# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
4 April 2001 *

In Case T-288/97,

**Regione autonoma Friuli-Venezia Giulia,** represented by R. Fusco and M. Maresca, avocats, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities,** represented by P.F. Nemitz and P. Stancanelli, acting as Agents, assisted by M. Moretto, avocat, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

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

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

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

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2000,

gives the following

## Judgment

### Legal framework and facts

1 In its Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region

(OJ 1998 L 66, p. 18, hereinafter 'the contested decision') the Commission declared part of that aid to be incompatible with the common market and ordered the recovery of the aid, together with interest. That aid was granted, under a regional system of aid not notified to the Commission, to small road haulage contractors established in the Friuli-Venezia Giulia Region (hereinafter 'the Region'), most of which are engaged solely in local or regional transport with a single vehicle.

*Legal framework*

2 The general provisions on State aid set out in Articles 92 of the EC Treaty (now, after amendment, Article 87 EC) and 93 and 94 of the EC Treaty (now Articles 88 EC and 89 EC) apply within the field of transport, subject to the special provisions of Article 77 of the EC Treaty (now Article 73 EC), which provide that aids meeting the needs of coordination of transport or representing reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

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

4 Regarding the coordination of transport, Article 3(1)(d) of Regulation No 1107/70 authorises, under certain conditions, aid granted in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems, and thus to contribute towards meeting the needs of the transport market more effectively. Article 3(1)(e) also authorises, under certain conditions, aid designed to facilitate the development of combined transport.

5 As a measure towards establishing a common transport policy, the international road haulage market was partially liberalised within the Community by Council Regulation (EEC) No 1018/68 of 19 July 1968 on the establishment of a Community quota for the carriage of goods by road between Member States (OJ 1968 L 175, p. 13), which introduced a quota system in 1969. Within that quota, Community authorisations entitled their holders to engage in the carriage of goods between Member States for a period of one year. That system was kept in force until 1 January 1993, the date on which this activity was fully liberalised by Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ 1992 L 95, p. 1).

6 Regarding the market for the carriage of goods within a Member State, Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1989 L 390, p. 3) made cabotage, that is to say, the carriage of goods within one Member State by a carrier established in another Member State, subject, with effect from 1 July 1990, to a transitional system in the form of a progressively increasing Community quota. Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down conditions under which non-resident carriers may operate national road haulage services within a

Member State (OJ 1993 L 279, p. 1) provided for the continuance of that transitional system until the definitive introduction of the full liberalisation of cabotage activities with effect from 1 July 1998.

*The aid in dispute*

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

8 The system introduced by Law No 28/1981 was replaced by Regional Law No 4 of 7 January 1985 on action to promote and develop transport of concern to the Friuli-Venezia Giulia Region and the carriage of goods by road for hire or reward (hereinafter 'Law No 4/1985'). Articles 4 to 6 of Law No 4/1985 introduced a system of regional aid that was essentially identical to the system set up by Law No 28/1981.

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

(a) annual financing, over a maximum period of ten years, of up to 60% (for individual contractors) and 70% (for cooperatives and groups) of the

reference rate laid down by Ministerial Decree, of interest on loans contracted for the purpose (Articles 4 of Laws No 28/1981 and 4/1985) of:

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

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

(b) financing the cost of leasing, for a period of three or five years, new vehicles, trailers and semi-trailers and their swap-bodies, suitable for the operation of road haulage, together with the installations, machinery and equipment for the use, maintenance and repair of vehicles and for the handling of goods, up to the level of 25% (for individual contractors) and 30% (for cooperatives and groups) of the purchase price of the assets. This aid, laid down in Article 7 of Law No 28/1981 and Article 5 of Law No 4/1985, was reduced, for all recipients, to 20% and then to 15% of the purchase price by subsequent regional laws;

(c) annual financing, for groups and other forms of association, of up to 50% of investment to be used for the construction or purchase of installations and equipment required in pursuing the aims of the group or association, or contributing to the operation and development of service centres for housing,

maintenance and repair of vehicles or related facilities and equipment (Article 8 of Law No 28/1981 and Article 6 of Law No 4/1985).

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

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

12 According to the information sent by the Italian Government to the Commission after the initiation of the administrative procedure, aid granted under Article 6 of Law No 4/1985 was for investment in the combined transport sector, namely the purchase of swap-bodies and corresponding attachment devices for intermodal vehicles and semi-trailers. According to that information, that aid accounted for between 10% to 15% of the total amount of aid granted (section II and section VIII, seventh and eighth paragraphs, of the contested decision).

13 According to the contested decision (section II, ninth paragraph), the Italian authorities on several occasions stressed in their observations to the Commission that the granting of the aid was suspended in 1995 following the Commission's comments on the systems of aid in question.

*Administrative procedure and content of the contested decision*

14 Having learned of the existence of Law No 4/1985 when examining another case pertaining to State aid provided for by a later regional law, the Commission, by letter of 29 September 1995, asked the Italian authorities to forward all the legislation, documents, information and data needed to assess the compatibility with the common market of the system of aid established by Law No 4/1985. In that letter, the Commission reminded the Italian authorities that Member States are required to communicate in advance any plans to grant or alter aid and that they must not put the proposed measures into effect until that procedure has resulted in a final decision.

15 Following an exchange of correspondence with the Italian authorities, the text of Law No 4/1985 was communicated to the Commission during a meeting on 18 July 1996, and further information was provided on 18 November 1996.

16 By letter of 14 February 1997, the Commission informed the Italian Government of its decision to initiate the procedure provided for in Article 93(2) of the Treaty in respect of the system of aid for commercial road hauliers laid down by Law No 4/1985 and Law No 28/1981 (OJ 1997 C 98, p. 16). It asked the Italian authorities and interested third parties to submit their observations and furnish all documents, information and data required in order to examine the compatibility of the aid in question with the common market. The Commission

received the Italian Government's observations on 3 April 1997 (supplementary report by the Friuli-Venezia Giulia Region annexed to the letter of 27 March 1997 from the Italian Republic's Permanent Representation, hereinafter 'the supplementary report').

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

'*Article 1*

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

*Article 2*

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

*Article 3*

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

*Article 4*

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

*Article 5*

Italy shall abolish and recover the aid referred to in Article 4. The aid shall be reimbursed in accordance with the provisions of domestic law, together with interest, calculated by applying the reference rates used for assessment of regional aid, as from the date on which the aid was granted and ending on the date on which it is actually repaid.

...'

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

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

20 As regards the market for international carriage, the Commission observes that it was opened up to intra-Community competition from 1969, when Regulation No 1018/68 came into force. On that basis it argues that 'the aid provided for under Laws No 4/1985 and No 28/1981 strengthens the financial position and hence the scope of commercial haulage companies in the Friuli-Venezia Giulia Region *vis-à-vis* their competitors since... 1969 for [undertakings] engaged in international transport and may accordingly affect trade between Member States' (section VII, final paragraph, of the contested decision).

21 Turning to the question whether the aid thus classified as State aid might be the subject of a derogation, the Commission considers that aid for the funding of equipment to be used for combined transport may benefit from the exemption provided by Article 3(1)(e) of Regulation No 1107/70 regarding aid designed to facilitate the development of combined means of transport. As to the other aid in question (hereinafter 'the aid in question' or 'the aid in dispute'), it could not benefit from the derogation provided by Article 3(1)(d) of Regulation

No 1107/70, because there was no situation of excess capacity and no reorganisation plan for the sector. In the same way, the derogations referred to in Article 92(3)(a) and (c) of the Treaty, for aid to promote the economic development of certain areas, are not applicable because there is no regional development plan covering all sectors of the region's economy, and the territory of the Friuli-Venezia Giulia Region as a whole is not one of the areas qualifying for the exemptions. The derogations provided by Article 92(3)(c) of the Treaty in favour of sectoral aid do not apply to the aid in question in that it is not accompanied by any action aimed at an objective of common interest such as a restructuring plan for the sector. Furthermore, aid for leasing operations associated with the acquisition of new vehicles is operating aid (section VIII, 13th paragraph, of the contested decision).

22 The Commission concludes that 'the aid granted under Laws No 28/1981 and No 4/1985 to commercial road haulage companies in the Friuli-Venezia Giulia Region engaged in national transport operations from 1 July 1990 onwards, as well as for those engaged in international transport operations, is incompatible with the common market within the meaning of Article 92 of the Treaty' (section VIII, final paragraph, of the contested decision).

## Related cases

23 By application lodged at the Registry of the Court of Justice on 28 October 1997, the Italian Republic brought an action for the annulment of the contested decision and, in the alternative, the annulment of that decision in that it requires, in Article 5, the recovery of the aid granted from 1 July 1990 onwards (Case C-372/97).

24 By documents lodged at the Registry of the Court of First Instance between 12 December 1997 and 26 January 1998, 151 undertakings, which had benefited from aid granted by the Friuli-Venezia Giulia Region, also brought actions for the annulment of the contested decision. Those cases were joined, by order of the President of the First Chamber, Extended Composition, of 16 June 1998. The oral procedure took place on 15 September 1999. By judgment of 15 June 2000, the Court annulled Article 2 of the decision in so far as it declared illegal aid granted after 1 July 1990 to undertakings engaged exclusively in local, regional or national transport, and Article 5 thereof in so far as it required the Italian Republic to recover that aid. It dismissed the remainder of the application (Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta* v *Commission* [2000] ECR II-2319). That judgment is the subject of an appeal pending before the Court of Justice (Case C-298/00 P).

## Procedure and forms of order sought

25 By application lodged at the Court Registry on 10 November 1997, the applicant brought these proceedings.

26 By document lodged at the Court Registry on 19 February 1998, the Commission raised an objection of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance. On 14 July 1998 the Court decided, pursuant to Article 114(3) of the Rules of Procedure, to open the oral procedure but only with regard to that objection. The objection was dismissed by judgment of the Court in Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871.

27 Following that judgment, the applicant failed to lodge a reply within the prescribed period, and the written procedure was closed on 10 February 2000. At

the Court's request, the applicant submitted, on 4 September 2000, its written observations on the conclusions to be drawn in the present case from the judgment in *Alzetta* v *Commission*. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure.

28 The parties presented oral argument and replied to the Court's questions at the hearing on 13 December 2000.

29 The applicant claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Article 5 of that decision, which requires the recovery of aid granted after 1 July 1990, together with interest;

— order the Commission to pay the costs.

30 The defendant contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

31 At the hearing, the defendant presented its observations on the conclusions to be drawn in the present case from the judgment in *Alzetta* v *Commission*. It withdrew its claims for dismissal of the action to the extent that the action seeks the annulment of Article 2 of the contested decision in so far as that article declares illegal the aid granted after 1 July 1990 to companies engaged exclusively in transport operations at local, regional or national level, and of Article 5 of that decision in so far as it requires the Italian Republic to recover that aid.

## Law

32 In support of its application for annulment, the applicant relies on several main pleas in law. They will be grouped and considered as follows: first, infringement of Article 92(1) of the Treaty, of the principle of legal certainty and of the obligation to state reasons; second, infringement of Article 92(3)(c) of the Treaty, infringement of Article 3(1)(d) and (e) of Regulation No 1107/70, failure to state reasons, and the plea that it is impossible to distinguish the aid considered in the contested decision to be compatible with the common market from the aid which is not and, consequently, to implement that decision; third, misclassification of the aid in dispute as new aid; and fourth, infringement of the principles of the protection of legitimate expectations and proportionality, as well as failure to state reasons for the recovery of the aid.

*Infringement of Article 92(1) of the Treaty, of the principle of legal certainty and of the obligation to state reasons*

Arguments of the parties

33 The applicant submits that the aid in dispute is trivial in amount and intended for small and medium-sized undertakings. It is therefore not such as to affect trade between Member States. In its observations on the judgment in *Alzetta* v *Commission*, the Region argues that the judgment in question (paragraph 84 et seq.) contains a contradiction in this respect. On the one hand, the Court states that the trivial amount of the aid in dispute and the relatively small size of the recipient undertakings do not mean that the aid can be regarded as having no effect on competition and trade between Member States and, on the other hand, it cites the judgment in Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 49) in which it held that '[e]ven aid of a relatively small amount is liable to affect trade between Member States where, as here, there is strong competition in the sector in which the recipient operates'. However, a sector in which, as in the case of international road haulage until 1992 and cabotage until 1998, access to the market was subject to a system of quotas cannot, in the applicant's view, be regarded as a sector in which 'there is strong competition'.

34 In support of that argument, the applicant relied at the hearing, in reply to a question put by the Court, on the fact that the number of road haulage companies established in the region is extremely large, whereas the number of haulage authorisations allocated to the Italian Republic is relatively limited. In particular, the majority of contractors in the region, of which there are several thousand, carry on their business with a single vehicle and are not equipped to engage in international haulage operations. The biggest companies operate 100 to 150 vehicles, which is the equivalent of a small haulage firm in other Member States. However, under the system of quotas applicable in the international haulage

sector, the maximum number of authorisations allocated to the Italian Republic was 7 770 in 1992. The number allocated was appreciably lower in previous years. In the cabotage sector, 3 520 authorisations were granted in 1993, that figure increasing by 30% per year until the market was fully liberalised on 1 January 1998. In those circumstances, the amount of competition was extremely limited, even virtually non-existent, under the quota systems.

35 Moreover, the aid in dispute should logically be treated in the same way as '*de minimis*' aid, which is exempted from the obligation of notification, referred to in point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises adopted by the Commission on 20 May 1992 (OJ 1992 C 213, p. 2), amended and replaced by the notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) and by the Community guidelines on State aid for small and medium-sized undertakings of 23 July 1996 (OJ 1996 C 213, p. 4). By merely recalling, in the contested decision (section VII, second paragraph), the general tenor of the abovementioned texts, which exclude aid granted in the transport sector from the scope of the *de minimis* rule, on the ground that such aid is subject to specific rules, the Commission failed to comply with its obligation to state reasons and infringed the principle of legal certainty. In the sphere of State aid, the Commission must be guided, regardless of the sector of activity concerned, and in any case where no specific rules exist, by the general criteria on which the policy and rules governing competition are based.

36 Furthermore, virtually all the recipients of the aid in question operate within the Region. In that context, the Commission merely mentioned the existence of a risk that the aid would affect trade between Member States and competition, finding that since 1 July 1990 undertakings in the Friuli-Venezia Giulia Region have, in

principle, been competing against any other Italian or Community haulage contractor engaged in cabotage in Italy. In particular, it failed to establish that certain Community undertakings holding a cabotage authorisation had been adversely affected by the aid in dispute.

37 The Commission should also have adduced evidence that the aid in question strengthened the position of undertakings operating in the international transport market up to the end of the quota system on 31 December 1992. Friuli-Venezia Giulia Region road hauliers hold only a marginal share of that market, so that the effect of the aid in question on that market was insignificant.

38 For all those reasons, the conditions laid down for the application of Article 92(1) of the Treaty are not satisfied in the present case.

39 The Commission contends that it sets out explicitly and precisely in the contested decision the grounds on which the aid in question is considered likely to affect trade between Member States and to distort competition. In that decision (section VII), the Commission states in particular the reasons for which the *de minimis* rule is not applicable in this case. Moreover, the Commission is not required to prove that the aid in dispute actually had an effect.

40 During the oral procedure, the Commission challenged the applicant's argument that the quota systems in question had almost eliminated any competition. In

particular, it observed that the international transport sector was very competitive, since the number of authorisations granted was considerable and those authorisations entitled their holders to engage, without limitation, in international transport operations for one year.

Findings of the Court

41 The Court points out, first, that, in matters relating to State aid, the two conditions for the application of Article 92(1) of the Treaty, namely that trade between Member States must be affected and competition distorted, are as a general rule inextricably linked. In particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (*Alzetta* v *Commission*, paragraph 81, and the case-law cited therein).

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

43 It is therefore necessary to examine whether those assessments are well founded in the light of the circumstances of the case and the arguments put forward by the applicant.

44 As regards, first, the applicant's argument based on the modest amount of the aid in dispute, it is settled case-law that even aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in which the recipient operates (*Vlaams Geweest* v *Commission*, cited above, paragraph 49).

45 In this particular case, contrary to what the applicants allege, the quota systems in force on the international road haulage market from 1969 to 1993 and on the cabotage market from 1990 to 1998 enable a situation to be established in which there was actual competition within the limit of the quotas laid down, which was capable of being affected by the grant of the aid in question, as the Court has already pointed out in *Alzetta*v *Commission* (paragraph 92). By virtue of the relevant provisions of Regulations Nos 1018/68, 4059/89 and 3118/93, Community authorisations issued in the carrier's name and usable only for one vehicle, were granted under national quotas for a period of one year in the case of international transport and two months for cabotage. During those periods of validity, holders of an international transport authorisation or a cabotage authorisation were entitled to transport goods without limitation, with one vehicle, between Member States of their choice or within any Member State.

46 Moreover, because of the structure of the market, a feature of which is the presence of a large number of small-scale undertakings in the road haulage sector, even relatively modest aid is liable to strengthen the position of the recipient undertaking as compared with its competitors in intra-Community trade. In that context, the effects on competition and trade of a relatively small amount of aid may not therefore be negligible. It follows that such aid cannot be regarded as of little importance.

47 Since the aid in dispute was liable to have an appreciable effect on trade between Member States and on competition, the Commission was fully entitled to take the

view that the conditions laid down by Article 92(1) of the Treaty were satisfied in the present case. From that point of view, the contested decision does not infringe the principle of legal certainty. The Community guidelines on State aid for small and medium-sized enterprises adopted on 20 May 1992, which introduced the *de minimis* rule with regard to State aid for small and medium-sized undertakings, and the notice of 6 March 1996 on the *de minimis* rule for State aid expressly exclude the transport sector from the scope of that rule.

48 Finally, the Commission gave a sufficient statement of reasons for the contested decision on this point by stating, concisely but clearly, the reasons why the aid in question is such as to affect trade between Member States and distort competition. It also refuted the objections raised by the Italian Government during the administrative procedure. In this connection, it explained in the contested decision (section VII, second paragraph), first, that the Community guidelines on aid to small and medium-sized enterprises and the *de minimis* rule were not adopted until 1992 and, second, 'in accordance with point 2.2 of those guidelines, those rules are not applicable to the transport sector since there are specific rules on competition in that sector'.

49 As regards, secondly, the complaint concerning the alleged absence of proof of any actual effect on intra-Community trade and competition attributable to the aid in dispute, it must be pointed out that State aid fulfils the conditions for the application of Article 92(1) of the Treaty if it threatens to distort competition and is capable of affecting trade between Member States (*Alzetta* v *Commission*, paragraph 80, and the case-law cited therein).

50 Contrary to the applicant's allegations, the onus was therefore not on the Commission to establish that the aid in question had affected the competitive position of certain haulage undertakings.

51 Moreover, as regards the applicant's argument that most of the undertakings receiving the aid in question operate solely at local level, it should be borne in mind that according to well-established case-law, an aid may be of such a nature as to affect trade between Member States and to distort competition even if the recipient undertaking that is competing with producers from other Member States does not itself export. A situation of this kind may also arise when there is no excess capacity in the particular sector. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State.

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

53 Likewise, as regards international transport, which was partially opened up to Community competition from 1969 and fully liberalised from 1 January 1993, in the contested decision (section VII, 10th and 11th paragraphs) the Commission rejected the Italian Government's objection that hauliers from the Friuli-Venezia Giulia Region play only a small part in international transport, and can therefore be regarded as having little significant effect on competition. Having pointed out that the limited nature of the competition cannot preclude the application of

Article 92(1) of the Treaty in the road haulage sector, it rightly stated that the aid in question strengthens the financial position and hence the scope of commercial road haulage companies in the Friuli-Venezia Giulia Region *vis-à-vis* their competitors and may accordingly affect trade between Member States.

54 In consequence, the essentially local activity of most recipients of the aid in question and the existence of quota schemes were not such as to prevent the aid from having an effect on trade between Member States and on competition, as the Court has already held in *Alzetta* v *Commission* (paragraphs 91 to 97).

55 On all those grounds, the pleas alleging infringement of Article 92(1) of the Treaty, infringement of the principle of legal certainty and failure to state reasons must be dismissed as unfounded.

*Infringement of Article 3(1)(d) and (e) of Regulation No 1107/70, of Article 92(3)(c) of the Treaty and of the obligation to state reasons, and the plea that it is impossible to distinguish the aid which the contested decision considers compatible with the common market from that which it does not and, consequently, to implement the contested decision*

Arguments of the parties

56 The applicant submits that, by finding that the aid in question was not, in the majority of instances, covered by the derogations provided for in Article 3(1)(d)

and (e) of Regulation No 1107/70 and by Article 92(3)(c) of the Treaty, the Commission infringed those provisions and failed to give adequate reasons for the contested decision in that regard.

57 It challenges the contested decision, first, in respect of its finding that the aid in question is not covered by the exemption provided for by Article 3(1)(d) of Regulation No 1107/70 in so far as it was not part of any reorganisation plan for the sector concerned, within the meaning of that article, and was not intended to eliminate excess capacity in that sector. Contrary to the Commission's claims, all the aid is part of an effective restructuring project for the road haulage sector which complies with Community rules and was notified to the Commission. Moreover, the leasing aid for the purchase of new vehicles was not intended to increase capacity — which was frozen by the licence system — but to bring about a qualitative restructuring in order, in particular, to put an end to the placing of an excessive workload on resources and personnel, with negative repercussions in terms of safety.

58 Second, as regards aid intended to finance equipment for combined transport, which is exempt under Article 3(1)(e) of Regulation No 1107/70, the Region states, in its observations on the consequences of the judgment in *Alzetta* v *Commission*, that the Court was not called on to consider this question in that case. It submits that the Commission committed an arror of assessment in taking the view that only 10 to 15% of the aid in question was covered by that exemption. Article 3(1)(e) of Regulation No 1107/70 refers, in general terms, to aid relating to 'investment in fixed and movable facilities necessary for transhipment'. All the disputed aid fulfils that condition. The Italian authorities had explained that the percentage of 10 to 15% of the disputed aid, which they

had indicated as aid intended to finance combined transport equipment, represented an average rate and that it would be impossible to verify the actual use of equipment financed and suitable for a use in both wheeled and intermodal transport of containers, swap-bodies and semi-trailers for combined use.

59 The applicant also maintains that the national and regional authorities are unable to identify the aid to be recovered. Because the contested decision contains no detail whatsoever with regard to the aid falling within the category referred to in Article 3 of the operative part of that decision, which declares that the aid for financing equipment to be used in combined transport is compatible with the common market, those authorities are not in a position to implement the contested decision.

60 Third, the disputed aid fulfils the conditions for exemption laid down by Article 92(3)(c) of the Treaty. It is intended to facilitate development of the economic activity of transport in a manner which respects the environment and takes account of specific regional characteristics. Because of its particular geographical position, the Friuli-Venezia Giulia Region needs to be 'defended' — on account of the modest share of the international road haulage market held by undertakings established in that region — against competition from countries outside the European Community, such as Austria (until 1994), Croatia and Slovenia. Moreover, the aid in question forms part of a project for the qualitative restructuring of the undertakings concerned, which is evident from the very nature of that aid which is intended to achieve objectives clearly defined by law. It is being introduced in a sector which is not characterised by excess capacity, as the Commission itself has conceded. No legal significance whatsoever can be attributed to the mere technical fact that no measure specifically described as a 'restructuring plan' has been adopted by the national or regional Italian authorities. On the contrary, the actual and practical significance of the aid measures must be assessed in their economic context. The aid in question here, which is degressive, trivial in amount and for the most part intended for very

small undertakings, was not likely to have an adverse effect on trading conditions to an extent contrary to the common interest. Moreover, the Region did not grant the applications for aid submitted in 1994 and 1995.

61 In its observations on the judgment in *Alzetta* v *Commission* and during the hearing, in reply to a question put by the Court, the Region suggested that in the Draft Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2000 C 89, p. 15) the Commission had itself acknowledged that aid granted to small enterprises in the transport sector must be considered to be compatible with the common market within the meaning of Article 87(3) EC. That draft group exemption regulation, which was adopted under the powers conferred on the Commission by Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), does not mention the transport sector among the sectors excluded from the scope of the exemption.

62 In the first place, the defendant maintains that the conditions for the application of Article 3(1)(d) of Regulation No 1107/70, namely the existence of excess capacity causing serious structural difficulties in the transport sector and with the existence of a reorganisation plan, are not satisfied in this case.

63 In the second place, it challenges the applicant's interpretation according to which the derogation referred to in Article 3(1)(e) of Regulation No 1107/70 should have been extended to cover all aid granted under the disputed laws, including the aid for renewal of the vehicle fleet.

64 In the third place, Article 92(3)(c) of the Treaty should be interpreted as meaning that sectoral aid may be considered to be compatible only if its adverse effects on

trade and competition are offset by real advantages for the common interest, and provided that the offsetting is done in the context of the Community and not from the standpoint of a single Member State (Joined Cases T-126/96 and T-127/96 *Breda Fucine Meridionali* v *Commission* [1998] ECR II-3437, paragraph 97 et seq., and Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 26). On that view, the preparation of a restructuring plan specifying in detail the advantages for the common interest in granting the disputed aid could, in principle, constitute action in the common interest capable of offsetting the distorting effects of that aid on competition and trade.

Findings of the Court

65 First, as regards the application of Article 3(1)(d) of Regulation No 1107/70, that provision authorises only and subject to certain conditions aid granted with a view to eliminating, as part of a reorganisation plan, excess capacity causing serious structural problems.

66 In this case, there is no evidence in the file to show that such excess capacity exists. On the contrary, according to the contested decision (section VIII, third paragraph), in their observations on the decision to initiate the procedure the Italian authorities stated that in the Friuli-Venezia Giulia Region there was 'no problem of excess capacity in the sector... but, rather an undercapacity in vehicle fleet of about 20% as compared to real needs — in other words, an excessive workload is being placed on existing equipment and personnel in the Region'. That statement is corroborated by the applicant's argument that the disputed aid

aims to remedy structural difficulties arising from over-use of equipment and personnel.

67 Furthermore, it must be observed that the aid systems in question in no way refer to the need to avoid increasing the capacity of the sector and impose no condition in order to avoid such an increase. In addition, the applicant's statement that the disputed aid was part of a 'project' for restructuring the road haulage sector is very general and does not prove that the aid formed part of a reorganisation plan which preceded it and accompanied its introduction, as required by Article 3(1)(d) of Regulation No 1107/70.

68 Second, the applicant's submission that the defendant failed to have regard to Article 3(1)(e) of Regulation No 1107/70 by finding, in the contested decision, that only 10 to 15% of the disputed aid was intended for combined transport and therefore eligible for a derogation under that provision, is likewise not well founded. The applicant merely suggests that all equipment, even non-specific, used in combined transport is covered by that provision. Such an interpretation is incompatible with the wording of Article 3(1)(e) of Regulation No 1107/70, which exempts aid 'designed to facilitate the development of combined transport' provided that it relates in particular to 'investment in fixed and movable facilities necessary for transhipment' or 'investment in transport equipment specifically designed for combined transport and used exclusively in combined transport'. The applicant's submission is also incompatible with the objectives pursued by that provision, as set out in the fourth, fifth and sixth recitals in the preamble to Council Regulation (EEC) No 3578/92 of 7 December 1992 amending Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway (OJ 1992 L 364, p. 11), namely to achieve economic and social cohesion rapidly in the Community by putting the emphasis on 'combined transport', in particular where it presents an alternative to infrastructure work that cannot be completed in the short term, to encourage small and medium-sized undertakings to avail themselves of that type of transport and to develop new bimodal and transhipment technology.

69 Moreover, the Commission's finding that 10 to 15% of the total amount of the disputed aid was for financing combined transport equipment is based on the information provided by the Italian Government during the administrative procedure.

70 In this regard, the Commission clearly stated in the contested decision (sections II and VIII, seventh paragraph) that under the aid systems in question, the aid for combined transport, which was declared compatible with Article 92(1) of the Treaty by virtue of Article 3(1)(e) of Regulation No 1107/70, was for the purchase of swap-bodies and corresponding attachment devices for intermodal vehicles and semi-trailers.

71 In those circumstances, the applicant's claim that it is impossible to distinguish, in the contested decision, the aid earmarked for combined transport — and exempted on that basis — from the aid declared incompatible with the common market is also without any foundation. Contrary to the applicant's claim, therefore, the national or regional authorities are not unable to implement the contested decision.

72 Third, with regard to derogations for sectoral aid covered by Article 92(3)(c) of the Treaty, it must be pointed out that the disputed aid in this case does not come within the scope of any of the Community guidelines laying down, according to the objective pursued, rules which the Commission follows when applying that provision. Aid not covered by any of those guidelines may none the less enjoy a derogation, if its purpose is to facilitate the development of certain activities and it does not adversely affect trading conditions to an extent contrary to the common interest, in accordance with Article 92(3)(c) of the Treaty.

73 The Community judicature has interpreted that provision as meaning that economic assessments made when applying it must be conducted in a Community context, which means that the Commission is under an obligation to examine the impact of an aid on competition and intra-Community trade. It is for the Commission, during that examination, to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition (*Philip Morris* v *Commission*, paragraphs 24 and 26; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 51; and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 282 and 283).

74 It should be borne in mind that Article 92(3) of the Treaty confers on the Commission a wide discretion to allow aid by way of derogation from the principle in Article 92(1) that State aid is incompatible with the common market. The Commission's examination entails consideration and appreciation of complex economic facts and conditions. Since the Community judicature cannot substitute its own assessment of the facts, especially in the economic field, for that of the originator of such a decision, the Court must confine itself to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment or misuse of powers (see, for example, *Philip Morris*, paragraphs 17 and 24; Case C-142/87 *Belgium* v *Commission*, '*Tubemeuse*' [1990] ECR I-959, paragraph 56; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34, and Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 63).

75 In this instance it is apparent from the file that, contrary to the applicant's assertions, in the course of the administrative procedure the Italian authorities did not provide any definite evidence of a specific, detailed plan for the restructuring of the road haulage sector. On the contrary, the authorities stated that no restructuring plan was necessary for the immediate future and, moreover, merely

alluded to possible measures to rationalise the sector, in particular through measures designed to encourage mergers and incentives for combined and intermodal transport, soon to be adopted by the regional authority (supplementary report, point 2-4, second paragraph).

76 In those circumstances the Commission, without exceeding the limits of its power of assessment, was able in section VIII, 14th paragraph, of the contested decision to take the view that it did not have information at its disposal enabling it to establish that the aid in question supported an action in the common interest, such as a restructuring plan.

77 Furthermore, the Commission rightly observed in section VIII, 13th paragraph, of the contested decision, that some of the aid in dispute, such as leasing aid for the acquisition of rolling stock in order to renew the existing fleet, described as old in the supplementary report, was operating aid, to which the derogation set out in Article 92(3)(c) of the Treaty does not apply (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 77 and 78). Since the replacement of old vehicles is a cost that all road hauliers normally have to bear if they are to continue offering services on the market on competitive conditions, that aid artificially strengthened the financial position of the recipient undertakings to the detriment of their competitors.

78 On all those grounds, the pleas alleging infringement of Article 3(1)(d) and (e) of Regulation No 1107/70 and Article 92(3)(c) of the Treaty and failure to state reasons, as well as the plea that it is impossible to identify the aid declared compatible in the contested decision, and consequently to comply with that decision, must be dismissed.

*Misclassification of the disputed aid as new aid*

Arguments of the parties

79 The applicant argues that the aid in question should be treated as existing aid because it was provided for by laws of 1981 and 1985, which preceded the liberalisation of the sectors concerned. By classifying it as new aid in the contested decision, the Commission committed a serious breach of the procedural rules laid down in Article 93 of the Treaty.

80 It was only from the time when the international road haulage market and the cabotage market were opened up fully to competition, on 1 January 1993 and 1 July 1998 respectively, that subsidies granted in those two sectors were capable of affecting trade and could therefore be classified as 'aid' within the meaning of Article 92(1) of the Treaty. However, it is clear from the wording and rationale of Article 93(3) of the Treaty that that provision is centred around an obligation to notify 'planned aid' in advance and on an obligation not to implement such a plan until the Commission has terminated the review procedure. When therefore a sector undergoes complete liberalisation, any aids instituted previously are not covered by that provision, to the extent that they have already been implemented.

81 In its written observations on the consequences of the judgment in *Alzetta* v *Commission*, the Region points out that, in that judgment (paragraph 149), the Court held that the aid granted from 1 July 1990 onwards to undertakings engaged solely in local, regional or national transport had been misclassified as new aid.

82 As far as the aid granted to undertakings engaged in international transport is concerned, the Region disputes the classification — confirmed by the Court in the abovementioned case — of that aid as new aid, on the ground that it was introduced after the liberalisation of the international haulage market in 1969 by Regulation No 1018/68 establishing a system of quotas.

83 It maintains that the international haulage sector could be considered subject to the free play of competition only from the time when it was fully liberalised by the introduction, by Regulation No 881/92 which entered into force on 1 January 1993, of a system of 'Community authorisations' making access to the market subject to purely qualitative criteria.

84 The argument that the transition from a system of market regulation based on quantitative criteria to one based on qualitative criteria constitutes the test of whether a sector can be regarded as liberalised is confirmed, by analogy, by the analysis of the Community system of public procurement in the public utility sectors, established by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84). It is clear from the 11th, 13th and 19th recitals in the preamble to that directive that markets opened up to competition are excluded from its scope. In its Communication pursuant to Article 8 of Directive 93/38 (OJ 1999 C 129, p. 11), the Commission took the view that, pursuant to that article, a number of telecommunications services were excluded from the scope of the directive as a consequence of the liberalisation of the telecommunications markets in question. That liberalisation was characterised by the transition from a system of special or exclusive rights (and therefore quantitative restrictions) to a system of authorisations (and therefore qualitative selection).

85 The Commission, for its part, stated at the hearing that it was no longer challenging the classification as existing aid adopted by the Court in *Alzetta* v

*Commission* as regards the aid granted with effect from 1 July 1990 to undertakings engaged solely in local, regional or national transport (see paragraph 31 above).

86 However, it explained that that aid had been classified as new aid in the contested decision as it was to be expected, in the case of the Member State concerned, that such measures would become State aid for the purposes of Article 92(1) of the Treaty when the market was liberalised. In those circumstances, the principles of legal certainty and protection of legitimate expectations did not require the classification of that aid as existing aid. Moreover, it is also in accordance with those principles that Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), which is not applicable in this case, provides — by way of exception to the principle that measures which have become aid following developments in the market should be considered as existing aid — that, '[w]here certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'. In this instance, the Commission has pointed out that, in the transport sector, there was no cabotage before the liberalisation of that sector by Regulation No 4059/89.

87 The Commission also rejects the Region's argument that subsidies constitute State aid for the purposes of Article 92(1) of the Treaty only from the time of the full liberalisation of the market concerned.

88 In the present case, the laws providing for the aid in question should therefore have been notified to the Commission, on their adoption in 1981 and 1985 respectively, as provisions instituting new aid, since the international road haulage market had been partly opened up to intra-Community competition since 1969.

Findings of the Court

89 The Commission does not challenge the classification of the aid granted, after the liberalisation of the cabotage market, to undertakings engaged solely in local, regional or national transport, which was upheld in the judgment in *Alzetta* v *Commission*, as existing aid. It is therefore sufficient to observe that a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, in so far as at the time of its establishment it did not come within the scope of Article 92(1) of the Treaty, which applies only to sectors open to competition, as the Court has already held in the abovementioned judgment (paragraphs 142 to 144, 146 and 147). In the present case, the Commission acknowledged at the hearing that the cabotage sector was closed to Community competition before it was liberalised by Regulation No 4059/89.

90 Moreover, contrary to the explanations furnished by the defendant during the hearing, the application, at the time of the liberalisation of the cabotage sector, of the system of new aid established by Article 93(3) of the Treaty with regard to aid granted in that sector prior to its liberalisation was not foreseeable by the Member State concerned solely on the basis of the provisions of the Treaty. In so far as that aid had been granted when the market was still closed to Community competition, the parties concerned could not but assume, in the absence of detailed provisions implementing Article 93 of the Treaty and ruling out the classification of such aid as existing aid after the date fixed for liberalisation, that it was subject to the system of existing aid. Article 93(3) of the Treaty imposes, in express terms, only an obligation of notification in respect of 'plans to grant or alter aid', so that they can be submitted to the Commission for scrutiny before they are implemented.

91 It follows that aid granted to undertakings engaged solely in local, regional or national transport must be classified as existing aid and can be the subject, if at

all, only of a decision finding it incompatible as to the future, as the Court has held in its judgment in *Alzetta* v *Commission* (paragraphs 147 and 148).

92 Conversely, since the international road haulage sector was opened up to competition by Regulation No 1018/68 from 1969 onwards, the systems of aid in question, which were established in 1981 and 1985, clearly fell within the scope of Article 92(1) of the Treaty when they were introduced and should, therefore, have been regarded as new systems of aid which were subject, as such, to the obligation of notification laid down by Article 93(3) of the Treaty.

93 In this regard, the Court cannot uphold the applicant's argument that only aid granted after the market was opened up fully to competition can be classified as new aid.

94 As has already been held (see paragraph 45 above), the establishment of a system of quotas in the international transport sector from 1969 onwards introduced a situation of actual competition liable to be distorted by the granting of the disputed aid, which therefore fell, from that date, within the scope of Article 92(1) of the Treaty.

95 In those circumstances, the analogy drawn by the applicant with the Community system of public procurement in the water, energy, transport and telecommunications sectors, established by Directive 93/38, is without any foundation. In those sectors, the criterion of full liberalisation of the market is applied in order to determine the field of application of the system established by that directive in comparison with other rules applicable in regard to public procurement. On the

other hand, in matters relating to State aid, it is sufficient that the market concerned be open, even partly, to competition, for aid to be capable of affecting trade between Member States.

96 For all those reasons, the plea alleging misclassification of the aid in question as new aid can be upheld only in so far as it relates to aid granted from 1 July 1990 onwards to undertakings engaged solely in local, regional or national transport.

97 As the Court has already held in *Alzetta* v *Commission* (paragraph 150), the contested decision must therefore be annulled in so far as Article 2 thereof declares aid granted with effect from 1 July 1990 to undertakings engaged solely in local, regional or national transport to be illegal, and in so far as Article 5 requires recovery of that aid.

*Infringement of the principles of protection of legitimate expectations and proportionality and failure to state reasons for the recovery of the aid in question, together with interest*

Arguments of the parties

98 According to the applicant, the obligation to recover the disputed aid, which is imposed by Article 5 of the contested decision, is contrary to the principles of the protection of legitimate expectations and proportionality. The Region and the recipients of the aid were not in a position, in 1985, to foresee that the aid, which

was granted lawfully, would be held to be unlawful 12 years later 'solely with reference to aid disbursed with effect from 1 July 1990'. The Region's good faith is demonstrated by the fact that it immediately suspended disbursement of the aid in question when it was informed of the Commission's complaints regarding its compatibility with the Treaty.

99 In its observations on the conclusions to be drawn from the judgment in *Alzetta* v *Commission*, the applicant states that, in that judgment (paragraph 158), the Court observed that 'exceptional circumstances' may allow the recipients of aid to plead legitimate expectations as to the lawfulness of that aid, even if it was not notified in accordance with Article 93(3) of the Treaty. According to case-law, a long interval which has elapsed prior to the adoption of the contested decision can constitute such 'exceptional circumstances' (Case 223/85 *RSV* v *Commission* [1987] ECR 4617).

100 The Commission states that the obligation to recover aid, imposed in the contested decision, applies to aid paid to undertakings engaged in international transport since 1981.

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

Findings of the Court

102 The Court has already held, in *Alzetta* v *Commission* (paragraphs 162 to 166), that Article 5 of the operative part of the contested decision, which refers to aid

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

103 It should also be pointed out that aid granted to undertakings engaged in local, regional or national transport is not required to be repaid, because, as has already been held (see paragraphs 89 to 91 above), it is existing aid, which may only be held incompatible *ex nunc*.

104 The Court must therefore verify whether the contested decision, in requiring the recovery of aid granted to undertakings engaged in international transport, together with interest, is compatible with the principles of proportionality and protection of legitimate expectations relied on by the applicant.

105 As regards, first, the alleged breach of the principle of proportionality, it should be observed that, since the elimination of an illegal aid through recovery of the amount of aid disbursed plus interest is the logical consequence of a finding that the aid is incompatible with the common market and is aimed solely at restoring the previously existing competitive situation, that obligation cannot in principle

be disproportionate to the objectives of Articles 92, 93 and 94 of the Treaty (*Alzetta* v *Commission*, paragraph 169, and the judgments cited therein).

106 In the present case, the applicant has not put forward any specific evidence to show that the obligation to reimburse individual aids granted to undertakings engaged in international transport is, in view of the effect of such aids on competition, manifestly disproportionate to the objectives of the Treaty.

107 As for the complaint of breach of the principle of protection of legitimate expectations, only exceptional circumstances can validly be the foundation for recipients' expectations as to the lawfulness of that aid. Furthermore, recognition of such legitimate expectations presupposes in principle that the aid has been granted in compliance with the procedure laid down by Article 93 of the Treaty. A diligent economic operator should normally be able to determine whether that procedure has been complied with (*Alzetta* v *Commission*, paragraph 171, and the judgments cited therein).

108 In the present case, the systems of aid in question were not notified. Moreover, the applicant does not plead any exceptional circumstance which could be the foundation for legitimate expectations as to the lawfulness of the aid granted to undertakings engaged in international transport. In particular, the adoption of a decision declaring the aid incompatible many years after it was granted can in fact be explained by the failure of the Member State concerned to notify the aid scheme in question. In the present case, the applicant does not claim any delay attributable to the Commission, unlike the situation examined in the judgment in *RSV* v *Commission* (paragraphs 13 to 17), which it cites.

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

110 Moreover, as regards the obligation to recover the aid incompatible with the common market, the Court has already held in *Alzetta* v *Commission* (paragraph 176) that the contested decision contains an adequate statement of reasons: having established that the aid in question distorts competition within the Community between commercial road haulage undertakings established in the Friuli-Venezia Giulia Region and those established outside that region (section VI, eighth paragraph), the Commission finds that action to recover that aid is necessary in order to restore the 'fair conditions of competition' which existed before the aid was granted (section IX, second paragraph).

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

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

## Costs

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

On those grounds,

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

hereby:

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

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

3. Dismisses the remainder of the application.

4. Orders each party to bear its own costs.

Mengozzi García-Valdecasas Tiili

Moura Ramos Cooke

Delivered in open court in Luxembourg on 4 April 2001.

H. Jung P. Mengozzi

Registrar President