down in Decree No 113/1998.

37 In consideration for the provision of maritime cabotage services between the islands of the archipelago during 1998, Trasmediterránea asked the authorities of the Canaries for financial compensation of ESP 2 538.9 million (EUR 15 259 096.32).

38 The authorities of the Canaries rejected that request by a decision of 29 March 1999. Trasmediterránea lodged an administrative objection against that refusal. The authorities of the Canaries then appointed an expert to draw up a report, on the basis of which they granted Trasmediterránea the right to reimbursement of ESP 1.650 billion (EUR 9 916 699.72) as financial compensation for the deficits due to the operation of certain maritime transport routes between the islands of the archipelago in 1998 (hereinafter the 'subsidy for 1998').

39 In application of Decree No 113/1998, on 17 August 1998 the authorities of the Canaries invited any candidates to submit applications for authorisation to operate the five regular inter-island cabotage routes defined in that decree. No application of that kind was submitted within the deadline. Consequently, in accordance with Decree No 113/1998, the authorities of the Canaries issued calls for tenders for the routes in question. None of the routes was awarded pursuant to the said decree before 19 September 2002.

The contested decision

40 The applicant made several complaints to the Commission, particularly with regard to the subsidy for 1997, the settlement subsidy and the subsidy for 1998. In those complaints it claimed in particular that the subsidy for 1997 and the settlement subsidy constituted new aid.

41 As a result of these complaints, on 25 July 2001 the Commission adopted a decision relating to the subsidy for 1997, the settlement subsidy and the subsidy for 1998 (hereinafter the 'contested decision').

42 The Commission considers that the subsidy for 1997 and the settlement subsidy constitute State aid, but that as they are based on a contract concluded by the Spanish authorities and approved by them before the entry into force of the EC Treaty in Spain they are existing aids within the meaning of Article 88 EC and Article 1(b)(i) of Regulation No 659/1999.

43 More specifically, with regard to the part of the settlement subsidy covering staff restructuring costs, the contested decision states that the measures relating to the termination of employment 'stem from the application of [fundamental principle] No 25 of the contract in question, which provides: a) that expenses arising from the preservation of workers' rights are recorded as operating costs charged to the State budget, and b) measures for reducing the undertaking's staff.' Under that decision, 'the measures referred to under b), which are also mentioned in [fundamental principle] No 28, stem from the implementation of two staff reduction programmes, the first for the period 1990-1994 and the second for the period 1995-1997'.

44 As regards the subsidy for 1998, the contested decision indicates that it is new aid within the meaning of Article 1 of Regulation No 659/1999, which should have been notified under Article 88(3) EC. It states that this aid cannot benefit from any of the exemptions provided for in paragraphs 2 and 3 of Article 87 EC. It then indicates that this aid should be examined to establish whether it may come under the exemption provided for in Article 86(2) EC.

45 In this regard, the contested decision states that 'in order to verify the existence and scope of the public service obligations entrusted to Trasmediterránea in 1998 and whether it was necessary to compensate the latter for the cost it incurred in meeting its obligations, the Commission is required to examine whether there are other operators offering similar services to those provided by [Trasmediterránea] and which meet the conditions laid down in Decree No 113/1998'. The contested

decision then indicates that no other operator met all the obligations specified in Decree No 113/1998 and that only Trasmediterránea satisfied the conditions laid down in that decree for routes 1, 3 and 4 and the conditions set for route 2, except for the links to the port of Playa Santiago.

46 The contested decision indicates the following with regard to the calculation of the amount of the subsidy for 1998:

'The method chosen consisted in assessing the expenditure that a given operator would have to make in order to meet the public service obligations imposed by the authorities of the Canaries on the routes in question. The reference data on the various items were provided by shipping operators in the market, in particular private operators, and by ... the Instituto Canario de Estadísticas [(Canaries Institute of Statistics)]'.

47 The contested decision further states that 'the compensation paid to Trasmediterránea is slightly below the estimated amount of additional costs associated with the public service obligations, which was calculated solely on the basis of the cost of the services provided by Trasmediterránea to meet the conditions laid down in Decree No 113/1998, by deducting the revenue derived from the operation of these services from the total amount of those costs'.

48 The subsidy for 1998 is then considered, in the contested decision, to fall under the exemption provided for in Article 86(2) EC.

49 On 27 September 2001 the Commission staff sent an e-mail to the applicant's counsel. The e-mail states:

'As agreed by telephone, a copy of the letter addressed to the Spanish authorities on 25 July 2001, which relates to the Trasmediterránea decision and from which confidential information has been removed, is attached. The latter decision will be published in the Official Journal in the near future. This e-mail does not in any event constitute a formal commitment on the part of the Commission.'

50 On 20 April 2002 the Commission published a notice in the *Official Journal of the European Communities* in which it informed third parties, by summarising the essential details of the case, that it raised no objection to the subsidies granted to Trasmediterránea (OJ 2002 C 96, p. 4). The notice indicates that '[t]he authentic text(s) of the decision, from which all confidential information has been removed, can be found at [the website of the Secretariat General of the Commission, whose internet address is] http://europa.eu.int/comm/secretariat_general/sgb/state_aids'.

Procedure

51 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 29 January 2002.

52 By a document lodged at the Court Registry on 29 May 2002, the Kingdom of Spain sought leave to intervene in these proceedings in support of the Commission. By order of 27 September 2002, the President of the Second Chamber (Extended

Composition) of the Court of First Instance allowed that intervention. The intervener lodged its statement and the other parties lodged their observations thereon within the time-limits laid down.

53 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure, after adopting measures of organisation of procedure, under Article 64 of the Rules of Procedure of the Court of First Instance, in the form of a series of written questions to the parties. The applicant, which was asked to answer those questions in writing before the hearing, answered them by letter of 5 July 2004.

54 The parties presented oral argument and their replies to the written and oral questions put to them by the Court at the hearing on 13 July 2004.

55 At the hearing the applicant requested leave to deposit a copy of judgment No 551/2003 of 24 October 2003 of the Tribunal Superior de Justicia de Canarias (High Court of Justice of the Canaries), Spain, partially annulling Decree No 113/1998. After hearing the observations of the defendant and the intervener on the deposit of this document, of which they received a copy, the said document was placed in the file.

56 The intervener requested leave to deposit a copy of the appeal against the judgment of 24 October 2003 of the Tribunal Superior de Justicia de Canarias. By decision of 1 December 2004, the Court agreed that a copy of that document be placed in the file and sent to the defendant and the applicant. The intervener failed to deposit the said document within the period granted.

57 The oral procedure was closed on 25 February 2005.

Forms of order sought by the parties

58 The applicant claims that the Court should:

— declare its action admissible;

— order, by way of measures of enquiry, that the Commission, the Kingdom of Spain and Trasmediterránea submit certain supporting evidence;

— annul the contested decision;

— order the Commission to pay the costs.

59 The Commission contends that the Court should:

— dismiss the applicant's requests for supporting evidence;

— declare the application inadmissible and, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

60 The Kingdom of Spain, intervening in support of the Commission, claims that the Court should:

— dismiss the applicant's requests for supporting evidence;

— dismiss the action;

— order the applicant to pay the costs.

Admissibility

I — *Arguments of the parties*

61 Without raising a separate objection of inadmissibility, the Commission disputes the admissibility of the action. In support of that claim, it initially brought two pleas of inadmissibility: the first on the ground that the action is out of time and the second based on the lack of an actionable measure. In reply to a question put by the Court at the hearing, the Commission expressly stated that it maintained its first plea of inadmissibility but would not proceed with the second.

62 With regard to the assertion that the action is out of time, the Commission maintains that as the text of the contested decision had been communicated directly to the applicant, the period for bringing an action against that decision began to run on the date of that communication, the date on which the applicant gained knowledge of the content of the said decision.

63 In the present case, according to the Commission, the applicant was informed of the text of the contested decision by the e-mail sent to it by the Commission staff on 27 September 2001, in other words more than four months before the present action was lodged. In those circumstances, in the opinion of the Commission, the application is out of time.

64 However, in its rejoinder, the Commission admits that the communication of the contested decision could, on account of its form, create some confusion in the applicant's mind as to its scope. At the hearing the Commission conceded that the wording of the e-mail of 27 September 2001 could have led the applicant to commit an excusable error with regard to the applicable period for commencing proceedings.

65 The applicant denies that its application is out of time.

66 In that regard it states first that it is clear simply from the wording of Article 230 EC that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (judgment in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35).

67 It adds, in essence, that since in accordance with a consistent practice Commission decisions such as the decision at issue in the present case are published, it could legitimately expect publication to take place and hence consider that the period prescribed for initiating proceedings would not commence until the date of publication (see, to that effect, the judgment in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, paragraph 35 et seq.). In the applicant's opinion, this is particularly true in the present case, since the e-mail of 27 September 2001 indicated first that the decision would be published in the Official Journal in the near future and secondly that the said e-mail did not in any event constitute a formal commitment on the part of the Commission.

68 According to the applicant, only formal notification from the Commission can determine the commencement of the period for bringing proceedings. In the present case, however, it maintains that the formal nature of the notification was undeniably lacking, on the grounds that the notification was sent to a person with no power to represent the applicant, that the Commission had emphasised the informal nature of the communication and that, as the person concerned was not the addressee of the contested decision, the decision could not be formally notified to him.

69 Furthermore, according to the applicant, that communication was manifestly in breach of the Code of good administrative behaviour for staff of the European Commission in their relations with the public, which is set out in the Annex to the Rules of Procedure of the Commission (OJ 2000 L 308, p. 26, 32), according to which decisions notified shall clearly state that an appeal is possible and describe how to submit it. The applicant maintains that in the present case that requirement was not met.

70 The applicant also claims, in essence, that in accordance with the legal principles firmly rooted in the administrative law of the Member States, incomplete notifications or those that do not meet the formal requirements prescribed as to substance, which include information on the recourse available, are devoid of all

effect, including the effect of commencing the period for instituting proceedings. According to the applicant, such principles are enshrined in particular in Article 58 (2) of the Spanish law on the legal system and on administrative procedure under common law.

71 Finally, the applicant maintains that it brought its action on the basis of information that it was able to obtain on the contested decision by consulting the Commission's website.

II — *Assessment by the Court*

72 Pursuant to Article 230(5) EC, proceedings for annulment must be instituted within two months. This period runs from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

73 It is clear simply from the wording of that provision that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (see the judgments in *Germany* v *Council*, cited in paragraph 66 above, paragraph 35, and in Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 30, and the case-law cited). It is also apparent from the case-law of the Court that, failing publication or notification, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period but, subject thereto, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action (judgments in Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and in Case C-309/95 *Commission* v *Council* [1998] ECR I-655, paragraph 18).

74 Pursuant to that provision, notification is the operation by which the author of a decision of individual relevance communicates the latter to the addressees and thus puts them in a position to take cognisance of it (see, to that effect, the judgments in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 10, and in Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 70). That interpretation also derives from Article 254(3) EC, under which decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.

75 In the present case, the Kingdom of Spain is the sole addressee of the contested decision, which was notified to it by a letter from the Vice-President of the Commission dated 25 July 2001.

76 Since the applicant is not the addressee of the contested decision, the criterion of notification of the decision is not applicable to it (see, to that effect, the judgment in *Commission* v *Council*, cited in paragraph 73 above, paragraph 17). In any event, even supposing that a decision can be notified to a person who is not the addressee thereof, pursuant to Article 254(3) EC it has to be found that the decision contested in the present case was not notified to the applicant. In that regard, it must first be stated that, by indicating expressly in its e-mail of 27 September 2001 that the e-mail in question did not in any case constitute a formal commitment on its part, the Commission refused to guarantee to the applicant that the document attached thereto corresponded to the decision notified to the Spanish authorities. That e-mail therefore did not enable the applicant to have precise knowledge of the content of the contested decision and of the reasons on which it is based in such a way as to enable it to exercise its right of action. Hence, it cannot be considered as constituting notification to the applicant within the meaning of Article 230(5) EC (see, to that effect, the judgment in Case 76/79 *Könecke Fleischwarenfabrik* v *Commission* [1980] ECR 665, paragraph 7). It must then be stated that the e-mail in question, to which was attached an undated and unsigned copy of the letter addressed to the Spanish authorities on 25 July 2001, and from which confidential information had been removed, was not sent directly to the applicant itself but to its lawyer.

77 With regard to measures which, in accordance with the established practice of the institution concerned, are published in the *Official Journal of the European Union*, although such publication is not a condition of their applicability, the Court of Justice and the Court of First Instance have recognised that the criterion of the day on which a measure came to the knowledge of an applicant was not applicable and that it was the date of publication which marked the starting point of the period prescribed for instituting proceedings (see, with regard to Council measures embodying the conclusion of international agreements binding on the Community, the judgment in *Germany* v *Council*, cited in paragraph 66 above, paragraph 39, and with regard to Commission decisions terminating a procedure for the review of aid under Article 88(2) EC, the judgment in *BAI* v *Commission*, cited in paragraph 67 above, paragraph 36). In those circumstances, the third parties involved can legitimately expect the decision in question to be published.

78 In accordance with Article 26(1) of Regulation No 659/1999, decisions by means of which the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 87(1) EC, and decides that the measure is compatible with the common market shall be the subject of a summary notice published in the *Official Journal of the European Union*, stating that a copy of the decision may be obtained in the authentic language version or versions. Such a notice, the purpose of which is to provide interested third parties with a brief summary of the main facts of the decision, mentions, in essence, the Member State involved, the aid number, its title, objective, legal basis, amount and intensity, the budget allocated to it and its duration.

79 In accordance with the established practice of the Commission, which has been developed since May 1999 following the entry into force of Regulation No 659/1999, the summary notice referred to in the preceding paragraph includes a reference to the website of the Secretariat General of the Commission and the statement that the full text of the decision in question, from which all confidential information has been removed, can be found there in the authentic language version or versions.

80 The fact that the Commission gives third parties full access to the text of a decision placed on its website, combined with publication of a summary notice in the *Official Journal of the European Union* enabling interested parties to identify the decision in question and notifying them of this possibility of access via the internet, must be considered as publication for the purposes of Article 230(5) EC.

81 In those circumstances, it is of little importance whether the applicant had sufficient knowledge of the contested decision from 27 September 2001 onwards, the date of despatch of the e-mail cited above. That issue is not relevant for determining the starting point of the period for bringing an action because it is not appropriate to apply, in the present case, the criterion of the day on which a measure came to the knowledge of an applicant, which is provided for in the alternative in Article 230 (5) EC. The applicant could legitimately expect that the contested decision would be published in the *Official Journal of the European Union* in the manner described in the preceding paragraph.

82 In the present case, moreover, it is apparent from the file that the Commission published a summary notice relating to the contested decision in the *Official Journal of the European Union* of 20 April 2002, indicating the date of adoption of the decision, the Member State involved, the aid number, its title, objective, legal basis, the budget allocated to it and its duration. That notice also indicated that the authentic text of the contested decision, from which confidential information had been removed, could be found at the Commission's website and, in that regard, mentioned the internet address permitting access to that text. Moreover, it is not contested between the parties that the text of the contested decision was indeed to be found on the website indicated.

83 As the application was lodged on 29 January 2002, in other words even before publication of the contested decision, it is not out of time.

84 It should be added, for the sake of completeness, that in the present case the application could not be out of time even if the subsidiary criterion of the day on which a measure came to the knowledge of an applicant had applied.

85 It is not disputed that although the contested decision cannot be considered to have been validly notified to the applicant by means of the communication of 27 September 2001 (see paragraph 76 above), the applicant was nevertheless informed of the existence of that decision at that date. Hence, in accordance with the case-law cited in paragraph 73 above, it was for the applicant to request the whole text within a reasonable period commencing on 27 September 2001.

86 In the circumstances of the case, and taking account particularly of the fact that the e-mail of 27 September 2001 indicated explicitly that the contested decision would be published in the *Official Journal of the European Union* in the near future, it should be considered that the reasonable period for requesting communication of the complete text of the contested decision cannot be shorter than the period needed by the Commission to publish the notice relating to that decision. It is common ground that the notice in question was published on 20 April 2002, that is to say after the date on which the present application was lodged. The application is therefore not out of time.

87 In the light of the foregoing considerations, the plea of inadmissibility based on the late submission of the application must be dismissed and the application declared to be admissible.

The substance

88 The applicant maintains that the contested decision is unlawful, both as regards the subsidy for 1997 and the settlement subsidy and as regards the subsidy for 1998.

89 The Commission, supported by the Kingdom of Spain, claims that each of these two aspects of the contested decision complies with the law.

I — *The subsidy for 1997 and the settlement subsidy*

90 The applicant raises two pleas with regard to the subsidy for 1997 and the settlement subsidy. The first alleges infringement of the obligation to provide a statement of reasons. The second is based on errors of assessment by the Commission.

91 The Commission, supported by the Kingdom of Spain, disputes the merits of these pleas.

A — *The plea based on infringement of the obligation to provide a statement of reasons*

1. Arguments of the parties

92 The applicant contends that, in spite of the fact that its complaints expressly mentioned the staff restructuring expenses charged to the 1997 financial year, the contested decision contains no specific statement of reasons on this point. It adds that the contested decision gives no details about the amount of the subsidy for 1997 and merely indicates that the payments relate to the rights and obligations

associated with the contract. This brief statement of reasons did not, according to the applicant, enable it to know the reasons why the Commission considered that the staff restructuring expenses had been charged correctly, which in itself would be grounds for annulment.

93 It adds that, in its opinion, merely referring to two clauses in the contract of 1978 cannot constitute an adequate statement of reasons, in the absence of a minimum of legal and factual grounds to justify their application. In particular, it maintains that fundamental principle No 28 of the specifications concerns investment plans approved by the Spanish Government, which are not mentioned in the contested decision and on which the Commission does not elaborate in its written submissions.

94 The Commission contends that the contractual basis of the payments relating to the cost of staff restructuring is the same, whether it is a question of the payments made in the context of the subsidy for 1997 or in that of the settlement subsidy, and that therefore the reasoning set out in the contested decision applies equally to the two subsidies. Moreover, according to the Commission, that reasoning adequately explains the reasons why the Commission regarded those payments as stemming from the contract of 1978.

2. Assessment by the Court

95 In accordance with settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirement to state reasons must be appraised by

reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see the judgments in Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 and 36, and in Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft and Others* v *Commission* [2004] ECR II-1, paragraph 94, and the case-law cited).

96 In the present case, the contested decision indicates that the subsidy for 1997 and the settlement subsidy are linked to the performance of the contract of 1978.

97 Furthermore, the contested decision was adopted in a context that was well-known to the applicant. It is apparent from the documents before the Court that even before the adoption of the contested decision the applicant had the report of the Tribunal de Cuentas (Spanish Court of Auditors) on the economic effects of the expiry of the contract of 1978 (hereinafter the 'report of the Tribunal de Cuentas'), which approved all the subsidies granted to Trasmediterránea in connection with the settlement of that contract. The report examines, in particular, the charging of staff restructuring expenses to the State account as part of the settlement of the contract and for the 1997 financial year. Furthermore, it clearly indicates the amount of restructuring expenses charged to the State account under each of these headings.

98 Moreover, as regards the compensation for staff restructuring costs in the framework of the settlement subsidy, the contested decision indicates clearly that that compensation derived from fundamental principles Nos 25 and 28 of the specifications. Admittedly, that statement of reasons does not make specific reference to the subsidy for 1997. However, the context in which the contested decision was adopted effectively enabled the applicant to understand that that statement of reasons applied to all the compensation payments for staff

restructuring expenses, whether they were charged to the State account for the 1997 financial year or in connection with the settlement of the contract of 1978. The applicant cannot argue that it did not understand that that statement of reasons covered all the restructuring expenses, because in its written submissions it contends that the reference to fundamental principles Nos 25 and 28 of the specifications does not constitute an adequate statement of reasons for the contested decision as regards the question of whether compensation for staff restructuring expenses derived from the contract of 1978.

99 In the light of the foregoing, it must be considered that, even though the contested decision was not drafted with all the desirable precision as regards the restructuring expenses, this circumstance has not prevented either the applicant or the Court from understanding the Commission's reasoning and assessing whether it is well founded.

100 The plea that the statement of reasons is inadequate must therefore be rejected.

B — *The plea based on errors of assessment in the application of Article 88 EC*

1. Arguments of the parties

101 The applicant maintains, in essence, that the Commission committed errors of assessment in considering that the subsidy for 1997 and the settlement subsidy have their origin in the contract of 1978. Accordingly, in its opinion the Commission infringed Article 88 EC when it described these subsidies as existing aid. This plea is

in two parts; the first relates to the staff restructuring expenses and the second deals with the charging of the expenditure incurred by Trasmediterránea and covered by the settlement subsidy.

(a) The first part

102 The applicant disputes first that the staff restructuring expenses stem from the contract of 1978.

103 In that regard, it maintains that fundamental principle No 25 of the specifications, which is mentioned in the contested decision, relates only to ordinary operating expenses, to the exclusion of extraordinary expenses such as those incurred for staff restructuring. Moreover, contrary to the Commission's contention in its written submissions, in the applicant's opinion it is not apparent from the wording of fundamental principle No 25, A, sub-section b), point 7, of the specifications, which deals with technical restructuring, that Trasmediterránea is entitled to recover the extraordinary cost of staff restructuring and to charge it to the State account. That provision is intended, according to the applicant, merely to induce Trasmediterránea to ensure good management and increase its productivity. This incentive mechanism provides that Trasmediterránea's remuneration for a given financial year increases if the State contribution to cover the operating deficit for that year decreases. In those circumstances, in the opinion of the applicant it is neither legitimate nor in compliance with the contract to demand, on the basis of the provision in question, reimbursement by the State of extraordinary expenses incurred for the restructuring of the undertaking.

104 In order to substantiate its claim that extraordinary costs fall outside the scope of fundamental principle No 25 of the specifications, the applicant requests the production of the IGAE reports on the State account for the years from 1990 to 1997.

105 It goes on the claim that fundamental principle No 28 of the specifications, which is also mentioned in the contested decision, cannot justify reimbursement of the staff restructuring expenses as part of the settlement subsidy, because that provision refers only to the four-year plans submitted to the Spanish Government for approval. According to the applicant, contrary to the statement made in the contested decision, the restructuring expenses reimbursed as part of the settlement subsidy are not the result of the restructuring plans for 1990-1994 and 1995-1997 but stem from the restructuring plan for 1996-1997, which is not a four-year plan. Moreover, even if, as the Kingdom of Spain maintains, this restructuring plan in reality covered the period 1996-1999, it would be a plan whose effects would unfold at a time when notice of termination of the contract of 1978 had already been given and for financial years in which it was no longer in force. In addition, according to the applicant, that plan had not been approved by the contracting authority until 1999.

106 In support of its claims, the applicant asks the Court to order the Spanish central authorities to produce the entire file relating to the restructuring plans for the period 1995-1997.

107 It maintains, secondly, that the reimbursement of staff restructuring expenses as part of the settlement subsidy and the subsidy for 1997 is the result of autonomous decisions by the contracting authority.

108 With regard to the settlement subsidy, the charging of restructuring expenses to the State account derives, according to the applicant, from the decisions of the contracting authority dated respectively 26 October 1998 and 25 February 1999, which amended the contract of 1978. It adds, in essence, that, contrary to the assertions of the Kingdom of Spain, these two decisions are not simply unilateral interpretations of the contract of 1978, which are authorised by Spanish administrative law, but must be regarded as true amendments of the contract of 1978 since they upset the balance of the payments initially provided for, as the Tribunal de Cuentas allegedly found.

109 With regard to the subsidy for 1997, according to the applicant the reimbursement of the restructuring expenses is the result of the contracting administration's decision of October 1995 approving the staff restructuring plan for the period 1995-1997.

110 Even if it is considered that this decision only constitutes an authorised unilateral interpretation of the contract of 1978, according to the applicant the granting of the subsidy for 1997 is not consistent with this interpretation of the contract of 1978. The applicant maintains that the decision of October 1995 required the State to obtain a decrease in the funds paid annually, in the form of a reduction in other expenses to offset the increase in staff expenses, which was not the case in this instance.

111 In order to establish this fact, the applicant asks the Court to order the production of the IGAE reports on the State account for the financial years from 1990 to 1997.

112 The Commission maintains that the reimbursement of staff restructuring expenses as part of the settlement subsidy and as part of the subsidy for 1997 stems from the contract of 1978.

113 In that regard it states first that, in application of fundamental principle No 25, A, sub-section b), points 1, 5 and 7, and fundamental principle No 28 of the specifications, the cost of restructuring Trasmediterránea's staff may be financed by contributions of public funds under the contract of 1978.

114 According to the Commission, the applicant interprets these fundamental principles too restrictively, despite their obvious literal meaning. In its opinion, that interpretation is founded essentially on the doubts expressed by the IGAE during the internal administrative procedure that preceded the payment of the said subsidies.

115 It adds that the Tribunal de Cuentas, as the external auditing body, concluded that the financing of staff restructuring expenses out of public funds was perfectly in compliance with the provisions of the contract of 1978 and that that financing permitted an overall saving of ESP 12.255 billion of public funds during the period from 1990 to 1997.

116 According to the Commission, although the opinion of the Tribunal de Cuentas is not decisive, in its view it nevertheless corroborates the reasonableness of the interpretation of the contract of 1978 supported by the Commission. Furthermore, it is not even alleged that an action has been brought before the national courts challenging the compatibility of the payments in question with the contract of 1978.

117 It maintains secondly that it is difficult to conceive that, in the absence of any other legal act, a decision by the contracting administration is sufficient to effect payment of the amounts at issue. According to the Commission, the decisions to which the applicant refers did not amend the contract of 1978 but were merely the affirmative response of the Spanish administration to the question whether Trasmediterránea was or was not entitled to receive the said payments by virtue of the contract of 1978.

118 It concludes that, in the light of the wording of the contract and its application and of the position of the Spanish administration and of the Tribunal de Cuentas as set out in its report, the public funds earmarked for staff restructuring operations derive from the contract of 1978 and thus constitute existing aid.

119 The Kingdom of Spain contends that the contract of 1978 did not contain an exhaustive and precise list of the items likely to appear as expenses and revenue in the 'operations' section of the State account. It adds that the contract of 1978 is a contract under administrative law and that consequently the power to decide on the

expenditure to be included in the State account rests with the contracting administration within the framework of its competence to interpret contracts, as laid down in national rules on public markets. The alleged authorisations granted by the contracting authority, on the basis of which the applicant seeks to justify classifying the subsidy for 1997 and the settlement subsidy as new aid, are in fact no more than a manifestation of the exercise of its power to interpret the contract of 1978 as the body responsible for its conclusion.

(b) The second part

120 The applicant maintains in essence that in order to apply the contract of 1978 correctly the Spanish authorities should have offset the amount of the obligations chargeable to each financial year against the surplus for that year so that they agreed a subsidy in respect of the settlement only for the obligations charged to the deficit years or for which the surplus was insufficient to offset the relevant obligations. It adds that, since the Spanish authorities did not do so, the Commission could not regard the liquidation subsidy as deriving from the contract of 1978, nor consequently that that subsidy constituted existing aid.

121 In support of its claims it asserts first that, in the absence of specific provisions on the settlement of the contract of 1978, settlement must be carried out by applying the rules on the State account, which, according to the applicant, require that each obligation giving rise to compensation in the framework of the settlement subsidy be charged to the financial year in which it arose.

122 The applicant then contends that it follows from fundamental principle No 25 of the specifications that Trasmediterránea is only entitled to economic compensation for any deficit arising at the end of the financial year in the 'operations' and 'investment'

sections of the State account. According to the applicant, the 'operations' section of the State account showed a net surplus for the years from 1991 to 1995 and would have done so for the 1997 financial year but for the incorrect charging of the staff restructuring expenses.

123 On the other hand, it denies that it follows from fundamental principle No 25 of the specifications that surpluses in the 'operations' section and any deficits in the 'investment' section must be offset against one another. In its opinion, it is clear from the wording of fundamental principle No 25, A, sub-section (a), point 3, and B, sub-section (a), point 1, of the specifications that the public subsidy allocated for each financial year is used as revenue to balance each section, considered separately. According to the applicant, the purpose of separating the two sections is precisely to guarantee to Trasmediterránea that it will obtain a subsidy equal to its financial costs recorded in the 'investment' section, irrespective of the amount of its revenues. It maintains that these expenses are taken into account only if there is a need to balance the 'operations' section, which reflects Trasmediterránea's other current expenses.

124 According to the applicant, the declarations of the Kingdom of Spain on the offsetting between the two sections is not corroborated by any evidence establishing conclusively the manner in which the contract of 1978 was applied as far as any offsetting between the two sections is concerned. In its opinion, such proof cannot be considered to have been provided by referring to a table in the report of the Tribunal de Cuentas, because it cannot be ruled out that that table is wrong.

125 It also argues that fundamental principle No 26 of the specifications does not permit offsetting between any operating surplus in one financial year and deficits arising in others, an operation that would have reduced the funds provided by the State. According to the applicant, the deficit or surplus referred to in fundamental principle No 26 is solely the result of setting the funds paid in advance by the State in accordance with budget forecasts against the contribution actually due after the State account has been closed.

126 In order first to establish whether offsetting between the operating surplus and the investment deficit took place and secondly to interpret fundamental principle No 26 of the specifications, the applicant asks the Court to order the production of the IGAE reports on the State account for the financial years from 1990 to 1997.

127 The applicant also asks the Court to order the Spanish authorities to produce the entire file on the settlement of the contract of 1978 so that it may be apprised of the negotiations that took place between Trasmediterránea and the Spanish State at the time of the settlement of the contract and the facts and legal points on which the Spanish State ultimately relied in order to draw up the settlement account.

128 The Commission, supported by the Kingdom of Spain, contends in essence that the applicant has made an error of fact in considering that the operating surpluses achieved by Trasmediterránea in certain financial years were used to increase the assets of Trasmediterránea rather than to offset other contributions of public funds.

129 It concedes that the 'operations' section of the State account showed a surplus in some years. However, the 'investment' section of the State account was in deficit in each year. Moreover, it claims that it is clear from the report of the Tribunal de Cuentas that the abovementioned operating surpluses were used systematically to offset the deficits in the 'investment' section in order to reduce the annual contribution of public funds. Since the operating surplus was never larger than the investment deficit, there was no surplus on the State account in any year. In that regard, the Kingdom of Spain states, in essence, that during the 20-year validity of the contract of 1978, after offsetting between the 'operations' and 'investment' sections, which are to be regarded as two sections of one and the same account, the State account always showed a deficit.

130 In those circumstances, according to the defendant and the intervener, it is pointless to discuss the interpretation of fundamental principle No 26 of the specifications, which in any event provides for offsetting between financial years.

131 In their opinion, it is therefore obvious that it is entirely irrelevant whether the obligations to be settled are or are not charged to a particular year, because even if charging on an annual basis took place this would in no way affect the total amount of public funds received by Trasmediterránea over the entire period of the contract of 1978.

2. Assessment by the Court

(a) The first part

132 The contested decision cites two fundamental principles of the specifications, namely fundamental principles Nos 25 and 28, as the basis for the contractual nature of the reimbursement of Trasmediterránea's staff restructuring expenses.

133 According to the applicant, the contractual nature of the reimbursement of the staff restructuring expenses cannot stem from fundamental principle No 25, A, sub-section (b), point 7, which provides for an incentive to improve the productivity of Trasmediterránea. That argument has no bearing on the issue, since the contested decision refers to fundamental principle No 25 as a whole and does not explicitly mention the provision of that principle that creates a productivity incentive. Even if it were admitted, in keeping with the applicant, that the specific provision of point 7 of fundamental principle No 25, A, sub-section (b), of the specifications does not establish the contractual nature of the reimbursement of staff restructuring

expenses, it does not nevertheless follow that the Commission made an error in assessing the contract of 1978 by considering that fundamental principle No 25, which it should be remembered provides for the accounting mechanism of the State account, offered a contractual basis for reimbursing the restructuring expenses at issue.

134 The applicant also alleges that fundamental principle No 25 of the specifications, taken as a whole, does not cover extraordinary expenses and that the expenses relating to staff restructuring constitute such expenses. In this regard, suffice it to note that the applicant adduces no evidence to support its claim that fundamental principle No 25 distinguishes between admissible ordinary expenses and extraordinary expenses falling outside its scope. In addition, it does not indicate any reason whatsoever why staff restructuring expenses should be considered as extraordinary expenses. In those circumstances, it is not necessary to order measures of enquiry to establish whether the alleged distinction exists and the consequences it would have on the admissibility of the reimbursement of staff restructuring expenses.

135 It follows from the foregoing that the applicant has not provided sufficient evidence to establish that the Commission was wrong in its assessment that the reimbursement of staff restructuring expenses, taken into account to determine the amount of the subsidy for 1997 and the settlement subsidy, stemmed from the contract of 1978 by virtue of fundamental principle No 25. Moreover, the Commission's assessment is consistent with that made by the Tribunal de Cuentas — the national authority for external financial auditing — as set out in that body's report on the settlement of the contract of 1978, the validity of which has not been challenged before the competent Spanish authorities. In those circumstances, for the purposes of the present proceedings, it has to be considered that fundamental principle No 25 constitutes a valid contractual basis for the reimbursement of restructuring expenses.

136 It is therefore not necessary to examine whether it was wrong to consider that the contractual nature of the reimbursement of staff restructuring expenses also derived from fundamental principle No 28 of the specifications. Nor is it necessary to examine whether such reimbursement is based on autonomous authorisations from the Spanish authorities. Similarly, the Court has no cause to rule on the requests for measures of enquiry to establish certain facts relating to fundamental principle No 28 and the autonomous authorisations from the Spanish authorities, which in any event would not alter the conclusion drawn in the preceding paragraph.

137 The first part of the plea must therefore be rejected as unfounded.

(b) The second part

138 In the second part of its plea, the applicant alleges in essence that the Commission committed an error of assessment by considering that the entire amount of the settlement subsidy derived from the contract of 1978. According to the applicant, the contract of 1978 requires that settlement expenses be charged to the financial years to which they relate and be offset against any surpluses for those years. The settlement subsidy could therefore cover settlement expenses only to the extent that in the financial years to which they relate there was not a sufficient surplus to carry out offsetting.

139 Even supposing that the contract of 1978 requires settlement expenses to be charged to the financial years to which such expenses relate and to be offset against any surpluses for those years, it does not follow for that reason that the Commission committed an error in considering that the entire amount of the settlement subsidy derived from the contract of 1978.

140 It is apparent from the documents before the Court that the 'investment' section of the State account was in deficit throughout the period of the contract of 1978 and that the 'operations' section of the State account was also in deficit for all the years of the contract of 1978 except 1987, 1988 and 1991-1995. It follows that, except in the latter years, the State account never showed a surplus.

141 With regard to the financial years 1987, 1988 and 1991-1995, it is common ground that the deficit in the 'investment' section exceeded the surplus in the 'operations' section, so that after offsetting between the two sections the State account still did not show a surplus in those years.

142 Although the applicant contends that offsetting between the two sections of the State account does not comply with fundamental principle No 25 of the specifications, the applicant's proposed interpretation of that principle is supported neither by the wording of that provision nor by the application thereof in the context of the contract of 1978. Contrary to the applicant's assertions, the fact that fundamental principle No 25 of the specifications provides for possible contributions of public funds to balance each of the two sections of the State account does not in any way mean that the amount of such contributions may not be calculated after any surpluses in one section have been used to offset deficits in the other. In that regard, as the Commission rightly observes, it is clear from the report of the Tribunal de Cuentas that the operating surpluses were used systematically to offset the deficits of the 'investment' section in order to reduce the annual contribution of public funds.

143 Whereas the applicant claims that the report of the Tribunal de Cuentas could be in error with regard to the offsetting between the sections of the State account, it does not adduce any evidence which might give reason to doubt the veracity of the information cited in that report, which the applicant itself produced in the context of the present proceedings. In those circumstances, it is not necessary to take action

on the applicant's request that the Court order the audit reports of the IGAE for the years from 1990 to 1997 to be produced in order to establish whether or not there was offsetting between the two sections of the State account (see to that effect the judgment in Case 119/81 *Klöckner-Werke* v *Commission* [1982] ECR 2627, paragraph 8).

144 Since it has not been established that the State account showed any surplus whatsoever that could be used to offset the settlement expenses, it has to be considered that the Commission did not commit an error in recognising that the settlement subsidy covered all settlement expenses, without allocating those expenses to the years to which they relate. The second part of the present plea must therefore also be dismissed.

145 Lastly, with regard to the applicant's request that the Court order the Spanish authorities to produce the entire file on the settlement of the contract of 1978 in order to establish whether negotiations took place between the Spanish authorities and Trasmediterránea, it is sufficient to find that the applicant does not explain how such negotiations or the circumstances in which the settlement account was drawn up would make it possible to establish that the Commission committed an error of assessment in considering that the subsidy for 1997 and the settlement subsidy derive from the contract of 1978. In those circumstances, there is no need to grant the applicant's request for measures of enquiry.

146 In the light of all the foregoing, the second plea alleging that the contested decision is unlawful in that it relates to the subsidy for 1997 and the settlement subsidy must be dismissed.

II — *The subsidy for 1998*

147 The applicant also challenges the legality of the contested decision in that it authorises the payment of the subsidy for 1998 as new aid compatible with the common market. In that regard, it maintains that the contested decision infringes Article 88 EC, Article 86(2) EC and the obligation to provide a statement of reasons for acts adopted by the institutions.

148 The Commission, supported by the Kingdom of Spain, disputes the merits of these pleas.

A — *The plea alleging infringement of Article 88 EC*

1. Arguments of the parties

149 The applicant maintains in essence that the contested decision infringes Article 88 EC in that the Commission misconstrued the scope of the appropriate measures proposed with regard to the contract of 1978 by classifying the subsidy for 1998 as new aid and examining its compatibility in the light of Articles 86 EC and 87 EC.

150 In that regard, it maintains first that it is apparent from Article 19 of Regulation No 659/1999 and the case-law that where a Member State accepts the measures proposed by the Commission it is bound by its acceptance to implement the said measures (judgments in Case C-313/90 *CIRFS and Others* v *Commission* [1993]

ECR I-1125 and in Case C-311/94 *IJssel-Vliet Combinatie* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraph 35 et seq.). The binding nature of appropriate measures that have been proposed and accepted is also, in the opinion of the applicant, enforceable against the Commission, which cannot subsequently ignore their contents and effects.

151 It then contends that the Kingdom of Spain accepted the proposal of appropriate measures made by the Commission with regard to the contract of 1978. According to the applicant, the appropriate measures that were proposed and accepted called on the Spanish authorities to terminate the contract of 1978 with effect from 31 December 1997 and to issue a call for tenders with a view to concluding a new public service contract. In order to establish that fact, it asks the Court to order the Commission to produce the file on the proposal for appropriate measures.

152 According to the applicant, the Spanish authorities did not take the appropriate measures as regards the shipping routes between the islands of the Canary archipelago; from 1 January 1998 onwards Trasmediterránea continued to operate those routes and received a subsidy on the same conditions as under the contract of 1978, which in theory was no longer in force, without this service being awarded — and hence the cost of the public service obligations determined — by means of a call for tenders. The applicant contends that the appropriate measures that had been accepted were therefore not complied with.

153 Moreover, according to the applicant, no new factor arose that enabled the Commission to question the assessment made in the proposal for appropriate measures, according to which the services offered by Trasmediterránea did not constitute services of general economic interest since there was competition for the provision of those services.

154 First, the fact that the services covered by the subsidy for 1998 related only to the routes between the islands of the archipelago, whereas the proposal for appropriate measures related to all the routes covered by the contract of 1978, did not, in the opinion of the applicant, render the assessments made in the context of the proposal for appropriate measures regarding the contract of 1978 irrelevant for examining the subsidy for 1998.

155 Indeed, according to the applicant, the proposal for appropriate measures regarding the contract of 1978 was aimed expressly at the shipping routes in the Canaries. In that regard, it contends that it is apparent from the considerations in the introduction to the proposal for appropriate measures that the proposal was adopted as a result of complaints relating precisely to the anti-competitive behaviour of Trasmediterránea in the operation of the Canary routes. Moreover, the applicant asserts that by means of those appropriate measures the Commission was aiming implicitly at the Canary routes, as is apparent from the fact that the Commission criticised the commercial flexibility set out in the contract of 1978, a flexibility that was the subject of a complaint from the applicant about the Tenerife-Agaete-Gran Canaria route. It is also apparent, according to the applicant, from the fact that in the proposal for appropriate measures the Commission indicated serious doubts about the need to impose public service obligations on some of the shipping routes in question, as those routes could be or were served adequately by private undertakings operating them commercially.

156 In order to establish whether the Commission was particularly attentive to the situation in the Canary market, the applicant asks the Court to order the Commission to produce the file on the proposal for appropriate measures.

157 Secondly, the allegedly provisional nature of the arrangements that gave rise to the payment of the subsidy for 1998 is not sufficient, according to the applicant, to justify re-examination of the criteria applied by the Commission in connection with the proposal for appropriate measures regarding the contract of 1978. The applicant contends first that the arrangements that gave rise to the subsidy for 1998 are not really provisional, because the decision of 9 October 1998 allowed Trasmediterránea

to offer services on the routes in question without a time-limit. Secondly, as the Commission allegedly found in its examination of the contract of 1998 [Commission Decision 2001/156/EC of 19 July 2000 on the State aid implemented by Spain in favour of the maritime transport sector (new maritime public service contract) (OJ 2001 L 57, p. 32)], the Canaries authorities had sufficient time to create legal arrangements in compliance with Community law and/or not endangering the continuity of public service. In any case, in the opinion of the applicant, there was no risk of interruption of the services between the islands of the Canary archipelago, because those routes were sufficiently well served, not only by Trasmediterránea but also by competing shipping companies.

158 In order to demonstrate that the authorisations forming the provisional arrangements are not provisional, the applicant asks the Court to order the Spanish authorities to produce, first, the file compiled by the Consejería de Turismo y Transportes of the Autonomous Community of the Canaries in connection with Trasmediterránea's claim for payment of the sums allegedly due to the latter to cover the deficit on operation of the public service cabotage routes between the islands in 1998, 1999 and 2000, and, secondly, the entire file relating to the calls for tenders for the public service routes in the Canaries after the entry into force of Decree No 113/1998 and the entire file preparatory to the adoption of Decree No 113/1998, in particular the studies, reports and economic information, on the basis of which the annex defining the public service obligations was drawn up.

159 The Commission, supported by the Kingdom of Spain, maintains first that the proposal for appropriate measures relating to the contract of 1978 and accepted by the Kingdom of Spain has no binding legal effects on the provisional arrangements.

160 In that regard, it states that by terminating the contract of 1978 the Spanish authorities 'exhausted the direct legal scope' of the proposal for appropriate measures. According to the Commission, from that moment onwards the new

measures adopted by the various Spanish authorities — that is to say, on the one hand the provisional arrangements within the jurisdiction of the Canaries authorities and on the other the contract of 1998 falling within the powers of the national authorities — had to be examined as new aid. In its view, because of the change in their period of validity, the provisional arrangements constituted new aid, despite their being materially identical to the contract of 1978. It adds that if it had considered the contract of 1978 and the provisional arrangements to be exactly identical, the provisional arrangements would have had to be recognised as existing aid, which would have made it impossible to recover the aid granted under those arrangements. According to the Commission, such an approach was not only manifestly inappropriate in the present case but would also have produced results that were probably contrary to those sought by the applicant.

161 It maintains, secondly, that the analysis of the contract of 1978 contained in the proposal for appropriate measures could not be transposed directly to the situation in the archipelago in 1998, because it related to shipping routes in the whole of Spanish territory and not to the particular situation of island cabotage in the Canaries. According to the Commission, the fact that the proposal for appropriate measures had been preceded by complaints from the applicant in no way affected that conclusion, because even though the applicant was referring only to the situation in the Canaries, the Commission had examined the problem raised in its entirety.

162 It adds that it had to examine the situation in the Canary archipelago in the light of the applicable rules, which include Article 6(2) of Regulation No 3577/92, under which no liberalisation of cabotage in the Canary Isles was required until 1 January 1999, and the Community guidelines on State aid to maritime transport, which did not require calls for tenders to be used for the award of public service contracts.

163 It concludes from the foregoing that it was perfectly justifiable to make an analysis of the compatibility of the provisional arrangements that was distinct from the one it had carried out for the proposal for appropriate measures with regard to the

contract of 1978. The applicant's plea based on the alleged violation of Article 88 EC on grounds of non-compliance with the accepted proposal for appropriate measures is therefore, in the opinion of the Commission, without legal foundation.

2. Assessment by the Court

164 As the applicant rightly states, it is clear from Article 19(1) of Regulation No 659/1999 that where, in the context of a procedure for the examination of existing aid schemes, a Member State accepts the proposal for appropriate measures issued to it, it is bound by its acceptance to implement the said measures.

165 In the present case, and contrary to the assertion of the applicant, the Commission does not deny that the proposal for appropriate measures was accepted by the Spanish authorities. This fact must therefore be considered as established, without the need to grant the applicant's request that the Court order the Commission to produce the file on the proposal for appropriate measures.

166 Secondly, as the Commission and the Kingdom of Spain rightly point out, the binding legal effects of the accepted appropriate measures, which related to the amendment of the contract of 1978, expired at the same time as the contract of 1978.

167 Lastly, it is common ground that the subsidy for 1998 constitutes new aid, within the meaning of Article 1(c) of Regulation No 659/1999, so that by definition it is precluded that that subsidy was granted under the contract of 1978.

168 In those circumstances, the accepted appropriate measures cannot form the framework for assessing whether the subsidy for 1998 is compatible with the common market. Its compatibility must be assessed directly in relation to the rules set out in the EC Treaty.

169 It is nevertheless necessary to examine whether, as the applicant maintains, the Commission's assessments contained in the proposal for appropriate measures regarding the contract of 1978 related specifically to inter-island cabotage in the Canaries, in which case the Commission could not reach a different conclusion on the compatibility of the subsidy for 1998 from the one that had led it to propose appropriate measures regarding the contract of 1978 unless it stated the reasons for changing its assessment.

170 In that regard, as a preliminary matter it must be recalled that the provisional arrangements cover only the provision of maritime services between the islands of the archipelago, whereas the contract of 1978 was designed to govern the provision of maritime services not only between the islands of the Canary archipelago but also between various points on the peninsula on the one hand and the Balearics, North Africa and the Canaries on the other.

171 It must then be noted that the applicant does not show that the assessments contained in the proposal for appropriate measures regarding the contract of 1978 related to maritime links between the islands of the Canary archipelago.

172 First, the fact that the proposal for appropriate measures was in response to complaints about the anti-competitive behaviour of Trasmediterránea in the operation of the maritime routes in the Canaries is not sufficient to establish that the proposal necessarily referred to the particular situation of inter-island cabotage in

the Canaries. Indeed, since the proposal related to the contract of 1978 as a whole, it must be considered that the Commission's assessment covered the contract of 1978 in its entirety and not only the situation of the Canary routes.

173 Secondly, there is nothing to indicate that the Commission was referring to the maritime routes in the Canaries when, in the proposal for appropriate measures, it expressed serious doubts about the need to impose public service obligations on some routes since those routes are or can be served adequately by private undertakings operating them commercially. More specifically, the applicant does not adduce any evidence that allows the Court to consider that the routes on which, according to the proposal for appropriate measures, there was adequate competition were necessarily the Canary routes.

174 Thirdly, nor does the Commission's assessment that the contract of 1978 gave Trasmediterránea commercial flexibility that was rather inconsistent with a public service task indicate that the proposal for appropriate measures referred specifically to the situation between the Canary Isles.

175 On the contrary, the fact that the proposal for appropriate measures called upon the Spanish authorities to bring the contract of 1978 into line with Community legislation, and in particular with the rules on public service contracts, suggests that the proposal did not refer to the Canary routes served by Trasmediterránea under the contract of 1978. Indeed, according to Article 6(2) of Regulation No 3577/92, no liberalisation of cabotage in the Canary Isles was required before 1 January 1999. In those circumstances, the Commission could not effectively propose that the Spanish authorities amend the arrangements for the provision of maritime services between the Canary Isles.

176 It is therefore not established that the critical assessments contained in the Commission's proposal for appropriate measures referred specifically to maritime routes in the Canaries.

177 Since the applicant puts forward no serious arguments in support of its claim, it is not necessary to order the Commission to produce the entire file on the proposal for appropriate measures in order to establish whether the Commission was particularly attentive to the situation in the Canary market. Moreover, since the conclusion drawn in the preceding paragraph does not depend in any way on whether the provisional arrangements established by the decision of 18 December 1997 are or are not transitional, it is also not necessary to order the measures of inquiry allegedly likely to show that the provisional arrangements are not transitional.

178 In the light of the foregoing, the plea alleging infringement of Article 88(1) EC, which purportedly resulted from the Commission's misconstruing the scope of the appropriate measures relating to the contract of 1978, must be dismissed as unfounded.

B — *The plea alleging infringement of Article 86(2) EC and infringement of the obligation to provide a statement of reasons*

179 The applicant presents five arguments in support of this plea. The first alleges the lack of an act of public authority entrusting Trasmediterránea with the operation of a service of general economic interest. The second is based on the absence of specific content in the public service obligations allegedly entrusted to Trasmediterránea. In the third part of the plea, the applicant contests the need to raise the service offered by Trasmediterránea in the Canary archipelago to the status of a

service of general economic interest. In the fourth part of the plea, the applicant alleges the absence of a public tendering procedure to award the alleged public service task to Trasmediterránea and the lack of a statement of reasons in this regard. The fifth part alleges that the subsidy for 1998 is inadequate and that the statement of reasons in the contested decision was insufficient in this regard.

1. The first part, alleging the lack of an act of public authority

(a) Arguments of the parties

180 The applicant maintains that, in accordance with case-law, for an undertaking to be regarded as entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) EC, it must have been so entrusted by an act of public authority (judgment in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 65).

181 In the present case, however, the applicant alleges that no act of public authority requires Trasmediterránea to provide the services for which it received the subsidy for 1998. The decision of 18 December 1997 by which the authorities of the Canaries authorised Trasmediterránea to provide maritime services between the islands of the Canary archipelago has, according to the applicant, no mandatory effect on Trasmediterránea. In that regard it contends first that that authorisation was granted at the request of Trasmediterránea and secondly that Trasmediterránea unilaterally ceased to operate some of the routes covered by that authorisation or changed those routes when that appeared to serve its commercial interests. As a consequence, in the absence of an act of public authority imposing obligations on Trasmediterránea, one of the conditions for the application of Article 86(2) EC was not met, which in the opinion of the applicant should have prevented the

Commission from concluding that the subsidy for 1998 was compatible under that provision.

182 The Commission maintains that the operation of a public maritime service between the Canary Isles was entrusted to Trasmediterránea for a fixed period by decisions of the Canaries authorities of 18 December 1997, 30 March 1998 and 11 June 1998. According to the Commission, those decisions define the scope of the said services and the arrangements governing them, even if that definition is established by reference to the arrangements under the contract of 1978. In the opinion of the Commission, those facts are sufficient to consider that a task of the type provided for in Article 86(2) EC was entrusted to Trasmediterránea.

183 It adds that Article 86(2) EC, as interpreted by the case-law, imposes no formal requirements but concentrates on functional aspects. Accordingly, that provision does not require that the act entrusting the task be a law or regulation or that it necessarily be binding, as explained in point 22 of the Commission Communication on services of general interest in Europe. The only determining factor, according to the Commission, is the desire of the public authority to entrust a task to the undertaking concerned, which would run counter to the undertaking in question acting unilaterally.

184 In this instance, according to the Commission, while the provisional arrangements were in force Trasmediterránea did not act unilaterally but in accordance with the measures taken by the Canaries Government in the exercise of its powers to organise the market.

185 The Kingdom of Spain maintains, in essence, that the authorisation granted by the Government of the Canaries under its devolved powers entrusted to Trasmediterránea a task within the meaning of Article 86(2) EC.

(b) Assessment by the Court

186 As the applicant rightly states, undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority (judgment in Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 126, and the case-law cited).

187 In the present case, it is common ground that Trasmediterránea provided the maritime services between the islands of the Canary archipelago from 1 January 1998 onwards on the basis of the decision of the Canaries authorities of 18 December 1997, renewed by decisions of 30 March, 11 June and 9 October 1998. Hence, it was indeed on the basis of an act of public authority that Trasmediterránea was entrusted with the task of providing the services in question.

188 The fact that that task was entrusted to Trasmediterránea at the request of that operator does not call into question the conclusion drawn in the preceding paragraph. A public service task may be entrusted to an operator through the grant of a public service concession (see to that effect the judgment in Case C-393/92 *Almelo and Others* v *NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, paragraph 47). A concession can be granted only if accepted by the concessionary. Consequently, it is apparent from that case-law that the involvement of the operator entrusted with a public service task in the process by which that task is entrusted to it does not mean that that task does not derive from an act of public authority.

189 Moreover, nor does the fact that Trasmediterránea ceased to operate some routes covered by the provisional arrangements, a fact that is not disputed by the Commission, call into question the conclusion drawn in paragraph 187 above. In that regard it should be noted that the unilateral withdrawal from the provision of a

service is, as a matter of principle, compatible with the imposition of public service obligations (see to that effect the judgment in Case C-205/99 *Analir and Others* v *Administración General del Estado* [2001] ECR I-1271, paragraph 64). By definition, however, public service obligations can be imposed only by means of an act of public authority. It is therefore clear from that case-law, transposed to the circumstances in the present case, that Trasmediterránea's cessation of service on some routes does not demonstrate that no act of public authority entrusts Trasmediterránea with the operation of a service of general economic interest.

190 In any case, if it were so established, the fact that Trasmediterránea unilaterally abandoned or altered the conditions for the operation of some maritime routes indicates at most that Trasmediterránea failed to honour some of the obligations imposed on it by the provisional arrangements.

191 In the light of the foregoing, the first part of the present plea must be dismissed as unfounded.

2. The second part, alleging the lack of a precise definition of the public service obligations

(a) Arguments of the parties

192 The applicant contends that it is apparent from Article 4 of Regulation No 3577/92 that public service obligations must have a specific content.

193 According to the applicant, the requirement to provide a precise definition of public service obligations also derives from the Community guidelines on State aid to maritime transport. Although the Community guidelines on State aid to maritime transport do not have the character of rules of law which the administration is always bound to observe, they nevertheless set forth rules of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so, since otherwise the principles of equality of treatment would be infringed (see to that effect the judgments in Case 148/73 *Louwage* v *Commission* [1974] ECR 81, paragraph 12, in Case 343/82 *Michael* v *Commission* [1983] ECR 4023, paragraph 14, and in Joined Cases 80/81 to 83/81 and 182/82 to 185/82 *Adam and Others* v *Commission* [1984] ECR 3411, paragraph 22).

194 It maintains that in the present case no rule or act, either unilateral or contractual, defines clearly and precisely the claimed service obligations of general economic interest with which Trasmediterránea was entrusted.

195 According to the applicant, the decision of 18 December 1997 granting provisional authorisation only refers to the services that Trasmediterránea was already providing under the contract of 1978. The applicant points out that, as the Commission had already noted in the proposal for appropriate measures, the contract of 1978 did not meet the minimum requirements as regards definition and precision. More specifically, in relation to certain essential aspects, such as the schedule of services or the table of rates, the applicant contends that the proposal for appropriate measures found that the contract of 1978 allowed Trasmediterránea a wide freedom of action in the market incompatible with its role as provider of regular maritime transport services financed by public funds.

196 It adds, in essence, that the definition of the obligations set out in Decree No 113/1998 cannot be relied upon to demonstrate compliance with the conditions provided for in Article 86(2) EC. According to the applicant, first, the principle that the provisions of regulations do not apply retroactively precludes the said decree

from applying to the provisional authorisation granted by a previous decision. Secondly, Trasmediterránea did not, in the opinion of the applicant, even seek to ensure that the provisional authorisations met the requirements set out in the said decree.

197 In the absence of a clear and precise definition of the task entrusted to Trasmediterránea, the subsidy for 1998 cannot, according to the applicant, come within the scope of Article 86(2) EC.

198 The Commission, supported by the Kingdom of Spain, maintains that the provisional authorisations contained a definition of the services entrusted temporarily to Trasmediterránea by referring to the definition in the contract of 1978. That definition was not general but extremely detailed and precise. In their view, it follows that the public service obligations entrusted on a temporary basis to Trasmediterránea by the Canaries authorities were defined adequately, in the light of the provisions of Article 86(2) EC.

(b) Assessment by the Court

199 Article 4 of Regulation No 3577/92, which according to the applicant requires a precise definition of the content of the public service obligations, is of no relevance for assessing whether the subsidy for 1998 is covered by Article 86(2) EC. It is clear from Article 6 of Regulation No 3577/92 that cabotage in the Canary archipelago was temporarily exempt from application of the said regulation until 1 January 1999. It is common ground that the subsidy for 1998 relates to cabotage services in the Canary archipelago for 1998 only. It follows that Regulation No 3577/92 is not applicable to the circumstances in the present case.

200 Similarly, it is to no avail that the applicant cites the Community guidelines on State aid to maritime transport in the context of this part of its plea. Although point 9 of those guidelines mentions that public service obligations must be defined clearly, that condition is applicable only where it is a matter of determining whether the reimbursement of operating losses resulting directly from the performance of certain public service obligations can escape classification as State aid within the meaning of Article 87(1) EC. In the present case, however, it is not disputed that the subsidy for 1998 constituted such State aid. Hence, in the circumstances of the case, the requirement for a definition of the content of the public service obligations laid down in the Community guidelines on State aid to maritime transport is not applicable.

201 Furthermore, even if it were supposed that Article 86(2) EC can exempt the subsidy for 1998 from the application of the State aid rules only if the public service obligations giving rise to that subsidy are clearly defined, it has to be found that that is indeed the case in this instance. The decision of 18 December 1997, as renewed subsequently, entrusts to Trasmediterránea the task of providing shipping services between the islands of the Canary archipelago that that company had to provide under the contract of 1978. That contract defines the routes to be operated, the service frequency and the technical characteristics of the vessels used for those services. Hence, it must be considered that the obligations in question are clearly defined.

202 In this latter regard, contrary to the assertions of the applicant, it is not in any way apparent from the proposal for appropriate measures regarding the contract of 1978 that the Commission considered that that contract did not meet the minimum requirements as to the definition of the public service obligations entrusted to Trasmediterránea. Indeed, in its proposal for appropriate measures, the Commission merely noted that Trasmediterránea was 'able to alter or change its schedule of services and the table of rates ... , subject to prior approval from the competent authorities, [which gave it] a freedom of action in the market that was not compatible with its role as provider of regular maritime transport services financed from public resources'. That freedom of action does not in any way mean that there is not a clear definition of the public service obligations entrusted to Trasmediterránea. Indeed, since in accordance with fundamental principle No 5

of the specifications any alteration must be approved by the contracting administration, the definition of the public service obligations derives from a reading of the contract of 1978 in combination with the decisions approving any alterations in those obligations. Moreover, the applicant does not adduce any evidence whatsoever that would allow the Court to state that Trasmediterránea amended its schedule of services without approval from the contracting administration or that the approval decisions taken by that administration were unlawful.

203 It must therefore be held that the public service obligations entrusted to Trasmediterránea under the provisional arrangements are clearly defined and hence the second part of this plea must be dismissed as unfounded.

3. The third part, based on the absence of real need for a public service

(a) Arguments of the parties

204 The applicant maintains that it was not necessary to classify the services offered by Trasmediterránea in the Canary archipelago as a service of general economic interest. In that regard, it points out first that, although the Member State has some latitude in the organisation and design of the service of general economic interest, it is nevertheless for the Community authorities to verify whether the service in question has been designed in such a way as to meet the required material needs.

205 It contends that those needs derive first and foremost from the Communication from the Commission on services of general interest in Europe, point 14 of which states that such services are different from ordinary services in that public authorities consider that they need to be provided even where the market may not

have sufficient incentives to do so. Furthermore, in the specific context of maritime transport, according to the applicant, Article 2 of Regulation No 3577/92 defines public service obligations as obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

206 The applicant goes on to claim that the proposal for appropriate measures already stated that there were serious doubts about the need to impose public service obligations on some of the routes in question, given that those routes could be or were being served adequately by private undertakings operating them commercially and offering similar levels of frequency, continuity, regularity and rates. In the opinion of the applicant, that assessment made in 1997 was even more valid for 1998, a year in which there was not only intense competition on almost all of the subsidised routes but also adequate sea and air connections between the islands.

207 In support of its claim that inter-island maritime connections did not constitute a public service task, the applicant again pointed out at the hearing that in its judgment of 24 October 2003 the Tribunal Superior de Justicia de Canarias annulled Decree No 113/1998. According to the applicant, the main reason for annulling Decree No 113/1998 was that there was no need to set public service obligations in view of the level of competition in the market in the inter-island Canaries routes and the fact that other shipping companies were providing these services with more capacity, more vessels and without subsidy. In the opinion of the applicant, another reason for the annulment of Decree No 113/1998 was that the decree and all its annexes were 'made to measure' for Trasmediterránea and the decree was completely contrary to Community and Spanish law.

208 At the hearing the applicant again referred to a statement from the Directorate-General for Transport of the Canaries Government, which appeared in Annex 28 of the application and which identified, for 1998 and 1999, all the companies operating in the Canary archipelago, stating the vessels, routes, capacity and frequency of traffic. That traffic was maintained even in the absence of public service obligations.

209 The Commission, supported by the Kingdom of Spain, observes first that, in accordance with the case-law on Article 86(2) EC and point 22 of its Communication on services of general interest in Europe, the Member States have wide discretion in determining public service obligations and that control by the Commission is limited, as a matter of principle, to reacting to manifest errors or abuses.

210 It adds, in essence, that its examination could relate only to the need to establish public service obligations when the provisional arrangements of 1998 were introduced, in other words at the end of 1997. Consequently, according to the Commission, neither the statements contained in the proposal for appropriate measures nor the fact that subsequent developments in the situation made it possible to maintain certain services in the Canary archipelago without public service obligations are relevant in the present case.

211 According to the Commission, since the routes in question had, until December 1997, always been covered by public service obligations, it was not unreasonable for the competent authorities to wish to take measures to ensure their continuity until the definitive arrangements came into force.

212 With regard to the judgment of the Tribunal Superior de Justicia de Canarias annulling Decree No 113/1998, the Commission and the Kingdom of Spain assert

first that the annulment of the said decree is of no relevance for assessing the need to classify the services entrusted to Trasmediterránea under the provisional arrangements as services of general economic interest.

213 In that regard the Commission and the Kingdom of Spain maintain that Article 2 of Decree No 113/1998, which was annulled by the judgment of the Tribunal Superior de Justicia de Canarias, laid down public service obligations for all operators, whereas the provisional arrangements consisted in a public service contract with Trasmediterránea and provided for compensation. In their view, the judgment annulling Decree No 113/1998 related to a different situation to that which is the subject of the present action.

214 In addition, the Kingdom of Spain states that the judgment of the Tribunal Superior de Justicia de Canarias is the subject of an appeal to the Tribunal Supremo (Spanish Supreme Court).

(b) Assessment by the Court

215 It must be pointed out first that, for the reasons stated in paragraph 199 above, Regulation No 3577/92 is not applicable to the circumstances in the present case. Hence it is to no avail that the applicant cites Article 2 of that regulation to define the substantive conditions in which a service can be regarded as a service of general economic interest within the meaning of Article 86(2) EC.

216 It must then be noted that, as the Commission states in point 22 of its Communication on services of general interest in Europe, Member States have wide discretion to define what they regard as services of general economic interest

(see to that effect Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 99). Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error.

217 It is then necessary to examine whether the Commission was right to conclude, in the contested decision, that the authorities of the Canaries did not commit a manifest error of assessment in considering that from 1 January 1998 until 31 December of that year there was need of a public service on the Canaries routes, served until then by Trasmediterránea.

218 In that regard it must be found, as did the Commission, that upon expiry of the contract of 1978 it was not unreasonable for the authorities of the Canaries to consider that the state of the market was such that the continuity of maritime connections between the Canary Isles, as provided by Trasmediterránea until 31 December 1997, could not be guaranteed.

219 Although it is common ground that Trasmediterránea offered such services in competition with other operators, including the applicant, the applicant does not show that that competition made it possible to ensure services comparable to those provided by Trasmediterránea in terms of continuity, regularity and frequency on all the routes served by Trasmediterránea under the provisional arrangements.

220 In that regard, contrary to the assertions of the applicant, the existence of competition likely to provide the same level of services as Trasmediterránea on the Canaries routes is not demonstrated by the Commission's finding in the proposal for appropriate measures relating to the contract of 1978 that 'some routes are likely to be served (or are already served) by private undertakings offering similar levels of frequency, continuity and regularity and rates'. Indeed, for the reasons stated in paragraph 173 above, it has not been established in any way that that finding referred to the Canaries routes.

221 Nor does the existence of air connections between some of the islands in the Canary archipelago in 1998 establish that the competition offered inter-island connections that were comparable in terms of frequency, continuity and regularity to those entrusted to Trasmediterránea under the provisional arrangements.

222 With regard to the judgment of the Tribunal Superior de Justicia de Canarias cited by the applicant at the hearing, it must be stated from the outset that, as it was delivered subsequent to the contested decision, it could not be taken into account by the Commission when adopting that decision. Hence the Court is also unable to take account of it when assessing the lawfulness of the contested decision.

223 Moreover, although the applicant maintains that in that judgment the national court found that other operators provided inter-island connecting services similar to those provided by Trasmediterránea with greater capacity and more vessels, it has to be found that the judgment did not contain such a finding.

224 It must again be noted that the applicant does not identify the market analysis data in the judgment of the national court in question that would make it possible to establish that the authorities of the Canaries had committed a manifest error of assessment with regard to the real need for a public service.

225 Furthermore, the other findings allegedly contained in that judgment and cited by the applicant are not such as to establish that the authorities of the Canaries had committed a manifest error of assessment which the Commission should have reported in the contested decision. Indeed, the claimed finding that Decree No 113/1998 and all its annexes were 'made to measure' for Trasmediterránea, which would render that decree contrary to Community and Spanish law, is of no significance in assessing whether market forces were able to guarantee the services provided by Trasmediterránea in the archipelago in 1998.

226 Lastly, contrary to the assertions of the applicant, no statement from the Directorate-General for Transport of the Canaries Government identifying, for 1998, all the companies operating in the Canary archipelago and specifying, for that traffic, the vessels, routes, capacities and frequencies is contained either in Annex 28 of the application or elsewhere in the file.

227 Since none of the applicant's arguments undermine the plausibility of the assessment made by the authorities of the Canaries that the market did not have sufficient incentive to provide connections similar to those offered by Trasmediterránea under the provisional arrangements, it has not been established that those authorities exceeded the limits of their discretion by adopting the decision of 18 December 1997, as renewed subsequently. In those circumstances, it has to be concluded that the contested decision, in which the Commission acknowledges that the authorities of the Canaries could reasonably entrust Trasmediterránea with a task of general economic interest, is not vitiated by an error of assessment.

228 In view of the foregoing, the third part of the present plea must be dismissed as unfounded.

4. The fourth part, based on the absence of a public tendering procedure and the lack of a statement of reasons

(a) Arguments of the parties

229 The applicant claims, in essence, that the award of aid to finance public service obligations must comply with the principle of non-discrimination between

operators, which must have the same opportunities to benefit from the aid in question. According to the applicant, that principle is enshrined in Article 4 of Regulation No 3577/92. The applicant asserts, moreover, that it is in application of that principle that the Community guidelines on State aid to maritime transport provide for the use of public tendering procedures.

230 The applicant maintains that these requirements have not been met in the present case, since the aid granted to Trasmediterránea was awarded to it directly without a call for tenders. Although after that grant of aid a call for tenders was made under Decree No 113/1998, the conditions for that call were, in the opinion of the applicant, manifestly unacceptable, since the decree made no provision for subsidy to operate routes subject to public service obligations, but only laid down maximum rates, which, according to the applicant, were inadequate.

231 Lastly, the applicant claims that the contested decision contains no details on the essential point of whether performance of the task entrusted to Trasmediterránea was obstructed by application of the principle of non-discrimination, according to which aid must be awarded by means of a call for tenders. According to the applicant, such details should have been included in the contested decision, because in the proposal for appropriate measures the Commission had allegedly concluded that application of the State aid rules did not obstruct either in law or in practice the operation of the services in question since those rules require a public tendering procedure. From this it concludes that, in the absence of such detailed information, the contested decision not only contravenes Article 86(2) EC but is also arbitrary and does not contain an adequate statement of reasons.

232 The Commission, supported by the Kingdom of Spain, maintains, in essence, that the Spanish authorities were not obliged to award the public service contracts by means of a call for tenders. In its view, it is clear from point 9 of the Community guidelines on State aid to maritime transport that although the Commission encourages the award of public service contracts through tendering procedures, the use of other methods of award are acceptable, particularly in the case of island cabotage involving regular ferry services.

233 Moreover, since in the present case the facts relate to 1998, the Commission contends that citing Article 4 of Regulation No 3577/92 is of no relevance in the light of Article 6(2) of Regulation No 3577/92, which provides that the regulation does not apply to the Canaries before 1 January 1999.

234 It adds that, in the present state of Community law, no general obligation to award public service contracts by means of calls for tender can be deduced from Article 86 EC. In those circumstances, in the opinion of the Commission there is no need to examine whether an award without a call for tenders complies with Article 86(2) EC.

235 It further contends that, even if the obligation to issue a call for tenders had in principle been applicable in the present case, which it was not, the provisional and temporary nature of the arrangements in question and the principle of continuity of public service recognised in the declaration annexed to the Treaty of Amsterdam could have justified ad hoc treatment, because it would be reasonable to think that only the operator that historically had provided these services was able to maintain them immediately and for such a short period as that covered by the provisional arrangements.

236 Lastly, it maintains that the final arrangements deriving from Decree No 113/1998 permit the award of public service contracts entailing reimbursements only in the framework of a public tendering procedure.

237 In the light of these observations, it is clear, according to the Commission, that the absence of a tendering procedure does not preclude the application of Article 86 (2) EC in the present case.

b) Assessment by the Court

238 It is to no avail that the applicant cites Regulation No 3577/92 and the Community guidelines on State aid to maritime transport in order to establish that contracts for services of general economic interest must be awarded as a result of a tendering procedure. First, Regulation No 3577/92 does not apply to the circumstances of the present case (see paragraph 199 above). Secondly, the abovementioned guidelines, which in any case do not require the use of public tenders to choose the operators entrusted with providing island cabotage services, are not relevant for determining the conditions for applying Article 86(2) EC (see paragraph 200 above).

239 Furthermore, it is not apparent either from the wording of Article 86(2) EC or from the case-law on that provision that a general interest task may be entrusted to an operator only as a result of a tendering procedure. In those conditions, contrary to the applicant's claims, there can be no requirement for the contested decision to contain a particular statement of reasons for the absence of such a procedure for entrusting to Trasmediterránea the provision of a maritime service between the Canary Isles.

240 The fourth part of the present plea must therefore be dismissed.

5. The fifth part, alleging the inadequacy of the compensation for 1998 and the lack of a statement of reasons

(a) Arguments of the parties

241 The applicant maintains, in essence, that the subsidy for 1998 is inadequate and that the contested decision lacks a sufficient statement of reasons on this issue.

242 With regard first to the alleged deficiency in the statement of reasons, the applicant first states that it did not have knowledge of the actual figures on the costs of the routes in question that were taken into account to assess the amount of the subsidy for 1998. The fact that the Commission did not indicate the precise figures on which it based its recognition of the appropriateness of the amount of that subsidy constitutes, in the opinion of the applicant, a lack of a statement of reasons in the contested decision, rendering it void. The applicant asks the Court to order the Commission to produce the contested decision in its entirety so that it may defend itself.

243 With regard secondly to the inadequacy of the compensation, it claims first that, according to Community case-law, in order to benefit from the exception provided for by Article 86(2) EC compensation may only offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest. Furthermore, the grant of such compensation must be necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium (judgment in *FFSA and Others* v *Commission*, cited in paragraph 216 above, paragraph 11). The applicant also maintains that the guidelines on State aid to maritime transport state that the extra costs must be directly related to the deficit recorded by the operator and that they should be accounted for separately for each service in order to avoid overcompensation, cross-subsidy or inefficient management and operating methods.

244 The applicant asserts that in the present case the contested decision does not meet those requirements. It puts forward four arguments in that regard.

245 First, it claims that the Commission did not check the figures contained in the report of the independent expert appointed by the authorities of the Canaries to examine the admissible amount of the compensation for 1998, whereas the impartiality of the author of the report was subject to reservations, since the report had been commissioned by the authorities of the Canaries. In order to substantiate its allegations regarding the report of the expert appointed by the authorities of the Canaries, the applicant asks the Court to order the production of the said report.

246 Secondly, according to the applicant, the methodology underlying the said report was inadequate because it was based on analysis of the costs incurred by a given operator and not on the real costs borne by Trasmediterránea.

247 Thirdly, the applicant asserts that that methodology was tailor-made for Trasmediterránea, because when Decree No 113/1998 was adopted the authorities of the Canaries themselves allegedly concluded that the provision of the services to which it related did not necessitate the grant of subsidy and that the receipts obtained by charging the maximum rates laid down in the decree were sufficient to guarantee the financing of those services. In the view of the applicant, if those rates were sufficient when the call for tenders was issued, their application by Trasmediterránea should not have led to a deficit that needed to be compensated by a subsidy.

248 Moreover, according to the applicant, there was discrimination between Trasmediterránea, which benefited from a subsidy scheme, and other operators, which could benefit only from the arrangements set by Decree No 113/1998, which provided for no subsidy.

249 In order to establish the technical and economic conditions taken into account by the authorities of the Canaries to define the public service obligations and applicable rates in Decree No 113/1998, the applicant asks the Court to order the Spanish authorities to produce the file compiled by the Consejería de Turismo y Transportes of the Autonomous Community of the Canaries in connection with Trasmediterránea's claim for payment of the sums allegedly due to it to cover the operating deficit on the public service cabotage routes between the islands during 1998, 1999 and 2000. It also asks for the report of the independent expert to be produced. In addition, it asks the Court to order the production of the entire file on the calls for tenders for the public service routes in the Canaries after the entry into force of Decree No 113/1998. Lastly, it asks for production of the entire file preparatory to the adoption of Decree No 113/1998, in particular the studies, reports and economic information, on the basis of which the annex defining the public service obligations was drawn up.

250 Fourthly, the applicant asserts that the report by the independent expert does not analyse either the reasons for the operating deficit on the routes or the pricing policy followed by Trasmediterránea, whereas, according to the applicant, it was essential to examine these aspects in order to determine whether the deficit was in fact due to the need to meet public service obligations or to other commercial reasons.

251 In that regard, the applicant maintains that the subsidy compensated a deficit caused mainly by a policy of selectively reducing rates on the high-speed route between Santa Cruz de Tenerife and Las Palmas. More specifically, it states that Trasmediterránea applies, on that route, a reduction of more than 50% in relation to the maximum rates approved for three of the five routes that Trasmediterránea serves daily and on which it is in competition with the applicant. According to the latter, on the other two routes Trasmediterránea charges a rate practically equal to the maximum. In order to demonstrate the truth of the latter allegation, the applicant asks the Court to order the Commission to produce the information it has on the pricing policy applied by Trasmediterránea during 1998 on the routes Los Cristianos — La Gomera and Santa Cruz de Tenerife — Las Palmas. It also asks the Court to order Trasmediterránea to produce a copy of the official rates in force in 1998 for the high-speed route Las Palmas — Santa Cruz de Tenerife, broken down on an hourly basis.

252 The applicant maintains, essentially, that it is unlawful to subsidise routes that in theory are classified as being of general interest when the operator of those routes incurs large operating deficits because of a policy of reducing rates in relation to the rates fixed, which contravenes important provisions of the EC Treaty. In those circumstances, the Commission could not, in the opinion of the applicant, certify that the subsidy for 1998 was compatible with the common market.

253 The Commission, supported by the Kingdom of Spain, contends that the compensation received by Trasmediterránea, which was calculated using a reasonable method, is adequate and proportionate.

254 On the question of methodology, the Commission maintains that the method used involves first a simulation of the fixed and variable costs that a given operator should have incurred to operate each of the routes in question, taking into account the conditions imposed by the public authorities and the traffic flows recorded in earlier years, and secondly a simulation of the foreseeable revenues for each route, calculated by applying the rates to the traffic flows mentioned above. The deficit judged to be objectively justifiable in each case is, according to the Commission, the difference between these costs and revenues. On the basis of these criteria, the Commission asserts that the study concludes that all the routes are loss-making to a greater or lesser extent. The total deficit amounted to ESP 1.652 billion, whereas Trasmediterránea had requested a subsidy of ESP 2.5 billion. The difference between the amount requested by Trasmediterránea and that actually awarded by the authorities of the Canaries proves, according to the Commission, that when the compensation was calculated the interests of Trasmediterránea and those of the Canaries Government were clearly opposed to one another. Hence, in the view of the Commission, there is no reason to suspect that the report of the independent expert had been drawn up to favour Trasmediterránea.

255 According to the Commission, the fact that the report did not rely solely on data provided by Trasmediterránea but used estimates based on the costs that a given operator should incur, far from posing a problem, demonstrated the rigour of the analysis. Indeed, the use of that method made it possible, in the view of the Commission, to avoid dependence on costs that could have been artificially overestimated by Trasmediterránea.

256 Furthermore, the Commission states that it did not blindly accept the report of the independent expert but studied in detail the information on which it was based, its methodology and the calculations made, and concluded that they constituted a reliable basis.

257 With regard to the argument that the compensation paid to Trasmediterránea was excessive on the ground that the revenue from previously authorised rates should be sufficient, the Commission retorts that, in the context of the regulation of a sector, the public authority can legitimately provide that the operator be financed partly by

direct payments from users and partly by public aid, the primary concern of the public authorities being the interest of users of the public service rather than that of the operators.

258 As concerns the complaint that the aid is disproportionate and hence in contravention of Article 86(2) EC on the ground that the compensation serves to finance Trasmediterránea's pricing policy on the routes where it is exposed to competition, the Commission states essentially that this complaint does not stand up to the minimum of scrutiny. First, in the context of the regulation of a sector, the public authority could legitimately provide that the operator entrusted with providing a public service be financed partly by direct payments from users and partly by public aid. According to the Commission, Article 86(2) EC is there precisely to cater for this type of situation. That provision requires that the deficits to be financed by public aid genuinely derive from the public service task entrusted to the undertaking, which is true in the present case.

259 It adds that, in maintaining that the subsidy for 1998 is disproportionate solely on the ground that Trasmediterránea competed with it on price, the applicant is confusing two distinct levels of analysis, one dealing with the compatibility of the subsidy for 1998 and the other with the commercial behaviour that Trasmediterránea may have adopted.

260 The question whether Trasmediterránea did or did not behave in contravention of the competition rules, particularly by offering services at prices below the cost of those in the markets in which, where applicable, it occupied a dominant position, is, according to the Commission, a separate question that would have to be resolved via the appropriate legal channels. Even if it were established that Trasmediterránea's conduct infringed the competition rules, it does not follow, in the opinion of the Commission, that that conduct was financed by the subsidy for 1998, which amounted to only ESP 1.65 billion, whereas Trasmediterránea recorded a deficit of ESP 2.5 billion in 1998 on all of the routes served in that year under the provisional arrangements.

(b) Assessment by the Court

261 It is first appropriate to examine whether the applicant's four complaints regarding the inadequacy of the subsidy for 1998 are well founded.

262 In its first complaint the applicant essentially accuses the Commission of not having checked the data in the independent expert's report, on the basis of which the subsidy for 1998 was calculated, whereas, according to the applicant, the impartiality of that expert was subject to reservations because he had been appointed by the authorities of the Canaries.

263 It must be noted from the outset that the applicant does not put forward any argument whatsoever that can cast serious doubt on the impartiality of the author of the expert report concerned. On the contrary, the report in question fixes the amount of expenses repayable to Trasmediterránea at ESP 1.652 billion, whereas that undertaking requested compensation of ESP 2.5 billion. In those circumstances, it must be considered that it has not been established in any way that the author of the report showed any partiality in favour of Trasmediterránea. Moreover, since the Kingdom of Spain indicated, without being effectively contradicted on that point by the applicant, that the applicant had a copy of the report in question before lodging its reply in the present case, there is no need to order a measure of inquiry requiring the authorities of the Canaries to produce the said report.

264 Even accepting that, irrespective of any partiality on the part of the author of the report in question, the Commission was required to check the data in that report, it must be found that the contested decision indicates clearly that an evaluation was carried out for each route and specifies the different items associated with the costs that were taken into account. Moreover, the applicant does not put forward any

argument whatsoever that could lead the Court to doubt that the Commission had in fact studied in detail the information, the methodology used and the calculations made in drawing up the said report. In those circumstances, the complaint must be dismissed as unfounded.

265 In its second complaint the applicant contends that the additional costs arising from the provision of the alleged public service cannot be validly calculated by taking into account the costs of a given operator instead of the costs actually incurred by Trasmediterránea in providing the service in question.

266 In assessing complex economic facts, the Commission has wide discretion for evaluating the additional costs due to the service concerned. It follows that the review which the Court is called upon to perform in relation to the Commission's assessment must be confined to verifying the accuracy of the facts found and establishing that there is no manifest error of assessment (see to that effect the judgment in *FFSA and Others* v *Commission*, cited in paragraph 216 above, paragraph 101).

267 In the present case, the Commission could reasonably consider that the use of objective costs made it possible to establish the amount of the subsidy for 1998 without having to base its assessment on the costs alleged by Trasmediterránea. If it were established that the objective costs taken into account by the Commission were unduly high, the Commission's assessment of the adequacy of the subsidy for 1998 could be vitiated by a manifest error of assessment. However, in the present case the applicant neither establishes nor even alleges that the objective costs used were excessive. In those circumstances, it must be concluded that the second complaint is unfounded.

268 In its third complaint the applicant accuses the Commission of having accepted the very principle of a subsidy for the provision of the services concerned, which constituted discrimination between Trasmediterránea and the other operators.

269 It is not disputed among the parties that the services provided by Trasmediterránea under the provisional arrangements are also provided for in Decree No 113/1998 and that the maximum rates charged by Trasmediterránea for the provision of those services are also those set by Decree No 113/1998. It is also common ground that Decree No 113/1998 does not provide for any subsidy for the provision of the services of general economic interest to which it relates, for the reason that the rates set for the provision of those services are deemed to be adequate to cover the associated costs. It cannot be deduced from that, however, that the Commission committed a manifest error of assessment by accepting the very principle of the subsidy for 1998. The Commission could reasonably consider that the costs associated with the provision of the service of general economic interest entrusted to Trasmediterránea were not adequately covered by the rates provided for in Decree No 113/1998. In that regard, it must be noted that the applicant itself maintains that those rates were manifestly inadequate to finance the services for which Decree No 113/1998 provides.

270 In those circumstances, there is no need to grant the applicant's request for the production of various documents to corroborate its allegations regarding the public service obligations provided for in Decree No 113/1998 and the rates applicable to those services.

271 Furthermore, contrary to the claims of the applicant, the fact that only Trasmediterránea benefited from the subsidy for 1998 does not constitute discrimination against other operators. It is settled case-law that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences (judgments in Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325, at p. 345, in Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8, and in Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 57).

272 The applicant does not succeed in establishing that operators other than Trasmediterránea were able to provide the maritime services between the islands of the Canary archipelago in accordance with the requirements laid down in the provisional arrangements. Nor does it establish that operators other than Trasmediterránea were entrusted with the task of providing those services. Lastly, it fails to establish that those services were actually offered by operators other than Trasmediterránea.

273 Consequently, it must be held that there was a substantial objective difference between the situation of Trasmediterránea and that of the other operators and that that objective difference was sufficient to justify only Trasmediterránea receiving compensation for the services between the islands of the Canary archipelago that only Trasmediterránea provided. The third complaint is therefore unfounded.

274 In its fourth complaint the applicant alleges essentially that the Commission acknowledged that the amount of the subsidy for 1998 covered the costs associated with the provision of a service of general economic interest, whereas that subsidy offset the operating deficits due to a pricing policy in contravention of the EC Treaty.

275 In that regard, it must be noted first that the applicant does not identify the provisions of the EC Treaty that the alleged pricing policy infringed. Secondly, on the supposition that the applicant intends to maintain that Trasmediterránea infringed Article 82 EC, it must be found that the applicant merely alleges that Trasmediterránea reduced rates on the routes where it was in competition with the applicant, without in the least exploring the reasons why that conduct constitutes, in its opinion, abuse of a dominant position. Lastly, even supposing that the pricing policy in question constitutes abuse of a dominant position, that finding would not have the effect of rendering completely implausible the Commission's assessment contained in the contested decision that the amount of the subsidy for 1998 is strictly proportional to the additional cost of providing the public service and hence compliant with Article 86(2) EC. Indeed, as it is common ground that Trasmediterránea was not reimbursed for the entire deficit associated with the

provision of the maritime services under the provisional arrangements but had to bear ESP 850 million of that deficit itself, it cannot be ruled out that the deficit associated with the pricing policy in question remained at Trasmediterránea's expense, without being offset in any way by the subsidy for 1998.

276 In those circumstances, there is no need to grant the applicant's request that the Court order the Commission and Trasmediterránea to produce documents on that operator's commercial practices on certain routes.

277 It follows from the foregoing that none of the four complaints made by the applicant in support of the fifth part of the present plea is well founded.

278 It is then necessary to examine whether, as the applicant claims, the contested decision is vitiated by the absence of a statement of reasons regarding on the one hand the actual figures on the costs of the routes in question that were taken into account in assessing the amount of the subsidy for 1998 (see paragraph 242 above) and on the other the reasons why the Commission considered that the application of the State aid rules obstructed the performance of the task entrusted to Trasmediterránea (see paragraph 231 above).

279 With regard to the alleged absence of actual figures on the costs of the routes in question, it is sufficient to point out that the unexpurgated version of the contested decision, as addressed to the Kingdom of Spain and of which the applicant has a copy (see paragraph 263 above), contains the data which the applicant complains is absent from the publicly accessible version of the contested decision. The contested decision is therefore not vitiated by the lack of a statement of reasons on this point.

280 With regard to the claimed lack of a statement of reasons on the question of whether the application of the Community's State aid rules obstructed Trasmediterránea in the performance of its task, it must be pointed out that the contested decision indicates clearly and unequivocally the reasoning that led the Commission to consider that the application of those rules would obstruct the performance of the task assigned to Trasmediterránea. It indicates, first of all, that in order to verify whether it is necessary to reimburse Trasmediterránea for the cost it had to bear to fulfil its task, the Commission is required to examine whether there are other operators offering services similar to those entrusted to Trasmediterránea. It then states that no other operator provided such services in the Canary archipelago in 1998. Lastly, it indicates that the subsidy paid and classified as State aid is strictly proportional to the additional cost associated with the performance of the public service obligations in question. In the light of these factors, it must be considered that the contested decision indicates, at least implicitly, that the subsidy for 1998, which would have had to be prohibited under the State aid rules, was necessary to ensure the provision of the services entrusted to Trasmediterránea under the provisional arrangements. The contested decision is therefore not vitiated by the lack of a statement of reasons on this point.

281 It follows from the foregoing that, like the first four parts, the fifth part of the present plea cannot be accepted. Consequently, the plea must be dismissed as unfounded.

282 In the light of all of the foregoing, the application must be dismissed in its entirety.

The requests relating to supporting evidence

283 In addition to the applicant's requests aimed at establishing particular facts, which have been examined above in the context of the various pleas, the applicant also

makes other requests for the production of documents but without identifying the precise facts that such measures are deemed to corroborate. In those circumstances, it must be considered that these requests are not decisive for the verification of lawfulness that the Community Court must carry out. Consequently, these requests must be rejected.

Costs

284 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

285 The Kingdom of Spain is to 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
(Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. **Orders the applicant to bear its own costs and to pay the costs incurred by the Commission;**

3. **Orders the Kingdom of Spain to bear its own costs.**

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 15 June 2005.

H. Jung J. Pirrung

Registrar President

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