JUDGMENT OF THE COURT (Third Chamber)

1 June 2006 *

In Joined Cases C-442/03 P and C-471/03 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 17 October and 10 November 2003 respectively,

P & O European Ferries (Vizcaya) SA, established in Bilbao (Spain), represented by J. Lever QC, J. Ellison, Solicitor, and M. Pickford, Barrister, assisted by E. Bourtzalas and J. Folguera Crespo, abogados,

appellant in Case C-442/03 P,

Diputación Foral de Vizcaya, represented by I. Sáenz-Cortabarría Fernández, M. Morales Isasi, abogados,

appellant in Case C-471/03 P,

* Languages of the case: English and Spanish.

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, J.-P. Puissochet (Rapporteur), S. von Bahr and A. Borg Barthet, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 9 February 2006,

gives the following

Judgment

1 By their appeals, P & O European Ferries (Vizcaya) SA, formerly Ferries Golfo de Vizcaya SA ('P & O Ferries'), and the Diputación Foral de Vizcaya (Provincial

Council of Biscay, 'the Diputación') ask the Court to set aside the judgment of the Court of First Instance of the European Communities of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2003] ECR II-2957 ('the judgment under appeal') dismissing their actions for the annulment of Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya (OJ 2001 L 89, p. 28, 'the contested decision').

Facts of the dispute and the contested decision

2 The facts giving rise to the dispute were set out in the judgment under appeal as follows:

'1 On 9 July 1992 the Diputación ... and the Ministry of Trade and Tourism of the Basque Government, of the one part, and Ferries Golfo de Vizcaya, now P & O European Ferries (Vizcaya) ... of the other part, signed an agreement (hereinafter "the original agreement") relating to the establishment of a ferry service between Bilbao and Portsmouth. That agreement provided for the purchase by the signatory authorities between March 1993 and March 1996 of 26 000 travel vouchers to be used on the Bilbao-Portsmouth route. The maximum financial consideration to be paid to P & O Ferries was fixed at ESP 911 800 000 and it was agreed that the tariff per passenger would be ESP 34 000 for 1993-94 and, subject to alteration, ESP 36 000 for 1994-95 and ESP 38 000 for 1995-96. The Commission was not notified of the original agreement.

2 By letter of 21 September 1992, Bretagne Angleterre Irlande, a company which has, under the name "Brittany Ferries", operated a shipping service between the

ports of Plymouth in the United Kingdom and Santander in Spain for a number of years, lodged a complaint with the Commission concerning the large subsidies which were to be granted by the Diputación and the Basque Government to P & O Ferries.

3 By letter of 30 November 1992, the Commission requested the Spanish Government to provide all the relevant information concerning the subsidies in question. Its reply reached the Commission on 1 April 1993.

4 On 29 September 1993 the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC). It took the view that the original agreement was not a normal commercial transaction given that it concerned the purchase of a predetermined number of travel vouchers over a period of three years, that the agreed price was higher than the commercial rate, that the vouchers would be paid for even in respect of journeys which were not made or were diverted to other ports, that the agreement included an undertaking to absorb all losses during the first three years of operation of the new service and that the element of commercial risk was therefore eliminated for P & O Ferries. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to P & O Ferries constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and did not fulfil the conditions necessary for it to be declared compatible with the common market.

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

6 By letter of 10 November 1993, the Basque Government informed the Commission that implementation of the original agreement had been suspended.

7 The decision to initiate a procedure concerning the aid granted by the Kingdom of Spain to P & O Ferries was the subject of a communication of the Commission addressed to the other Member States and the interested parties, which was published in the *Official Journal of the European Communities* (OJ 1994 C 70, p. 5).

8 In the course of the administrative procedure, P & O Ferries and the Commission discussed the type of agreement which could be negotiated by the parties. In particular, the discussions related to proposed amendments to the original agreement and proposals for replacing it with a new one.

9 By letter of 27 March 1995 to an official in the Directorate-General for Transport responsible for State aid in the transport sector, P & O Ferries sent the Commission a copy of a new agreement (hereinafter "the new agreement") which had been concluded on 7 March 1995 by the Diputación and P & O Ferries and would apply from 1995 to 1998. It is apparent from a letter enclosed by P & O Ferries that the Diputación was to receive interest on the sums which had been made available to P & O Ferries under the original agreement.

10 Under the new agreement, the Diputación undertook to purchase, for the period from January 1995 to December 1998, a total of 46 500 travel vouchers to be used on the Bilbao-Portsmouth route operated by P & O Ferries. The maximum financial consideration to be paid by the public authority was fixed at ESP 985 500 000, of which ESP 300 000 000 were to be paid in 1995, ESP 315 000 000 in 1996, ESP 198 000 000 in 1997 and ESP 172 500 000 in 1998. The agreed tariff per passenger was ESP 20 000 for 1995, ESP 21 000 for 1996, ESP 22 000 for 1997 and ESP 23 000 for 1998. Those tariffs were discounted to reflect the long-term purchasing commitment entered into by the Diputación and were calculated on the basis of a reference tariff of ESP 22 000,

that is to say the published commercial tariff for 1994, plus 5% per annum, increasing the tariff to ESP 23 300 in 1995, ESP 24 500 in 1996, ESP 25 700 in 1997 and ESP 26 985 in 1998.

11 Clause 5 of the new agreement reads as follows:

"... the [Diputación] hereby confirms that all necessary steps have been taken to comply with all applicable laws in respect of the agreement and in particular that it does not contravene internal legislation, the Law on the Protection of Competition, nor Article 92 of the Treaty of Rome, and all necessary steps have been taken to comply with Article 93(3) of the Treaty of Rome."

12 On 7 June 1995 the Commission adopted a decision terminating the review procedure initiated in relation to aid to P & O Ferries (hereinafter "the decision of 7 June 1995").

13 The decision of 7 June 1995 stated that the new agreement introduced a number of significant modifications in order to meet the Commission's concerns. The Basque Government was not a party to this agreement. According to the information supplied to the Commission, the number of travel vouchers to be purchased by the Diputación was based on the estimated take-up of the offer by certain low-income groups and those covered by social and cultural programmes, including school groups, young people and the elderly. The cost of the vouchers was below the advertised brochure price of tickets for the period in question, in accordance with the normal market practice of volume discounts for large users of commercial services. It was also stated in the decision that the remaining elements of the original agreement which had caused concern had been deleted from the new agreement.

14 In the decision of 7 June 1995, the Commission also found that the viability of the service offered by P & O Ferries had been proven by its commercial results and that the latter had established its business without any benefit from State support. According to the new agreement, P & O Ferries had no special rights to use the port of Bilbao and its priority on the berth was limited to the scheduled arrival and departure times of its vessels, which meant that other vessels could in fact use the berth at other times. The Commission considered that the new agreement, which was designed for the benefit of local people using local ferry services, appeared to reflect a normal commercial relationship, with arm's length pricing for the services provided.

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

16 By judgment of 28 January 1999 in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139 ..., the Court of First Instance annulled the decision of 7 June 1995 on the ground that the Commission had founded the decision on a misinterpretation of Article 92(1) of the EC Treaty when concluding that the new agreement did not constitute State aid.

17 On 26 May 1999 the Commission decided to initiate the procedure provided for in Article 88(2) EC in order to enable interested parties to submit their comments on the position adopted by the Commission in the light of the *BAI* v *Commission* judgment (OJ 1999 C 233, p. 22). It informed the Kingdom of Spain thereof by letter of 16 June 1999. It received comments from some interested parties and forwarded them to the Spanish authorities for their comments. The Spanish authorities made their submissions by letter of 21 October 1999, supplemented by further comments on 8 February and 6 June 2000.'

3 The judgment under appeal gave the following account of the contested decision:

'18 By [the contested decision], the Commission terminated the procedure under Article 88(2) EC, declaring the aid in question incompatible with the common market and ordering the Kingdom of Spain to require its recovery.

19 According to the contested decision, the Diputación sought, by purchasing travel vouchers, first, to subsidise trips for senior citizens resident in Vizcaye, under a programme of made-to-measure holiday packages called "Adineko", and second, to facilitate access to transport for people and institutions in Vizcaye in need of special arrangements for travel (for example, local authorities, associations, vocational schools and universities). It is also apparent from the contested decision that the Adineko programme was set up by the autonomous Basque authorities in order to replace, from 1996, the national subsidised travel programme called "Inserso" from which approximately 15 000 Vizcaye residents had benefited each year (paragraphs 32, 33, 34, 48 and 51 of the decision).

20 In its assessment of the aid, the Commission observes that the total number of travel vouchers purchased by the Diputación was not fixed by reference to its actual needs. In the Commission's view, contrary to the explanations given to it by the Diputación, the number of vouchers purchased from P & O Ferries could not have been estimated from the Inserso programme figures. It states (paragraph 49):

"The [Diputación] decided to purchase 15 000 vouchers from [P & O Ferries] in 1995 while it was still participating in the Inserso programme, itself designed to benefit approximately 15 000 people of Biscay in 1995. The autonomous Basque authorities did not explain why Biscay's needs were double in that particular year. Nor did they indicate why the scheme only provided for 9 000 and 7 500

vouchers (instead of 15 000) in 1997 and 1998. When the [Diputación] decided to commit itself to buying this number of vouchers, it did not know that the Inserso programme would continue to benefit people from the area [even though the Diputación had stopped contributing to this programme] and that its own scheme would not be successful. Furthermore, no indication was given by the autonomous Basque authorities of why the number of vouchers purchased had to differ significantly from month to month (e.g. 750 vouchers were purchased in January 1995 compared with 3 000 in February 1995."

21 As regards the number of vouchers distributed, the decision states that under Adineko a total of 3 532 vouchers were distributed between 1996 and 1998, and that 12 520 vouchers were distributed between 1995 and 1998 under the programme for facilitating access to transport for the people and institutions of Vizcaye (paragraphs 50 and 51).

22 Finally, the Commission observes that the new agreement contains several provisions which a normal commercial agreement concerning the purchase of travel vouchers would not include. The Commission mentions, by way of example, the fact that the agreement specifies the weekly and annual number of crossings to be made by P & O Ferries, the fact that the consent of the Diputación is needed for P & O Ferries to change the vessel providing the service and the fact that the agreement lays down certain conditions, such as the nationality of the crew and the sources of goods and services (paragraph 52).

23 The Commission concludes therefrom as follows (paragraph 53):

"[The new agreement] did not correspond to the autonomous Basque authorities' genuine social needs and did not constitute a normal commercial transaction but rather constituted aid to the shipping company. The fact that the amount of money provided for under the [original agreement and the new agreement] remained at approximately the same level reinforces this conclu-

sion. The authorities managed to design a second scheme allowing the ferry company to keep the amount of aid promised in 1992."

24 According to the Commission, none of the derogations provided for in Article 87(2) and (3) EC applies in the present instance (paragraphs 56 to 73).

25 As regards recovery of the aid, the Commission rejects the argument that recovery would frustrate the legitimate expectations of the Diputación and P & O Ferries. In this connection it relies on paragraphs 51 to 54 of the judgment in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, citing them in full. It also relies on the fact that the decision of 7 June 1995 was challenged in due time and subsequently annulled by the Court of First Instance, that the aid was implemented before the Commission adopted its final decision on it and that the Member State never made a valid notification under Article 88(3) EC (paragraphs 74 to 78).

26 Article 1 of the contested decision states:

"The State aid which Spain has implemented in favour of [P & O Ferries], to the sum of ESP 985 500 000, is incompatible with the common market."

27 Article 2 of the contested decision is worded as follows:

"1. Spain shall take all the necessary measures to recover from the recipient the aid referred to in Article 1 made available to it unlawfully.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.'"

The procedure before the Court of First Instance and the judgment under appeal

4 By applications lodged at the Registry of the Court of First Instance on 25 and 31 May 2001 respectively, P & O Ferries brought an action for the annulment of Article 2 of the contested decision (Case T-116/01) and the Diputación brought an action for the annulment of the entire decision (Case T-118/01). P & O Ferries was given leave to intervene in support of the form of order sought by the Diputación in Case T-118/01. The Diputación was given leave to intervene in support of the form of order sought by P & O Ferries in Case T-116/01.

5 By order of 20 January 2003, the two cases were joined for the purposes of the oral procedure and the judgment.

6 In the judgment under appeal the Court of First Instance found that the new agreement did not affect the substance of the aid as instituted by the original agreement and that the two agreements constituted a single grant of aid, instituted and implemented in 1992 without prior notification of the Commission, contrary to Article 88(3) EC.

7 It concluded, in particular, that in such a case the Commission was not required to demonstrate the actual effect which that aid had had on competition and on trade between Member States, and that the Commission was entitled to order recovery of the aid without this being precluded by the principle of the protection of legitimate

expectations. It also found that the failure to notify the Commission of the contested aid meant that the Spanish authorities could not rely on the 'sufficient time' principle formulated in the judgment in Case 120/73 *Lorenz* [1973] ECR 1471. The Court also observed that, as the aid was put into effect without notification of the Commission, the latter was not obliged to state reasons for its decision to order its recovery.

8 In addition, the Court of First Instance found that the force of *res judicata* attaching to the *BAI* v *Commission* judgment did not preclude consideration of the pleas raised by P & O Ferries and the Diputación to the effect that the new agreement could not be classified as State aid within the meaning of Article 87(1) EC, and that those pleas were unfounded.

9 Finally, the Court of First Instance dismissed the other pleas. In particular, it found that the Commission had been justified in concluding that the contested aid had not been granted to individual consumers without discrimination related to the origin of the products and that therefore the conditions laid down in Article 87(2)(a) EC were not fulfilled.

10 Consequently, the Court of First Instance dismissed the actions and ordered P & O Ferries and the Diputación to bear their own costs and pay those of the Commission.

Procedure before the Court and forms of order sought by the parties

11 P & O Ferries claims that the Court should:

— set aside the judgment under appeal and refer the case back to the Court of First Instance for it to rule on the lawfulness of Article 2 of the contested decision, in which the Commission ordered the recovery of the aid;

— order the Commission to pay the costs of the appeal.

12 The Diputación claims that the Court should:

— set aside the judgment under appeal;

— if permitted by the state of the proceedings, itself rule on the action and annul the contested decision or, in the alternative, annul Article 2 of that decision;

— in the alternative, remit the case to the Court of First Instance;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

13 The Commission contends that the Court should:

— declare the appeal of the Diputación inadmissible or, in the alternative, dismiss it as unfounded;

— dismiss the appeal of P & O Ferries;

— order P & O Ferries and the Diputación to pay the costs.

14 By order of 27 July 2005, the President of the Third Chamber joined the present cases for the purposes of the oral procedure and the judgment, in accordance with Article 43 of the Rules of Procedure of the Court of Justice.

The appeals

15 In Case C-442/03 P, P & O Ferries adduces seven grounds of appeal.

16 In Case C-471/03 P, the Diputación adduces nine grounds of appeal. The Commission raises a plea of inadmissibility against that appeal.

17 In order to examine those appeals the following must be analysed:

— the issue of the admissibility of the Diputación's appeal;

— the grounds of appeal concerning the classification of the sums paid to P & O Ferries as State aid;

— the grounds of appeal alleging that the Court of First Instance wrongly considered that the aid in dispute had not been legally notified to the Commission;

— the grounds of appeal concerning the consequences that the Court of First Instance deduced from the lack of notification; and

— the ground of appeal alleging that the Court of First Instance erred in law in considering that the aid was incompatible with the EC Treaty.

Admissibility of the Diputación's appeal

Arguments of the parties

18 The Commission claims that the appeal was lodged late and is thus inadmissible. It is true that the Diputación acknowledged receipt on 1 September 2003 of the contested judgment which was delivered on 5 August 2003, which suggests that the appeal was lodged within the prescribed period. However, several factors show that, by acknowledging receipt so belatedly, the Diputación seriously failed to take due care and even artificially prolonged the period available to it for preparing its appeal. The requirement to observe a reasonable period, which may be inferred from Articles 100(2) and 79(2) of the Rules of Procedure of the Court of First Instance, was disregarded. The parties were informed by letter of 7 July 2003 from the Registry of the Court of First Instance of the date on which judgment would be given. The Commission and P & O Ferries acknowledged receipt of the judgment on 12 and 13 August 2003 respectively. The press release published by the Diputación on 5 August 2003, indicating that it would appeal against the judgment dismissing its action, shows that it was aware of the judgment long before 1 September 2003.

19 For the Diputación there is no doubt as to the admissibility of the appeal. The judgment under appeal was served in the manner prescribed by Article 100(1) of the

Rules of Procedure of the Court of First Instance and the time-limit for appeal, running from 1 September 2003, was adhered to. Articles 100(2) and 79(2) of those rules, to which the Commission refers, do not apply to the service of judgments and are therefore irrelevant. It has not been shown in any case that the appellant's legal advisers were notified by fax of the dispatch of a copy of the judgment, so that those articles cannot apply in the present case. In addition, the time limit for appeal cannot run from the date on which the parties learn of the judgment which they contest. If that were the case, the time-limit would run from the date on which the judgments of the Court of First Instance are delivered, in so far as they are available on the internet on that date, which is not in conformity with Article 100 of the Rules of Procedure of the Court of First Instance, read in conjunction with Article 101(1)(a). Finally, the appellant observes that the period during which it ought, according to the Commission, to have lodged its appeal was the period of its lawyers' annual holidays, which coincides with the courts' vacation.

20 In its rejoinder, the Commission expands its line of argument concerning the late submission of the appeal. As the Diputación had no address for service in Luxembourg, the judgment under appeal had to be served by registered post with acknowledgment of receipt, pursuant to Article 100(1) of the Rules of Procedure of the Court of First Instance. Furthermore, on 5 August 2003 the Diputación acknowledged that it had learnt of the contested judgment on the Court of Justice internet site, and was therefore notified of the service of the judgment by a 'technical means of communication' in accordance with Article 100(2). Consequently, there was a presumption of service, pursuant to the second paragraph of Article 100(2), on the 10th day following the lodging of the registered letter at the Luxembourg post office. Under that provision, this presumption can only be rebutted by an acknowledgment of receipt on a date earlier than the presumed date. Therefore the presumption is not rebutted by the Diputación's acknowledgment of receipt on 1 September 2003. This interpretation of the Rules of Procedure of the Court of First Instance has been accepted by the Court of Justice (order of 19 February 2004 in Case C-369/03 P *Forum des Migrants* v *Commission* [2004] ECR I-1981, paragraphs 10 and 11). As the appellant is therefore deemed to have received service of the contested judgment on 17 August 2003 at the latest and the time-limit for appeal expired on 27 October 2003, the present appeal, which was lodged on 10 November 2003, is inadmissible.

Findings of the Court

21 Under the third subparagraph of Article 44(2) of the Rules of Procedure of the Court of First Instance, when the application does not state an address for service in the place where the Court of First Instance has its seat, a possibility provided for in the first subparagraph of Article 44(2) of those rules, and when the applicant's lawyer or agent has not agreed that service is to be effected on him by fax or other technical means of communication, a possibility provided for in the second subparagraph of Article 44(2) of those rules, all service on the party concerned for the purposes of the proceedings is to be effected by registered letter. By derogation from Article 100(1) of the Rules of Procedure, service is deemed to have duly been effected by the lodging of the registered letter at the post office of the place where the Court of First Instance has its seat.

22 In the present dispute, it is common ground that the Diputación did not state an address for service in Luxembourg for the purposes of the procedings before the Court of First Instance. It did thus not make use of the possibility provided for in the first subparagraph of Article 44(2). By contrast, it stated, on the first page of its application to the Court of First Instance, that its lawyers agreed that service was to be effected on them by fax in accordance with the second subparagraph of Article 44(2) of the Rules of Procedure of the Court of First Instance. Therefore, the third subparagraph of Article 44(2) of those rules is not applicable (see, to that effect, order of 29 October 2004 in Case C-360/02 P *Ripa di Meana* v *Parliament* [2004] ECR I-10339, paragraph 21).

23 In those circumstances, the method of service of the judgment under appeal can, in the present case, result only from the second subparagraph of Article 100(2) of those same rules. According to that provision, judgments and orders of the Court of First Instance are, where the addressee has failed to state an address for service, to be served at his address either by registered post, with a form for acknowledgement of receipt, of a copy of the judgment or order concerned certified by the registry, or by personal delivery of that copy against a receipt (see, to that effect, *Ripa di Meana* v *Parliament*, paragraph 22). According to that same provision, service is then to be deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the registered letter at the post office of the place where the Court of First Instance has its seat.

24 The second subparagraph of Article 100(2) states, however, that the addressee is to be 'advised' of that service or of its effectuation 'by telefax or other technical means of communication'. It is apparent from the wording of that provision that that advice is a formality which is to be implemented solely by the unit responsible for serving judgments or orders, namely the Registry of the Court of First Instance.

25 In addition, that provision provides that the rule that service is then deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the letter at the post office is not applicable, in particular, if the addressee informs the Registrar, within three weeks of being advised by fax or other technical means of communication, that the document to be served has not reached him. Advising the addressee by fax or other technical means of communication thus constitutes a substantial procedural requirement which alone can guarantee that a document is properly served. If the Registry did not advise the addressee as required, he could not challenge the presumed date of postage and the provision granting that possibility to the addressee would be rendered redundant.

26 It follows from those considerations that, when the Registry of the Court of First Instance fails to give such advice to the addressee, the judgment or order in question cannot be presumed to have reached the addressee on the 10th day following its lodging at the Luxembourg post office. In such a case, the date of service of that judgment or order, which starts the period for bringing an appeal, is either the date on which the addressee acknowledged receipt of the registered letter sent to him or the date of personal delivery against a receipt of the judgment or order concerned.

27 In the present case, first, it is common ground that the Registry of the Court of First Instance did not advise the Diputación by fax or other technical means of communication that the judgment under appeal would be served to it by registered post and that, consequently, that service would be deemed to have been effected on the addressee on the 10th day following its lodging at the Luxembourg post office. It is true that the publication, on the day that the judgment under appeal was delivered, of a press release on the Diputación's website shows that the latter could probably have made itself aware of that judgment by means of the website of the

Court. However, that does not prove, contrary to the Commission's submission, that the Diputación was 'advised' of the service of that judgment in accordance with the procedure laid down in the second subparagraph of Article 100(2) of the Rules of Procedure of the Court of First Instance. Equally, the Commission cannot rely on the interpretation of the Rules of Procedure given by the Court of Justice in its order in *Forum des Migrants* v *Commission*, in which the Court restricted itself to applying the third subparagraph of Article 44(2) of those rules, provision which, as previously stated, is not relevant in the present case.

28 Second, the Diputación submitted, without being contradicted, that it had acknowledged receipt of the judgment under appeal on 1 September 2003. It had two months from that date to lodge its appeal, and an additional single period of 10 days on account of distance, as laid down in Article 81(2) of the Rules of Procedure of the Court of Justice. The period prescribed for lodging an appeal therefore ran until 10 November 2003. The appeal was lodged on that date and was thus not out of time.

29 It follows from the above that the plea of inadmissibility raised by the Commission must be rejected.

The grounds of appeal concerning the classification of the sums paid to P & O Ferries as State aid

Arguments of the parties

30 These grounds of appeal are adduced by the Diputación in support of the form of order sought in its appeal in Case C-471/03 P.

31 With its first, second and third grounds of appeal the Diputación alleges that the Court of First Instance erred in law in considering that the sums paid to P & O Ferries could properly be classified as State aid by the Commission.

32 The first ground is that the Court of First Instance erred in law in taking into consideration a criterion relating to the need for intervention by the public authorities in order to determine whether the Diputación had acted as a private investor operating under normal market economy conditions.

33 First, this criterion, based on a subjective examination of the aims of public intervention, is not consistent with the case-law (see, in particular, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 16). The only criterion which the Court of First Instance ought to have used, according to the case-law of the Court of Justice, is that of a comparison of the conduct of the public operator concerned with that of a private investor, taking account of the economic analysis of the public operator's conduct by reference to objective and verifiable elements (see, in particular, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *UFEX and Others* [2003] ECR I-6993). Where services are purchased, as in the present case, there is no element of aid if the transaction takes place under normal market price conditions. In that respect the new agreement was comparable with contracts generally concluded between shipping companies and operators.

34 Second, the use of such a subjective criterion by the Court of First Instance led it to overlook the rule that the economic rationality of the State's conduct must be assessed in the context of the period during which the contested measures were taken (Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 71). To decide whether there was an 'actual and genuine' need for the Diputación to purchase the travel vouchers in dispute, the Court of First Instance wrongly took a later situation into account. Likewise the Court's argument, in paragraph 118 of the judgment under appeal, that it is all the more necessary to prove the existence of that need where there is no invitation to tender is irrelevant.

35 If the use of the criterion of a need for public intervention were accepted, this would result in an unacceptable difference in the treatment of public and private operators and would be inconsistent with the principles of legal certainty and protection of legitimate expectations. If the public intervention were subsequently found to be unnecessary, the private service provider concerned would be exposed to an obligation to repay the sums received, even if they were based on normal market conditions, and for a long period, having regard to the 10-year limitation period laid down by Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty (OJ 1999 L 83, p. 1). That criterion could lead to a general obligation for the notification of all plans for public intervention so that the Commission could decide whether they were justified.

36 The second ground of appeal alleges that the Court of First Instance misapplied Article 87 EC in concluding, in paragraph 137 of the judgment under appeal, that State aid existed because in the present case the purchase of the travel vouchers did not meet a need. The need to purchase those vouchers was proved before the Court of First Instance. The fact that vouchers were used proves the existence of that need. Consequently the sums paid for the used vouchers ought not to have been classified as State aid. Regarding the amounts paid for unused vouchers, the Court of First Instance should likewise not have described them, in paragraph 134 of the judgment under appeal, as State aid. It is clear from the new agreement that the vouchers could be used even after 1998. Therefore the sums paid for all the vouchers corresponded to services of use for the public authority that had financed them, the services remaining owed by P & O Ferries to the Diputación. The opening of the review procedure after the *BAI* v *Commission* judgment was the reason for the decision to stop using the vouchers at that time, as a precautionary measure pending the Commission's final decision. The Court of First Instance therefore wrongly refused to take that point into consideration, in concluding, in paragraph 121 of the judgment under appeal, that the new agreement was not entered into in order to meet 'actual' needs. Regarding the submissions concerning the number of vouchers used, the destinations chosen and climatic conditions in paragraphs 128 to 130 of the judgment under appeal, they are manifestly erroneous because the Court of First Instance erred in its assessment of the evidence before it.

37 The third ground is that the Court of First Instance erred in law in finding that the Commission could lawfully classify as State aid all the sums paid, including those for used vouchers. The Commission ought to have carried out the requisite economic analysis and reached the conclusion that the sums paid at market price for a service supplied could not be deemed an economic advantage and did not therefore constitute State aid.

Findings of the Court

38 Before analysing the plea in law, which was subdivided into three parts, alleging infringment of Article 87(1) EC concerning the classification as State aid of the measures in dispute, the Court of First Instance examined the plea of inadmissibility raised against it by the Commission. According to the Commission, the plea called into question the force of *res judicata* attaching to the *BAI* v *Commission* judgment and could thus not be examined.

39 The Court of First Instance declared the plea admissible. In coming to that conclusion it found, in paragraph 77 of the judgment under appeal, that the force of *res judicata* attaching to a judgment can constitute a bar of the admissibility of an action if the previous action which gave rise to the judgment in question was between the same parties, had the same subject-matter and was founded on the same grounds. It then observed, in paragraphs 79 and 80 of the judgment under appeal, that the Diputación's action, brought against a different act to that which gave rise to the *BAI* v *Commission* judgment, did not have the same subject-matter as the action brought in that case and was not between the same parties.

40 In doing so, the Court of First Instance mistook the scope of the force of *res judicata* attaching to the *BAI* v *Commission* judgment.

41 Contrary to the view taken by the Court of First Instance, the *BAI* v *Commission* judgment did not only have relative authority preventing merely new actions from being brought with the same subject-matter, between the same parties and based on the same grounds. That judgment was invested with the force of *res judicata* with absolute effect and prevented legal questions which it had already settled from being referred to the Court of First Instance for re-examination.

42 In the *BAI* v *Commission* judgment the Court of First Instance annulled the decision of 7 June 1995 in which the Commission held that the new agreement did not constitute State aid and consequently decided to terminate the review procedure which had been initiated in respect of the aid granted to Ferries Golfo de Vizcaya.

43 That annulment led retroactively to the disappearance of the decision of 7 June 1995 with regard to all persons. An annulling judgment of that nature thus has authority *erga omnes*, which gives it the force of *res judicata* with absolute effect (see, in particular, Case 1/54 *France* v *High Authority* [1954] ECR 1, or p. 17, 34; Case 2/54 *Italy* v *High Authority* [1954] ECR 37, at p. 55; Case 3/54 *Assider* v *High Authority* [1955] ECR 63; and Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 54).

44 That authority is not attached only to the operative part of the *BAI* v *Commission* judgment. It is also attached to the *ratio decidendi* of that judgment which is inseparable from it (see, to that effect, Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, and *Commission* v *AssiDomän Kraft Products and Others*, paragraph 54).

45 In addition, the question of the force of *res judicata* with absolute effect is a matter of public policy, which must, consequently, be raised by the Court of its own motion.

46 In the present case, in order to annul the decision of 7 June 1995 the Court of First Instance based itself, in particular, in paragraph 80 of the *BAI* v *Commission* judgment, on the conclusion that the new agreement 'is not a normal commercial transaction' and, in paragraph 81, on the fact that 'the cultural and social aims pursued by the Spanish authorities play no part in the characterisation [of the new agreement] in the light of Article 92(1) of the Treaty [now, after amendment, Article 87(1) EC]'. Finally, the Court of First Instance found, in paragraph 82 of the judgment, that 'the Commission's conclusion that [the new agreement] does not constitute State aid is based on a misinterpretation of Article 92(1) of the Treaty' and that '[c]onsequently, the decision terminating the review procedure initiated in relation to aid granted to Ferries Golfo de Vizcaya is vitiated by an infringement of that provision and must be annulled'.

47 No appeal was lodged against the *BAI* v *Commission* judgment, and its operative part and *ratio decidendi* therefore became final.

48 It is clear from the grounds of that judgment that the Commission should have classified the aid at issue as State aid for the purposes of Article 87(1) EC and that, following the annulment, it would have to reopen the review procedure in respect of that aid.

49 In order to comply with that judgment the Commission, as it was required to do, reopened the review procedure on the compatibility of the aid in dispute with the Treaty. In the contested decision it, first, confirmed the classification as State aid acknowledged by the Court of First Instance in the *BAI* v *Commission* judgment and, second, considered that the aid in dispute was incompatible with the Treaty. The Commission therefore gave its decision on the same measures as those which were classified as State aid in the *BAI* v *Commission* judgment.

50 In those circumstances, when the Diputación brought its application against the contested decision before the Court of First Instance that court could not re-examine the pleas alleging that the aid at issue did not amount to State aid without disregarding the scope of the *BAI* v *Commission* judgment. Consequently, in finding as it did, the Court of First Instance failed to have regard to the force of *res judicata* with absolute effect of its previous judgment.

51 Thus, the judgment under appeal is vitiated by an error of law in so far as it examined the plea alleging infringement of Article 87(1) EC which, in its three parts, sought to challenge the classification of the aid in dispute as State aid. That error does not, however, mean that the operative part of the judgment under appeal should be called into question.

52 It follows from the above considerations that the Diputación's first three grounds of appeal cannot, in the light of the force of *res judicata* of the *BAI* v *Commission* judgment, be examined by the Court of Justice. Those grounds of appeal are irrelevant and must be dismissed.

The grounds of appeal alleging that the Court of First Instance wrongly considered that the aid in dispute had not been legally notified to the Commission

53 Before examining the pleas in support of the applications, the Court of First Instance found it necessary to consider whether the aid to which the contested decision relates was granted in accordance with the procedure laid down in Article 88(3) EC, and hence whether the aid was lawful.

54 The Court of First Instance based its conclusion that that aid was unlawful on two sets of considerations concerning, first, the scope of the new agreement and, second, the failure to notify that agreement.

55 First, the Court of First Instance held that the aid in dispute had been implemented in 1992 without prior notification of the Commission and that the new agreement had not altered its subject-matter. It thus observed, in paragraph 58 of the judgment under appeal, that 'it is apparent from the contested decision, reinforced by the explanations provided by the parties in the course of the present proceedings, that the original agreement and the new agreement constitute a single grant of aid, instituted and implemented in 1992 in the context of the original agreement's conclusion without prior notification of the Commission'. It then held in paragraphs 59 and 60 of the judgment under appeal that 'the new agreement merely alters the original agreement', that it 'was drawn up in order to replace it', and that the amendments made to the original agreement as a result of the new agreement 'do not affect the substance of the aid as instituted by the original agreement'. In paragraph 74 of the judgment, the Court pointed out that 'the procedure initiated on 29 September 1993 and terminated by the decision of 7 June 1995 concerned solely the original agreement'.

56 Second, the Court of First Instance found that the new agreement had not been duly notified to the Commission, on the ground that, inter alia, the letter of 27 March 1995, which was sent by P & O Ferries' lawyers and not by the Spanish Government, could not be regarded as notification of new aid. In paragraph 70 of the judgment under appeal, the Court noted, similarly, that 'the fact that the Commission accepted the notification of the new agreement without raising any objection concerning the validity of the notification cannot under any circumstances alter the fact that the aid at issue is unlawful'.

The grounds of appeal concerning the scope of the new 1995 agreement

57 With its fifth ground of appeal the Diputación challenges the first series of considerations on the basis of which the Court of First Instance found that the aid at issue was unlawful. This ground of appeal will be examined before the first, second and seventh grounds adduced by P & O Ferries in its appeal against the same part of the judgment under appeal.

Arguments of the parties

58 The Diputación submits that, in reaching the conclusion that the aid in dispute was unlawful, the Court of First Instance distorted the facts, the contested decision and the evidence in finding, in paragraph 58 of the judgment under appeal, that the aid in the 1995 agreement was 'instituted and implemented in 1992'. Because of that distortion, the Court erred in the legal evaluation of the facts and drew wrong legal conclusions from its assessment. By substituting its own reasoning for that in the contested decision, it also impeded the appellant in exercising its rights of defence.

59 According to the Commission, this ground of appeal relates only to a factual issue and merely repeats the wording of the pleadings submitted to the Court of First Instance. It is therefore inadmissible. In any case, it is unfounded. The aid in dispute was never notified. All the Court's findings on this point are pertinent, so that the Court correctly concluded, in paragraph 58 of the judgment under appeal, that the two agreements constituted a single grant of aid, implemented unlawfully.

Findings of the Court

60 First, as regards the admissibility of the fifth ground of appeal adduced in Case C-471/03 P, the Diputación, contrary to the Commission's submissions, did not confine itself to reproducing the terms used in the pleadings which it submitted to the Court of First Instance. That ground contains a precise and detailed criticism of the grounds of the judgment under appeal, in particular paragraph 58 of that judgment. In addition, it concerns the distortion of the facts of the dispute by the Court of First instance and can thus not have been raised before that court. Second, while the assessment of the facts does not constitute a point of law, subject as such to review by the Court of Justice in the context of an appeal, that rule does not apply

when the clear sense of the evidence submitted to the Court of First Instance has been distorted. The Court of Justice is thus entitled to censure a distortion by the Court of First Instance of the evidence before it, in particular where that court substitutes its own reasoning for that of the contested decision (see, to that effect, Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 48 and 49).

61 That ground of appeal is therefore admissible.

62 It is also well founded.

63 As rightly pointed out by the Diputación, the aid which the Commission ruled upon in the contested decision is that resulting from the new agreement, which the Commission analysed separately from the aid contained in the original agreement.

64 It is apparent from the wording of the contested decision that there was not a single grant of aid, implemented in 1992. In finding the aid in dispute to be unlawful the Commission, in points 77 and 78 of the contested decision, relied entirely on factual circumstances which related only to the new agreement of 1995, and which thus concerned aid instituted and implemented in 1995.

65 The Commission thus pointed out, in point 43 of the contested decision, that '[t]he first Agreement concluded by the autonomous Basque authorities and Ferries Golfo de Vizcaya was repealed and the monies received by Ferries Golfo de Vizcaya reimbursed. Therefore the case became devoid of purpose'. The Commission continued, in point 44 of that decision, by indicating that '[a]s far as the second Agreement is concerned, the Commission takes the view that it falls under Article 92(1) of the Treaty (now Article 87(1))'. Point 45 of the decision confirms the extent

of the examination carried out by the Commission by stating that, '[t]o determine whether the 1995 agreement falls within the scope of Article 92(1) of the Treaty (now Article 87(1)), it must be considered whether it constitutes a "normal commercial transaction"'. Similarly, point 67 of the decision contains the statement that 'the aid that is being examined was granted between 1995 and 1998'.

66 It follows from the above that, in the contested decision, the Commission took a decision on the compatibility of the aid with the Treaty in respect only of the aid resulting from the 1995 agreement. This could hardly have been otherwise since the decision of 7 June 1995, adopted in the light of that agreement which was brought to the attention of the Commission by the letter of 27 March 1995, has the effect of authorising the implementation of the measures contained in that agreement only.

67 Therefore, by considering, in paragraph 58 of the judgment under appeal, that 'the original agreement and the new agreement constitute a single grant of aid, instituted and implemented in 1992 in the context of the original agreement's conclusion without prior notification of the Commission', and in paragraph 74 of that judgment that 'the procedure initiated on 29 September 1993 and terminated by the decision of 7 June 1995 concerned solely the original agreement', the Court of First Instance distorted the facts of the case and the content of the contested decision, substituting its own reasoning for that in the contested decision (see, to that effect, *DIR International Film and Others* v *Commission*, paragraphs 48 and 49).

68 Thus, the fifth ground of appeal adduced in Case C-471/03 P is well founded.

69 Consequently, the judgment under appeal distorted the facts of the case in so far as it found that the new agreement and the original agreement constituted a single grant of aid, implemented from 1992.

70 As a result, it is not necessary to examine the other three grounds of appeal directed against that part of the judgment under appeal, namely:

— the first ground of appeal raised in Case C-442/03 P alleging that the Court of First Instance wrongly considered that the new agreement did not establish a grant of aid which was independent of the initial grant;

— the second ground of appeal in that case alleging that the Court of First Instance erred in law in considering, in paragraph 60 of the judgment under appeal, that the alterations to the original agreement did not affect the substance of that agreement;

— the seventh ground of appeal raised in that case alleging that, in paragraph 67 of the judgment under appeal, the Court of First Instance overlooked the twofold nature of the decision of 7 June 1995 by which the Commission not only terminated the procedure initiated on 29 September 1993, but also expressly took a decision on the classification of the new agreement, 'which runs from 1995 to 1998'.

71 However, since the judgment under appeal was based also on the failure to notify the new agreement, it is necessary to continue with the examination of the grounds of appeal relating to that issue.

The grounds of appeal concerning the failure to notify the new agreement

72 With its third, fourth, fifth and sixth grounds of appeal, P & O Ferries challenges the grounds of the judgment under appeal in which the Court of First Instance held that the aid in dispute was not duly notified to the Commission and, consequently, the grounds of that judgment which are directly based on that finding.

73 In coming to the conclusion that the aid in dispute was not notified, the Court of First Instance found, in paragraph 62 of the judgment under appeal, that the letter of 27 March 1995, sent by P & O Ferries' lawyers to an official in the Commission's Directorate-General for Transport, 'far from constituting formal notification of proposed new aid, concludes lengthy correspondence between the Commission and the applicants relating to the alterations progressively made to the original agreement'. Similarly, the Court of First Instance found, in paragraph 64 of the judgment under appeal, that the letter of 27 March 1995 was sent by P & O Ferries' lawyers instead of by the Spanish Government, was sent to an official in the Directorate-General for Transport even though the Commission's letter SG (81) 12740 to the Member States of 2 October 1981 required communications to be sent to the Secretary-General of the Commission, and contained no reference to Article 88(3) EC. In paragraphs 66 and 70 of the judgment under appeal, the Court of First Instance pointed out that the analysis that the letter of 27 March 1995 was not a notification was borne out by the conduct of the Commission, and stated that the fact that the Commission had accepted the notification of the new agreement without raising any objection concerning its validity could not alter the fact that the aid at issue was unlawful. Finally, in paragraph 68 of the judgment, the Court of First Instance held that the parties had 'provided indications from which it may be concluded that they regarded the aid at issue as unnotified aid'.

74 Before proceeding to examine the four grounds of appeal of P & O Ferries brought against that part of the judgment under appeal, the Court must first consider the Commission's argument that the examination of those grounds of appeal is, in any case, pointless, so that they must be regarded as ineffective.

Ineffectiveness of the abovementioned grounds of appeal of P & O Ferries

75 The Commission submits that P & O Ferries' appeal is nothing more than a delaying manoeuvre. The question whether the aid in dispute was notified or not is irrelevant, since the appellant's argument concerning the principle of protection of legitimate expectations cannot succeed in any case. The aid was challenged within the time-limit for bringing an action and P & O Ferries cannot properly claim to

retain the benefit of that aid. Even if the Court of Justice were to find that the aid had been notified and were to remit the case to the Court of First Instance, the latter would be bound to find that P & O Ferries must in any case repay the aid in dispute. In those circumstances, the Court of Justice should, independently of its review of the grounds of appeal concerned, find that the procedural status of the aid in dispute has no bearing on the lawfulness of Article 2 of the contested decision. On that point the case is ready for judgment to be delivered, and the Court should dismiss P & O Ferries' appeal on that ground.

76 That argument cannot be accepted in so far as it relates to the effectiveness of the grounds of appeal mentioned above.

77 Those grounds of appeal are directed against the grounds of the judgment under appeal in which the Court of First Instance found that the aid in dispute had not been notified. It is that finding of the unlawfulness of the aid which enabled the Court of First Instance to come to the conclusion that the Commission was not obliged in such a case to demonstrate the real effect of that aid on competition and trade between Member States and that the Commission could rightly require the recovery of such aid without this being precluded by the principle of the protection of legitimate expectations or by exceptional circumstances. Relying on that same finding, the Court of First Instance held that the Spanish authorities could not rely, in the present case, on the 'sufficient time' principle formulated in *Lorenz*, and that the Commission was not bound to state the reasons for its decision to order recovery of the aid in dispute.

78 In those circumstances, the grounds of appeal mentioned above are, if well founded, capable of justifying the annulment of the judgment under appeal in so far as the Court of First Instance found that the aid at issue was unlawful and consequently rejected the complaints set out in the preceding paragraph of this judgment. Contrary to the Commission's submissions, those grounds of appeal are thus not ineffective.

79 The fact that P & O Ferries' appeal could be a delaying manoeuvre, even assuming that it is established, does not affect that analysis. As for the proposal put forward by the Commission that the Court should find, independently of the assessment of the grounds of appeal mentioned above, that the aid in dispute must be recovered in any case and the appeal dismissed on that basis, it is based on a misunderstanding of the powers of the Court in the context of an appeal. Such a proposal would lead the Court to rule directly on the substance of the dispute. When hearing an appeal, the Court can give judgment on the substance of a dispute only after having set aside the judgment of the Court of First Instance.

80 In addition, contrary to the Commission's assertions, P & O Ferries' sixth ground of appeal is clearly exposed and can be examined by the Court.

Merits of the abov mentioned grounds of appeal of P & O Ferries

81 These four grounds of appeal are closely linked and should be examined together.

— Arguments of the parties

82 P & O Ferries submits, in its third ground of appeal, that, in paragraph 62 of the judgment under appeal, the Court of First Instance erred in law in finding that the letter of 27 March 1995 from the appellant's lawyers to the Commission did not constitute formal notification of proposed new aid. That was indeed the purpose of the letter.

83 The fourth ground alleges that the Court of First Instance erred in finding, in paragraph 64 of the judgment under appeal, that that letter did not constitute notification on the grounds that it was from lawyers and not from the Spanish Government, was not sent to the Secretariat General of the Commission and made no reference to Article 88(3) EC.

84 The fifth ground of appeal is that the Court of First Instance erred in law in taking into account, in paragraph 65 of the judgment under appeal, the fact that the letters sent by the appellants to the Commission, including the letter of 27 March 1995, all bore the reference NN 40/93, used by the Commission in the case concerning the original agreement. A reference number used for the purposes of communication with the Commission services has in itself no particular legal force and no effect whatsoever on whether the new agreement is classified as new aid or not.

85 By its sixth ground, P & O Ferries submits that the Court of First Instance was in error as a matter of law in finding, in paragraph 66 of the judgment under appeal, that its analysis was borne out by the conduct of the Commission. On the contrary, such conduct confirmed that the notification given by the letter of 27 March 1995 was sufficient.

86 The Commission contends, regarding the fourth ground of appeal, that the general scheme of the State aid procedure, as laid down by Article 88(3) EC, means that aid must be notified by the Member States and that this was required even before Regulation No 659/1999 intervened. As the decisions on the matter are addressed to the Member States, they alone must notify the Commission (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45, and Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 32 and 84). It would be anomalous if notification by a third party could secure a Member State against a decision ordering the recovery of aid. If the Court were to take the view that notification must be effected in any case by the Member States, the fourth ground of appeal would be unfounded and the other grounds relating to the notification of the aid in dispute would be of no purpose.

87 With regard to the third ground of appeal, the Commission claims that, in paragraph 68 of the judgment under appeal, which was not challenged by the appellant, the Court of First Instance found that the parties 'regarded the aid at issue as unnotified aid'. In disputing the finding of the Court of First Instance that the letter of 27 March 1995 did not amount to notification of the aid, P & O Ferries vainly calls into question the assessment of the facts in the judgment under appeal.

88 So far as the fifth ground of appeal is concerned, the Commission denies that the use of the designation 'NN' was regarded by the Court of First Instance as establishing in law that the aid in dispute was not notified. This is an evidential matter taken into consideration by the Court in paragraph 65 of the judgment under appeal in reaching the finding of fact in paragraph 68, and that assessment cannot be challenged in the context of an appeal.

— Findings of the Court

89 The four grounds to be analysed here all seek to challenge the refusal of the Court of First Instance to classify the letter of 27 March 1995 as notification.

90 The classification of an act or a measure for legal purposes by the Court of First Instance is a question of law which may be raised in an appeal. That is true, for example, of the question whether a letter must be regarded as a complaint within the meaning of Article 90(2) of the Staff Regulations of Officials of the European Communities (see, to that effect, Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 26, and Case C-154/99 P *Politi* v *European Training Foundation* [2000] ECR I-5019, paragraph 11).

91 In the present case, in view of the nature of the arguments put forward, which concern the criteria used by the Court of First Instance in finding that the aid in dispute had not been notified, the question whether the letter of 27 March 1995 constitutes notification of the aid in dispute provided for in the new agreement is a question of law which falls within the jurisdiction of the Court.

92 Under Article 88(3) EC, 'plans to grant or alter aid' are subject to the obligation to notify laid down in that provision.

93 It follows from the very wording of that provision that an agreement such as the new agreement, which established the aid in dispute, is subject to the obligation to notify thus laid down. Consequently, as rightly submitted by P & O Ferries, the obligation to notify that new agreement is independent of the obligation to notify the original agreement. Consequently, the failure to notify the original agreement, which rendered it unlawful, has no bearing on the examination of the lawfulness of the new agreement, which is based on the assessment of compliance with the notification requirement applicable only to that latter agreement.

94 The fact that the new agreement was brought to the Commission's attention during the review procedure initiated in respect of the original agreement is not such as to invalidate that consideration. Since the contested decision relates, as already stated, only to the aid established by the new agreement, the question whether that aid was notified or not has to be assessed independently of the fact that the Commission had initiated the review procedure in respect of the original agreement.

95 Accordingly, the fact that the letters sent by the appellants to the Commission, including the letter of 27 March 1995, all bear the reference NN 40/93 used by the Commission in the file concerning the original agreement cannot, in itself, have an effect on whether the new agreement is to be classified as new aid or not. The Court

of First Instance thus wrongly relied on that factor in establishing that the aid in dispute was inseparable from the measures laid down in the original agreement and thus coming to the conclusion that the aid at issue had not been notified.

96 It also follows from the documents in the case that, by sending the letter of 27 March 1995, P & O Ferries intended to 'inform the Commission in good time' of the existence and content of the new agreement and of the wish of the parties to the agreement to implement the aid in dispute.

97 First, it was on the basis of the information in that letter and in the light of the 'significant modifications ... introduced into a new agreement' that the Commission decided, in its decision of 7 June 1995, to terminate the review procedure initiated in respect of the original agreement. Therefore, the Commission in fact took account of that letter, which was addressed to the official directly responsible for the case, for the purposes of the examination of the aid measures in dispute.

98 Next, it is apparent from the wording of the decision of 7 June 1995 that those substantial modifications were introduced in the new agreement 'in order to meet the Commission's concerns'. In addition, the decision of 7 June 1995 ends with the very explicit words that 'the new agreement, which runs from 1995 to 1998, does not constitute State aid'. The Commission can thus not legitimately pretend not to have been informed, in good enough time for it to submit its observations, of the measures contained in that new agreement, nor claim that the letter of 27 March 1995 did not enable it to exercise its power of review in a normal manner.

99 Finally, it is apparent from the documents in the Court's file that the aid in dispute, provided for in the new agreement, was not paid before the Commission decided, on 7 June 1995, to terminate the examination procedure initiated in respect of the original agreement. The first payments to P & O Ferries were not made until December 1995. Moreover, in paragraph 77 of the contested decision, the Commission acknowledged that 'the payments ... were effectively made only after the Commission's positive decision of 7 June 1995'. Furthermore, the new agreement contains a clause, the scope of which was not subject to reservations on the part of

the Commission in 1995, which states that 'all the necessary steps have been taken to comply with Article 93(3) of the Treaty of Rome'. As regards the fact that the new agreement was concluded before the intervention of the decision of 7 June 1995, it is not capable of establishing that the aid was put into effect prior to that decision.

100 It follows from the above that, in the judgment under appeal, the Court of First Instance wrongly held that the parties concerned and the Commission themselves considered the aid in dispute to be unnotified aid.

101 Therefore, there is no need for the Court to give judgment on the ninth ground adduced by the Diputación alleging that, by not ruling on the request to submit all documents relating to the 1995 agreement which would have made it possible to establish that the Commission treated the letter of 27 March 1995 as a notification of new aid, the Court of First Instance failed to have regard to the rights of defence and infringed Article 66 of its Rules of Procedure.

102 However, the Court of First Instance did not err in law in finding that the letter of 27 March 1995 did not constitute notification meeting the requirements of Article 88(3) EC.

103 It is apparent from the actual structure of Article 88(3) EC, which establishes a bilateral relationship between the Commission and the Member State, that only the Member States are under the obligation to notify. That obligation can thus not be regarded as satisfied by notification by the undertaking receiving the aid. As has already been held by the Court, the machinery for reviewing and examining State aid established by Article 88 EC does not impose any specific obligation on the recipient of aid. First, the notification requirement and the prior prohibition on implementing planned aid are directed to the Member State. Second, the Member State is also the addressee of the decision by which the Commission finds that aid is incompatible

with the common market and requests the Member State to abolish the aid within the period determined by the Commission (see Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 73).

104 In that respect, it is irrelevant, in the present case, that, on the date on which the proposal for a new agreement was sent to the Commission, no legislation provided that, in order to be lawful, notification had to be made by the government concerned. While the requirement that notification is the task of that government was noted in the Community legislation in Article 2(1) of Regulation No 659/1999, that article merely codified the case-law of the Court without adding anything to the state of the applicable law.

105 In those circumstances, the Court of First Instance was able, without vitiating its judgment by an error of law, to rely on the fact that the letter of 27 March 1995 was not sent by the government of the Member State concerned to come to the conclusion that that letter did not constitute notification meeting the requirements of Article 88(3) EC.

106 The Court of First Instance therefore did not misapply Article 88(3) EC by considering, from the facts of the case, that the letter of 27 March 1995 did not constitute notification of the new agreement.

107 It follows from the above that, although the Court of First Instance vitiated its judgment by distorting the facts of the case in so far as it found that the new agreement and the original agreement constituted a single grant of aid, implemented from 1992, it rightly held that the aid as issue was implemented without having been notified to the Commission. Consequently, the Court must reject the claims in the appeals directed against that part of the judgment under appeal.

The grounds of appeal concerning the consequences which the Court of First Instance deduced from the lack of notification

108 The sixth, seventh and eighth grounds of appeal adduced by the Diputación seek to challenge the grounds of the judgment under appeal which the Court of First Instance deduced from the failure to notify the aid in dispute.

109 With its sixth ground of appeal, the Diputación claims that the Court of First Instance erred in law in finding, in paragraphs 142 and 143 of the judgment under appeal, that the aid in dispute was unlawful and that it was, therefore, unnecessary for the Commission to assess the actual effect which that aid had on competition and trade between Member States.

110 That ground of appeal must be dismissed. As the Court has already held, if the Commission were required in its decision to demonstrate the real effect of aid which had already been granted, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (see Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

111 In the present case, the Court of First Instance, as stated above, rightly found that the letter of 27 March 1995 did not constitute notification of the new agreement. It could thus infer from that, without vitiating its judgment with an error of law, that the Commission was not required to demonstrate the actual effect of the aid on competition and on trade between Member States. The sixth ground of appeal is, therefore, unfounded.

112 The seventh ground of appeal of the Diputación alleges that the Court of First Instance distorted its arguments and therefore breached its rights of defence. In paragraph 203 of the judgment under appeal, the Court of First Instance found that

the Diputación was not justified in pleading that 'P & O Ferries' legitimate expectations should be protected', whereas it was pleading that its own legitimate expectations, as a party to the new agreement, should be protected. Even if P & O Ferries had pleaded exceptional circumstances and the protection of legitimate expectations, the Court of First Instance should not have found that the Diputación could not put forward a plea based on the principle of protection of the legitimate expectations of that undertaking.

113 The Commission submits that the scope of the seventh ground has changed in the course of the proceedings. The Diputación's reply repeated the plea of a failure to protect the legitimate expectations of the undertaking receiving the aid, which it had raised before the Court of First Instance. However, in its appeal it raised a different plea, namely failure to protect its own legitimate expectations. Consequently, the plea concerning the legitimate expectations of the undertaking receiving the aid is new and, accordingly, inadmissible. It is in any case unfounded.

114 The plea of inadmissibility raised by the Commission against the seventh ground of appeal must be rejected. Contrary to what is submitted by the Commission, the Diputación raised, in its statement in reply and in its appeal, the same ground of appeal alleging that the Court of First Instance distorted its arguments in taking account only of P & O Ferries' legitimate expectations, although the Diputación also pleaded its own legitimate expectations. That ground of appeal is thus admissible.

115 It is not, however, founded. Although it is true that the Court of First Instance, in paragraph 203 of the judgment under appeal, expressly mentioned only 'P & O Ferries' legitimate expectations', it did, however, respond to the arguments developed before it by the Diputación in holding, in paragraph 202 of that judgment, that it was not a matter for the Spanish authorities but for the beneficiary undertaking to plead exceptional circumstances on which it could have based its legitimate expectation in order to contest the recovery of the unlawful aid. The Diputación is thus not justified in pleading that the Court of First Instance distorted its arguments in the judgment under appeal.

116 As its eighth ground, the Diputación submits that the Court of First Instance distorted the arguments in the application based on Article 10 EC and the principle of sound administration in finding, in paragraph 211 of the judgment under appeal, that those arguments called into question the unlawfulness of the aid in dispute. On the contrary, the appellant submitted that Article 10 EC and the said principle precluded the repayment even of unlawful aid. Because of this distortion, the Court of First Instance did not truly examine that plea and infringed the rights of defence.

117 However, it is apparent from the documents before the Court that the arguments by which the Diputación, in particular in points 261 and 272 to 275 of its application, sought to call the Commission's conduct into question by relying on Article 10 EC and the principle of sound administration referred back to the arguments developed by the appellant to show that the aid in dispute had been correctly notified and essentially merged with those arguments.

118 In those circumstances, it cannot reasonably be claimed that the Court of First Instance distorted the Diputación's arguments by finding that those arguments based on Article 10 EC and the principle of sound administration appeared, essentially, to criticise the Commission's conduct when it investigated the case and call into question the unlawfulness of the aid in dispute. The Diputación's eighth ground of appeal must therefore be rejected.

The ground of appeal alleging that the Court of First Instance erred in law in holding that the aid in dispute was not compatible with the Treaty

119 The fourth ground of appeal in Case C-471/03 P is the only one which challenges the Court of First Instance's assessment that the derogation laid down in Article 87(2)(a) EC is not applicable in the present case.

Arguments of the Diputación

120 This ground of appeal is in two parts.

121 In the first part, the Diputación claims that the Court of First Instance distorted the reasoning of the contested decision in finding, in paragraph 165 of the judgment under appeal, that consumers using other shipping companies capable of operating between Bilbao and Portsmouth could not benefit from the aid at issue. In paragraphs 58 and 59 of the contested decision the Commission in reality found that Article 87(2)(a) EC could not apply because there was no transparency in the choice of the shipping operator. By distorting in that way the terms of the contested decision, the Court of First Instance did not enable the appellant to present a proper defence.

122 In the second part, the appellant submits that, in any event, the Court of First Instance erred in law in the interpretation of Article 87(2)(a) EC in referring, in paragraph 166 of the judgment under appeal, to the grant of aid to a single operator, to the exclusion of other companies capable of fulfilling the social objective pursued. In so far as only one operator was prepared to provide the service on the route concerned, the discriminatory nature of the aid related to the origin of the products could not be proved. In such a case, as the social character of the aid was admitted by the contested decision (paragraph 58), Article 87(2)(a) EC was applicable.

Findings of the Court

123 As regards the first part of the ground of appeal, it is apparent from the wording of the contested decision that, in coming to the conclusion that the aid in dispute did not meet the condition laid down in Article 87(2)(a) EC that aid must be granted 'without discrimination related to the origin of the products concerned', the Commission based its decision, in particular, first, in paragraph 58 of that decision, on the fact that 'vouchers have only been purchased from Ferries Golfo de Vizcaya

and the autonomous authorities have failed to prove that the company was selected in a transparent manner', and second, in paragraph 60 of the contested decision, on the fact that 'the autonomous Basque authorities might have achieved identical social goals with a diversified travel offer'.

124 For those reasons the Commission considered that Ferries Golfo de Vizcaya was the only undertaking benefiting from the aid in dispute and that it had not been established that the social objectives pursued by that aid could be achieved only by purchasing travel vouchers from that undertaking.

125 Contrary to the Diputación's submission, the Commission did not thus base its decision solely on the lack of transparency in choosing the shipping operator when refusing to apply the derogation laid down in Article 87(2)(a) EC.

126 Therefore, the Court of First Instance did not distort the reasoning of the contested decision or adversely affect the rights of defence in finding, in paragraph 165 of the judgment under appeal, that 'the Diputación has not alleged, and *a fortiori* has not established, that consumers could also have benefited from the aid at issue by possibly using other shipping companies capable of operating between Bilbao and Portsmouth'.

127 Consequently, the first part of the ground of appeal has no factual basis and can thus not be upheld.

128 As regards the second part of the fourth ground of appeal, it must be pointed out that, in reaching the conclusion that Article 87(2)(a) EC was not applicable in the present case, the Court of First Instance did not base its decision, in paragraph 166 of the judgment under appeal, solely on the fact that the agreement to purchase travel vouchers was entered into by the Diputación and P & O Ferries alone.

129 It held, in the first sentence of that paragraph, that '[u]nder the new agreement, P & O Ferries receives an annual sum determined in advance, irrespective of the number of travel vouchers in fact used by the ultimate consumers'. By that reference the Court of First Instance intended to point out, as it found, in particular, in paragraphs 121 and 137 of the judgment under appeal, that that agreement was not concluded by the Diputación to satisfy actual needs, but was made with a view to conferring on P & O Ferries an advantage which it would not have obtained under normal market conditions.

130 In the present case, in the light of the Court of First Instance's appraisal of the nature of the economic advantage granted to P & O Ferries, the reference in the first sentence of paragraph 166 of the judgment under appeal was sufficient in any case to justify in law the finding, in paragraph 167 of the judgment, that the aid at issue could not be analysed as having been 'granted to individual consumers ... without discrimination related to the origin of the products' within the meaning of Article 87(2)(a) EC.

131 Thus, the Court of First Instance did not err in law in applying that provision.

132 Therefore, the second part of the ground of appeal is unfounded and must be rejected.

133 It follows from the above considerations taken as a whole that the Court of First Instance vitiated its judgment by erring in law and distorting the facts of the case in so far as it, contrary to the force of *res judicata* with absolute effect resulting from the *BAI* v *Commission* judgment, examined the ground of appeal alleging infringement of Article 87(1) EC and in so far as it held that the new agreement and the original agreement constituted a single grant of aid, implemented in 1992.

134 Since that error of law and that distortion of the facts of the case do not, however, affect the operative part of the judgment under appeal, it need not be annulled.

135 The appeals must therefore be dismissed.

Costs

136 Under Article 69(2) of the Rules of Procedure, applicable in appeal proceedings by virtue of Article 118 thereof, 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 Commission has applied for costs and P & O Ferries and the Diputación have essentially been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeals;

2. Orders P & O Ferries (Vizcaya) SA and the Diputación Foral de Vizcaya to pay the costs.

[Signatures]