OPINION OF ADVOCATE GENERAL ALBER

delivered on 7 May 2002 [1]

I — Introduction

1. By this application the Kingdom of Spain seeks the annulment of Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles for the replacement of used vehicles (August 1994 — December 1996). [2] The Commission has declared the aid to be largely unlawful and incompatible with the common market and ordered its recovery.

II — Facts of the case and contested decision

2. On 28 July 1994 the Spanish Government, without previously notifying the Commission, adopted the Plan Renove Industrial (hereinafter 'PRI') in favour of natural persons, small and medium-sized enterprises (hereinafter 'SMEs'), regional public bodies and bodies providing local public services. The implementation of the programme was entrusted to the Instituto de Crédito Oficial (State credit institute) under an agreement of 27 September 1994.

3. The contested measure consisted in the granting of an interest-rate subsidy for four-year loans used to finance the purchase or hire purchase of commercial vehicles, the loans not to exceed 70% of the value of the vehicles. The subsidy amounted to a maximum of ESP 93 196 per million borrowed, equivalent to aid of 6.5% of the net purchase price. The subsidy was granted for the financing of vehicles of the following five categories: semi-trailers and lorries weighing more than 30 tonnes (Category A), commercial vehicles weighing between 12 and 30 tonnes (Category B), commercial vehicles weighing between 3.5 and 12 tonnes (Category C), car-based vehicles, light commercial vans and commercial vehicles weighing up to 3.5 tonnes (Category D) and motor buses and coaches (Category E).

4. The granting of the subsidy for the purchase of a new vehicle was subject to the requirement that a vehicle first registered in Spain 10 years previously (seven years in the case of tractor units) was irrevocably withdrawn from the market.

1 — Original language: German.
2 — OJ 1998 L 329, p. 23.

The replacement vehicle might also be larger — within set limits — than the vehicle withdrawn.

5. Between 9 February 1995 and 20 February 1996 the Commission asked the Kingdom of Spain for information on the PRI, about which it had heard from an unofficial source. The Kingdom of Spain responded to the request for information by letters of 6 March and 26 July 1995 and 14 March 1996.

6. By letter of 26 June 1996 the Commission informed the Kingdom of Spain of its decision to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88 EC) and called on it to comment.

7. The Kingdom of Spain submitted its observations by letter of 26 July 1996. A supplementary request for information by the Commission on 19 December 1996 was followed by further explanations from Spain in a letter of 12 February 1997. By letter of 19 November 1997 the Commission asked the Kingdom of Spain for additional information on the undertakings that do not provide transport services as a main activity and operate only in local markets. The Kingdom of Spain provided this information by letters of 27 November 1997 and 20 February 1998.

8. On 1 July 1998 the Commission adopted the contested decision, in the first two articles of which it stated that aid granted to regional public bodies and bodies providing local public services and to natural persons and SMEs pursuing a business other than transport on a solely local or regional level did not constitute State aid within the meaning of Article 92(1) of the Treaty. The following two articles read:

'*Article 3*

All other aid granted to natural persons and SMEs constitutes State aid within the meaning of Article 92(1) of the Treaty, is illegal and is incompatible with the common market.

Article 4

Spain shall abolish and recover the aid referred to in Article 3. The aid shall be repaid in accordance with the provisions of national law, and maturity interest shall be added to the sums recovered. The interest shall be calculated on the basis of the reference rates used in evaluating regional aid schemes and shall run from the date when the illegal aid was granted until the date when it is actually repaid.'

III — Procedure and formal claims

9. By a written pleading entered in the register of the Court of Justice on 25 September 1998 the Kingdom of Spain brought an action pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC).

10. On 25 February 1999 the Confederación Española de Transporte de Mercancías (CETM) brought an action before the Court of First Instance for the annulment of Articles 3 and 4 of the same decision (Case T-55/99).

11. By order of 25 January 2000 the Court of Justice suspended the procedure pursuant to Article 47(3) of the Statute until the Court had ruled in Case T-55/99.

12. In its judgment of 29 September 2000 the Court of First Instance dismissed CETM's action, [3] and the procedure before the Court of Justice in the present case was then continued.

13. The Kingdom of Spain claims that the Court should:

(1) annul Articles 3 and 4 of the contested decision; and

(2) order the Commission to bear the costs of the procedure.

14. The Commission contends that the Court should:

(1) dismiss the action as unfounded; and

3 — [2000] ECR II-3207.

(2) order the Kingdom of Spain to pay the costs.

15. The parties' arguments are set out under 'legal analysis' below.

IV — Legal analysis

16. The Kingdom of Spain bases its action on five pleas in law:

— infringement of Article 92(1) of the EC Treaty (now, after amendment, Article 87 EC),

— infringement of Article 92(3)(c) of the EC Treaty,

— infringement of the principle of the protection of legitimate expectations,

— infringement of the principle of proportionality in that there was an order for recovery and

— infringement of Article 190 of the EC Treaty (now Article 253 EC) on the basis that the statement of reasons for ordering recovery is inadequate.

A — *Infringement of Article 92(1) of the EC Treaty*

17. In the context of this plea the Spanish Government advanced two objections. It is of the opinion that the Commission is wrong to classify the PRI measures in the contested decision as selective measures in favour of certain undertakings or branches of production. It also believes that competition has not been distorted nor trade affected.

(1) No favouring of certain undertakings or branches of production

(a) Arguments of the parties

(aa) Kingdom of Spain

18. In the Spanish Government's view the measure is not selective since it was not

specified from the outset which undertakings would benefit. The PRI in fact sets out abstract criteria which both domestic and foreign undertakings can fulfil. All SMEs benefit, irrespective of the sector of the economy to which they belong.

19. Undertakings in other Member States can transfer commercial vehicles to Spain, register them there, then withdraw them and — assisted by the PRI — acquire a replacement vehicle. They can also agree with the holder of a vehicle registered in Spain that the vehicle will be withdrawn and then have its withdrawal assigned to them. In either case, the terms of the PRI do not prevent transport undertakings in other Member States from participating in the programme. The assistance provided is in fact unattractive to foreign undertakings because interest rates in their own countries are lower. In the final analysis, the PRI merely offsets the disadvantage to Spanish undertakings arising from interest rate differences.

20. The Spanish Government points out that, pursuant to Article 2.1 of the Agreement on Subsidies and Countervailing Measures (WTO-GATT 1994), [4] a subsidy is not deemed to be specific if it is linked to neutral and horizontally applicable requirements, as in the case of the PRI. Advocate General Darmon has also referred to the GATT concept of subsidies in the *Sloman Neptun* case. [5]

21. Nor, according to case-law, is there selectivity where the benefit arises from the nature or internal structure of the underlying system. [6] All undertakings can benefit from the PRI. The structure of the system is such that only large undertakings are excluded, but they do not face the same financial difficulties as SMEs.

(bb) Commission

22. The Commission takes the view that two criteria under the PRI in particular demonstrate its selectivity. Firstly, only undertakings needing commercial vehicles for their economic activity can claim the

4 — Uruguay Round of Multilateral Trade Negotiations (1986-1994) — Annex 1A, OJ 1994 L 336, p. 156.

5 — Opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, I-903, paragraphs 31 et seq. and 46.

6 — Judgments in Case 173/73 *Italy* v *Commission* [1974] ECR 709, and Case C-353/95 P *Tiercé Ladbroke* v *Commission* [1997] ECR I-7007, paragraph 38, and judgments of the Court of First Instance in Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 62, and Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 62.

subsidy. Secondly, the measure extends only to SMEs.

23. It is irrelevant that it is not known from the outset who the recipients will be. For there to be selectivity it is enough that only undertakings with specific characteristics are assisted. The Court of Justice, for example, regards as aid any measure that benefits all export undertakings in a Member State regardless of their size and the products they export. [7]

24. Nor can the measure be justified by the nature or internal structure of the underlying system. Spain has not explained what factor inherent in the system justifies the distinction made. It is not enough in this respect to claim that a measure pursues certain economic policy objectives. This argument is relevant only in connection with rules on taxation.

(b) Analysis

25. For a measure to be classified as State aid, Article 92(1) of the EC Treaty requires that it favour certain undertakings or industries.

26. Who the actual recipients are does not, however, need to be known from the outset. It follows from the wording alone of Article 92(1) of the EC Treaty, according to which it is enough for an industry to be favoured, that it is sufficient that the possible recipients be defined in abstract terms in order for a measure to be regarded as selective.

27. If the Spanish Government's approach were taken to its logical conclusion, statutory aid schemes or aid programmes would never satisfy the conditions for State aid since they typically only lay down abstract criteria to determine those who are to benefit. In fact, only subsidies granted on the basis of such general schemes can be measured against the standard set by Article 92 of the EC Treaty. The Court of Justice has repeatedly however been called upon to consider aid programmes and statutory aid schemes and has not voiced any doubts in regard to selectivity on the basis that the potential recipients were defined only by means of abstract criteria, rather than being specifically named. [8]

7 — The Commission refers to the judgments in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131.

8 — See, for example, the judgments in Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, on a scheme governed by the Austrian Energy Tax Law, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, on a scheme governed by the German Income Tax Law, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671 — Maribel scheme.

28. The fact that a measure is not a subsidy within the meaning of the WTO Agreement on Subsidies and Countervailing Measures is irrelevant to whether it constitutes State aid within the meaning of Article 92 of the EC Treaty. Although Advocate General Darmon referred to the concept of the subsidy under the GATT anti-subsidy code in the *Sloman Neptun* case in the context of comparing legal systems, [9] he did not draw any compelling conclusions for Community law. The Community is not, in any case, legally precluded from classifying as aid a measure which is not a subsidy according to the WTO agreement and applying, in this respect, stricter standards in its internal legal system than are required to be met in the context of international law.

29. The subsidy under the PRI would not be selective within the meaning of Article 92(1) of the EC Treaty only if it benefited all domestic undertakings without distinction. [10]

30. As the Commission rightly emphasises, only undertakings that need a commercial vehicle for their economic activities may claim the subsidy. Certain branches of the economy, such as the professions, are thus almost entirely excluded from the subsidy.

31. The PRI also has the effect of benefiting different industries to differing degrees. As there is no limit to the number of vehicles that can be subsidised per applicant, undertakings can benefit from the programme to different degrees depending on how important transport is in their area of commercial activity.

32. Another difference between the PRI and a permissible general measure is that only natural persons, SMEs, regional bodies and bodies providing services of general public interest may claim the subsidy. Although the PRI also provides for non-SMEs to be granted subsidies in exceptional circumstances, virtually no advantage has been taken of this option, as the Court of First Instance found in Case T-55/99. [11]

33. The question is whether these distinctions are justified by the nature or internal structure of the general system of which the measure forms part. The Court of Justice first developed this idea in the case of *Italy* v *Commission* which Spain cites. [12] This argument has since been frequently dis-

9 — Cited in footnote 5, points 46 and 63 et seq.

10 — Judgment in *Adria-Wien Pipeline* (cited in footnote 8, paragraph 35).

11 — See the judgment in *CETM* (cited in footnote 3, paragraphs 46 and 47).

12 — Cited in footnote 6, paragraph 33/35.

cussed, especially in connection with tax concessions and reductions in social security contributions. [13]

34. The facts in the present case differ from the circumstances in the cases cited in that the benefit consists not in exemption from a general burden but simply in the preferential treatment accorded to certain undertakings on environmental and transport policy grounds.

35. The fact that the Spanish Government is using the PRI to pursue specific policy objectives does not make the measure a general system within which certain systematic distinctions are made. [14] A system can be designated general only if, in principle, it extends to all domestic undertakings, as is true, for example, of the system of taxation or social security contributions. Undertakings which are not SMEs or do not need commercial vehicles are not, however, affected by the PRI.

36. As, moreover, Spain has also failed to show that the PRI forms part of an overriding system of some kind, it cannot be justified on the basis of systematic distinction.

37. The first objection under the first plea must therefore be dismissed.

(2) Competition not distorted and intra-Community trade not affected

(a) Arguments of the parties

(aa) Kingdom of Spain

38. The Spanish Government is of the opinion that the PRI measures do not distort competition or affect intra-Community trade. It argues that, as only SMEs are subsidised and the level of aid is low, the PRI does not have any appreciable impact. That must be taken into account, regardless of whether the Community guidelines on State aid to small and medium-sized enterprises (hereinafter 'SME guidelines') and the *de minimis* rule provided for thereunder apply.

13 — See the judgments cited in footnote 6 and the judgments in *Adria-Wien Pipeline* (cited in footnote 8, paragraph 42 et seq.) and *Maribel* (cited in footnote 8, paragraph 34 et seq.).

14 — See also the judgment in *CETM* (cited in footnote 3), paragraph 53.

39. The Spanish Government explains in this regard that the subsidy granted on the acquisition of a commercial vehicle amounted to a maximum of ECU 3 341 or 6.5% of the purchase price. Subsidised vehicles account for only 0.5% of all commercial vehicles registered in Spain. A large proportion of the beneficiaries engage in transport solely on their own account. Of the acquirers of larger vehicles (Categories A and E), 83% have only one vehicle and 97% fewer than five. The subsidised undertakings hardly operate outside Spain.

40. As the subsidy was subject to the condition that another vehicle be withdrawn, transport capacity is not increased. In its reply, however, the Spanish Government stated that in 12.3% of cases the subsidised replacement vehicle falls into a higher category than the withdrawn vehicle.

41. It was, moreover, only in its reply that the Spanish Government argued that the decision did not contain an adequate statement of reasons for the claim that intra-Community trade was affected.

42. Own-account transport and transport for hire or reward are not part of the same market. This is evident from the corresponding distinction made in the case of licences. Undertakings engaged in transport operations on their own account, with their own commercial vehicles, do not provide transport services in the market.

(bb) Commission

43. The Commission begins by emphasising that the possibility of competition being distorted is enough for Article 92 of the EC Treaty to be deemed to be infringed. In addition, the transport sector is a market that has only recently been liberalised and particular caution is therefore called for.

44. It stresses that even very low levels of aid in the transport sector might result in competition being distorted and intra-Community trade being affected, since this is a market beset with structural problems and overcapacity. The *de minimis* rule is not therefore applicable in this sector. The PRI also stimulates an increase in capacity.

45. The Commission further maintains that own-account transport and transport for hire or reward constitute one market since the activities involved are interchangeable. In this connection the Court of Justice asked the Commission before the hearing

to comment on the following when addressing the Court: in the context of merger control the Commission does not, as a rule, appear to take account of own-account activities when determining the relevant market. [15] If this is true, the Commission was asked to explain why it is acting differently in the present case in the context of aid supervision.

46. During the hearing the Commission stated that merger control and aid supervision were governed by completely different principles. However, own-account activities were also taken into account in the context of merger control in the determination of the market relevant to the merger, provided that they were interchangeable with activities undertaken for hire or reward. [16]

47. Intra-Community trade is affected by the mere fact that the competitive position of the Spanish undertakings is strengthened in Spain. Even if it is true that they hardly engage in intra-Community transport and provide very limited cabotage transport services in other Member States, the measure still makes it more difficult for transport undertakings in other Member States to penetrate the Spanish market.

(b) Analysis

48. Article 92(1) of the EC Treaty prohibits State aid that distorts or threatens to distort competition and affects intra-Community trade.

49. In examining the Commission's findings on these provisions in the contested decision, it must be borne in mind that the Commission enjoys considerable discretion in the application of Article 92 of the EC Treaty. The Court of Justice may not therefore substitute its own assessment for that of the Commission, but must confine itself to considering whether that assess-

15 — See Commission Decision 92/385/EEC of 28 April 1992 declaring the compatibility with the common market of a concentration (Case No IV/M.126 — Accor/Wagon-lits, in application of Council Regulation (EEC) No 4064/89, OJ 1992 L 204, p. 1); Commission Decision 93/9/EEC of 30 September 1992 declaring the compatibility of a concentration with the common market (Case No IV/M.214 — Du Pont/ICI, OJ 1993 L 7, p. 13); and Commission Decision 96/346/EEC of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.553 — RTL/Veronica/Endemol, OJ 1996 L 134, p. 32); the determination of the relevant market was confirmed by the judgment of the Court of First Instance in Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 107 et seq.

16 — See Commission Decision of 11 July 2000 declaring a concentration to be compatible with the common market (Case No IV/M.1943 — Telefonica/Endemol according to Council Regulation (EEC) No 4064/69, OJ 2000 C 235, p. 6, paragraph 8 (TV programmes limited to captive use are taken into account only if they are not available on the market. If, on the other hand, programmes made in-house are offered on the TV programme market, they form part of the relevant market); and Commission Decision of 3 July 2001 (COMP/JV.55 — Hutchison/RCPM/ECT, paragraph 71, accessible through http://www.europa.eu/int/comm/competition/mergers/cases/decisions/jv55_en.pdf).

ment contains a manifest error or constitutes a misuse of powers. [17]

50. In the application of Article 92 of the EC Treaty the Commission may base its decisions on guidelines and communications. In view of the level of aid provided under the PRI the Commission could [18] have applied the communication on *de minimis* aid and, on this basis, declared the measures compatible with the common market. It refused to do so, however, because it regards this as a transport sector measure, in which the communication is not applicable.

51. However, only some of the beneficiaries under the PRI are undertakings that provide transport services for hire or reward, i.e. transport undertakings in the narrower sense. The PRI also benefits undertakings operating mainly in other sectors of the economy that use their own commercial vehicles for their own account. The question is whether the Commission was entitled to regard the measure as falling within the transport sector, thus enabling it largely to ignore the *de minimis* rule.

52. For an accurate definition of what is meant by own-account transport reference should be made to the definition in point 4 of Annex I to the First Council Directive of 23 July 1962 on the establishment of certain common rules for international transport (carrying of goods by road for hire or reward), [19] as amended by Council Regulation (EEC) No 881/92 of 26 March 1992 [20] 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. [21]

17 — Judgments in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 26, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 46.

18 — In this respect, however, certain reservations persist where the detail is concerned. Although the subsidy per vehicle is small, the aid per applicant under the PRI is not restricted to a specific number of vehicles. In theory it would therefore be possible for the aid to exceed the limit of ECU 100 000 in three years in certain cases. A further question is how far the PRI precludes the cumulation of more than one type of aid, as the *de minimis* communication requires.

19 — OJ, English Special Edition, First Series 1959-1962, p. 267.

20 — OJ 1992 L 95, p. 1.

21 — The definition cited reads as follows:
4. Carriage of goods in motor vehicles provided the following conditions are fulfilled:
(a) the goods carried must be the property of the undertaking or must have been sold, bought, let out on hire or hired, produced, extracted, processed or repaired by the undertaking;
(b) the purpose of the journey must be to carry the goods to or from the undertaking or to move them, either inside the undertaking or outside for its own requirements;
(c) motor vehicles used for such carriage must be driven by employees of the undertaking;
(d) the vehicles carrying the goods must be owned by the undertaking or have been bought by it on deferred terms or hired... ;
(e) carriage must be no more than ancillary to the overall activities of the undertaking.'

(aa) Exclusion of the application of the *de minimis* rule

(i) Significance of guidelines

53. In its communication on *de minimis* aid the Commission adopted a rule on the interpretation of Article 92(1) of the EC Treaty. Put simply, the rule states as follows: where the total amount of aid does not exceed ECU 100 000 in three years, it is assumed that it does not have any appreciable impact on trade or competition between Member States. Below this ceiling, then, Article 92(1) of the Treaty is deemed not to be applicable. [22]

54. The *de minimis* rule was at first included in the Community guidelines for State aid to small and medium-sized enterprises of 20 May 1992 [23] and was replaced by the communication on *de minimis* aid. [24] With effect from 23 July 1996 the Commission replaced the 1992 SME Community guidelines with a new version. [25] In terms of the time frame, this version is presumably the one that was applicable to the assessment of the PRI. In the contested decision, however, the Commission refers only to the 1992 SME Community guidelines and the *de minimis* communication. [26] If one uses the new Community guidelines, however, one does not reach conclusions that are essentially different, especially as these guidelines refer to the 1996 *de minimis* communication.

55. The Court of Justice has commented on the significance of guidelines in the area of aid supervision on several occasions, stating in particular 'that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty.' [27]

56. The judgment in *CIRFS* also states that the Commission must comply with any guidelines it adopts. [28] But that case concerned 'aid discipline' in the synthetic fibre industry, which had been adopted with the approval of the Member States as an

22 — Advocate General Léger points out that there appears to be some inconsistency between the *de minimis* communication and the Court's ruling that even the smallest amount of aid may affect intra-Community trade (see further point 88 below) (Opinion in Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, point 45).

23 — OJ 1992 C 213, p. 2.

24 — OJ 1996 C 68, p. 9.

25 — OJ 1996 C 213, p. 4.

26 — See footnote 12 of the contested decision.

27 — Judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 52; see also the judgment in Case C-288/96 *Germany* v *Commission* (cited in footnote 17), paragraph 62.

28 — Judgment in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36; see also the judgement in Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 42.

appropriate measure based on Article 93(1) of the EC Treaty.[29] However, this statement is true, *mutatis mutandis*, of the guidelines laid down by the Commission in the communication on *de minimis* aid.[30]

57. The *de minimis* rule was published both to simplify administration and to ensure transparency and legal certainty.[31] In particular, the Commission makes it clear to the Member States when notification of a measure pursuant to Article 93(3) of the EC Treaty is unnecessary. That objective is achieved only if the Commission itself is bound by the rule. From this it follows that it is not within the Commission's discretion to decide whether or not it applies the rule: it must observe the scope of application of the guideline as defined in the *de minimis* communication.

(ii) *De minimis* rule not applicable to aid in the transport sector

58. The wording of the *de minimis* communication makes clear that the communication does not apply in the transport sector. The Commission has given a broad interpretation of the term 'transport sector'. According to its interpretation, the transport sector includes any transport operation, regardless of whether it is effected by a transport undertaking for hire or reward or by an undertaking in another sphere for its own account.

59. The Spanish Government, on the other hand, appears to advocate a narrower interpretation. The *de minimis* rule would then be applicable only to aid to transport undertakings, i.e. undertakings whose principal economic activity consists in the provision of transport services for hire or reward.

60. The exclusion of the transport sector in the *de minimis* communication must be interpreted in the context of the scheme and purpose of the provision. The communication itself does not give any information on this, however. The only explanation in the 1992 SME Community guidelines, of which the *de minimis* rule originally formed part, is that the Community guidelines do not apply in sectors in which special legislation has been adopted.

61. In the contested decision and in the procedure before the Court of Justice the Commission gave as the reason for the

29 — See the Report for the Hearing in Case C-313/90 [1993] ECR I-1127.

30 — See the Opinion of Advocate General Léger in Case C-382/99 *Netherlands* v *Commission* (cited in footnote 22), paragraph 50.

31 — See the judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 52.

exclusion of the transport sector the fact that in this sector, with its many small undertakings, even relatively small amounts of aid can have an impact on intra-Community competition and trade. The exclusion therefore takes account of the specific conditions in the transport market.

62. The question is what services the transport market encompasses. In the contested decision all the Commission has to say about this is the following:

'The transport sector is made up of transport for hire or reward as well as own-account transport, as both activities are regarded as being interchangeable. From a macroeconomic as well as an operational point of view in certain situations the outsourcing of transport services permits an optimum allocation of resources and brings a desired element of flexibility to the organisation of transport.'

63. Whether this definition of the market by the Commission is free from errors of assessment is open to question.

64. The issue discussed during the hearing as to whether the definition of the market should be based on the same standards in the cases of merger control and aid supervision need not be answered conclusively here, since the Commission has made it clear that in the context of merger control it also takes account of own-account activities when determining the relevant market in so far as they are interchangeable with services provided by third parties in each case.

65. What is not disputed, then, is that the determining factor in the definition of the market in both instances is whether all activities are able to meet the same need; services with different features form one market only where they are interchangeable to more than a limited extent. [32]

66. Nor is it sufficient for the customer to have a theoretical choice between the two forms of activity. There must also be some degree of probability that they are actually interchanged in a not insignificant number of cases.

67. In deciding whether own-account transport is interchangeable with services

32 — See the settled case-law of the Court of Justice on Article 86 of the EC Treaty: judgment in Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 33, with further references.

provided by external transport undertakings, the Commission did not take adequate account of the advantages of in-house transport. These include the fact that the holder himself can decide to use his own vehicle at any time and is not dependent on the availability of appropriate services from a third party. Where an undertaking carries out own-account transport operations, the carriage of goods and persons is, moreover, often linked to the provision of other services in its principal area of commercial operations, such as the installation and assembly of the goods transported. It hardly seems expedient in such cases for a third party to transport the goods concerned.

68. An SME that already undertakes own-account transport with a vehicle of its own has at some stage opted in principle for this system in view of its specific needs, and invested in a vehicle. It will be at pains to use this vehicle to make the investment and ongoing costs worthwhile. It will consider using a third party only if the overall circumstances are so changed that it seems advantageous to depart from the original decision to operate its own vehicle.

69. The Commission failed to appreciate that for an individual undertaking to reorganise its transport arrangement is a long-term process, if it occurs at all. It wrongly assumed that the two ways of procuring transport services are interchangeable, such that there may be deemed to be a current competitive relationship and thus a single market.

70. A further argument for considering own-account transport to be separate is the distinction that is also made between transport for hire or reward and own-account transport in secondary law on access to the market in the carriage of goods by road in the Community. Own-account transport is exempted from all the rules and other permit requirements for the Community licence which must otherwise be complied with to obtain access to the intra-Community carriage of goods by road. [33]

71. On a proper interpretation of the *de minimis* rule, the rule would only have been inapplicable in regard to subsidies awarded to transport undertakings that provide commercial transport services for hire or reward. Only those undertakings operate in the transport market, which is characterised by a large number of undertakings and in which even small amounts of aid may lead to a distortion of competition.

33 — See point 4 of Annex I to the First Council Directive on the establishment of certain common rules for international transport (carrying of goods by road for hire or reward) (OJ, English Special Edition, First Series 1959-1962, p. 267), as amended 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).

72. Even if they engage in transport activities on their own account, other undertakings should not be regarded as operators in the transport market. Instead, they should be covered by the rules that govern the sector in which they are principally active. Provided that such undertakings do not belong to other exempted sectors and the other requirements of the *de minimis* rule are satisfied, subsidies received by such undertakings under the PRI do not constitute aid within the meaning of Article 92(1) of the EC Treaty.

(iii) Initial conclusion

73. The Commission's error in its application of the *de minimis* rule means that the contested decision ought to be annulled in its entirety.

74. A partial annulment of the decision, limited to the part which concerns aid to undertakings engaged in own-account transport, is not an option open to the Court of Justice. It is for the Commission to reassess the measure as a whole, applying the *de minimis* rule correctly. What must be considered in this context is whether the subsidy received by non-professional carriers meets the requirements of the *de minimis* rule, in particular, whether the threshold is not exceeded, and whether cumulation with other aid is excluded. By partially annulling the decision, the Court of Justice would be anticipating a new, correct definition of the market and so substituting its assessment for that of the Commission.

75. In order that all the pleas be fully considered, and in the event that the Court does not share the view set out above, I propose to continue with my analysis.

(bb) Distortion of competition and effect on trade within the meaning of Article 92(1) of the EC Treaty (in the alternative)

76. Should the Court of Justice come to the conclusion that the Commission was right to regard the *de minimis* rule as inapplicable, it would be necessary to determine whether its contention that subsidies under the PRI distort or threaten to distort competition and affect intra-Community trade is free from manifest errors of assessment.

77. To ascertain what influence the measures have on competition, the market affected by the subsidies first needs to be defined.

(i) Definition of the relevant market

78. The Commission did not make any detailed findings in the contested decision as to the definition of the relevant market. In the context of examining the sphere of application of the *de minimis* rule, it merely found, as already stated, that the transport sector encompasses both transport for hire or reward and own-account transport. [34]

79. The comments on the definition of the transport sector for the purposes of the *de minimis* communication apply *mutatis mutandis* to the definition of the market as regards the application of Article 92(1) of the EC Treaty. Transport operations effected by an undertaking with its own vehicles for its own account cannot simply be replaced by external transport services. The two forms of transport do not therefore form a single market.

80. Above all, the Commission has not explained why transport operations hitherto effected by an undertaking with its own vehicles by way of an activity that is subsidiary to another principal activity are in fact interchangeable with the services provided by third parties. The fact that the relevant group of recipients under the PRI were hitherto using their own vehicles for these purposes militates against the proposition that they are interchangeable.

81. The erroneous definition of the relevant market thus constitutes a further ground for annulling the contested decision.

(ii) Distortion of competition and effect on trade

82. If the market in professional transport for hire or reward is considered in isolation, the Commission's findings in the contested decision as to the distortion of competition and the effect on intra-Community trade are unobjectionable.

83. The PRI gives SMEs in the transport sector established in Spain an advantage over large undertakings and undertakings with registered offices in other Member States. Only Spanish undertakings have regular use of commercial vehicles registered in Spain which can be withdrawn and replaced with new vehicles subsidised under the PRI. The possible ways in which

34 — See point 62 above.

the Spanish Government claims undertakings from other Member States can similarly meet the requirements for obtaining subsidies are impracticable, or at least involve additional costs. The expense involved would be disproportionate to the amount of subsidy granted.

84. The Spanish Government's argument that the PRI was intended merely to offset the different rates of interest on loans in the Member States is irrelevant here. Differences in the general legal and economic environments in the Member States can be overcome only through the approximation of laws. A unilateral change to a given cost factor in a sector of a Member State's economy is, on the other hand, likely to disturb the existing equilibrium. [35]

85. Although the subsidy contributes towards an acquisition, it must be classified as operating aid. As the subsidy is to be used for the acquisition of a new vehicle to replace a commercial vehicle at least 10 years old, the recipients are relieved of costs which they would normally have to bear in the course of their usual business activities. The acquisition does not entail a reorganisation or expansion of operations such as would require a financial outlay that was out of the ordinary. Operating aid is deemed in settled case-law to distort competition because it improves the financial position and scope for action of the recipient undertakings as compared to undertakings which do not receive operating aid. [36]

86. Where the position of domestic undertakings competing with undertakings from other Member States is strengthened by subsidies from State resources which distort competition, intra-Community trade is also affected. [37]

87. The Spanish Government advances various arguments — backed by a number of figures — in support of its contention that the subsidies granted under the PRI do not affect intra-Community trade. It argues, for example, that the amount of the subsidy is modest and that the recipient undertakings are very small, usually operating only one vehicle.

35 — See the judgment in Case 173/73 *Italy* v *Commission* (cited in footnote 6, paragraph 36/40) and the Opinion of Advocate General Darmon in *Sloman Neptun* (cited in footnote 5), point 62.

36 — See the judgment in Case C-288/96 *Germany* v *Commission* (cited in footnote 17), paragraphs 89 and 90, and the judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48, upheld by the judgment of the Court of Justice in Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 20 et seq.

37 — See the judgments in Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 11, and Case C-156/98 *Germany* v *Commission* (cited in footnote 8, paragraph 32).

88. According to settled case-law, however, the fact that the aid is comparatively limited in scale and is granted only to undertakings of a limited size does not exclude the possibility of intra-Community trade being affected. [38] Even relatively minor amounts of aid may affect trade between Member States if there is strong competition in the sector concerned. [39] This is particularly true of the transport market, which — as the Commission has stated without being challenged — is highly fragmented and beset by overcapacity.

89. Spain also argues that the recipient undertakings play little part in intra-Community transport. This again is not to say, however, that intra-Community trade is not affected. As the Court of Justice has ruled, [40]

'... it is not necessary for the recipient undertaking itself to export its products. 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...

Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on Community trade, especially in the case of undertakings established close to the frontier between two Member States.'

(iii) Inadequate statement of reasons as regards adverse effects on intra-Community trade

90. It was only in its reply that the Spanish Government raised an alleged failure to state reasons with regard to adverse effects on intra-Community trade. As it has not explained why this argument was advanced at such a late stage, its objection cannot be entertained, pursuant to Article 42(2) of the Rules of Procedure. However, the Court of Justice may at any time and of its own motion raise an infringement of essential procedural requirements and especially of

38 — Judgments in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 86 and Case C-156/98 *Germany* v *Commission* (cited in footnote 8), paragraph 32.

39 — Judgments of the Court of Justice in Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27.

40 — Judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraphs 84 and 85; see also the judgment in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 40.

the requirement to give a statement of reasons. [41] The objection must therefore be considered.

91. In connection with the obligation to state reasons for contending that intra-Community trade has been affected within the meaning of Article 92(1) of the EC Treaty, the Court of Justice ruled in its judgment in *Sardegna Lines*

'... that although in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.' [42]

92. The Commission complied with these requirements in the contested decision by stating (section IV, last paragraph):

'Where aid strengthens the financial position of firms in a particular sector involved in intra-Community trade, this trade must be regarded as affected within the meaning of Article 92(1) of the Treaty. Since the aid provided for in the Plan Renove Industrial strengthens the financial position and scope for action of the recipient companies as compared with their competitors, and since this effect takes place within the context of intra-Community trade, the Commission considers that the latter is likely to be affected by the granting of such aid.'

93. In view of the link which, according to the case-law, exists between the strengthening of an undertaking's competitive position and the effects on intra-Community trade, there was no need for a more detailed statement of reasons. The plea that the statement of reasons with regard to effects on trade was inadequate must therefore be dismissed.

(iii) Conclusion

94. As the Commission has wrongly failed to apply the *de minimis* rule to aid to undertakings which effect transport operations solely for their own account, the first plea is well founded. The erroneous definition of the market would also result in the annulment of the decision in the event, considered in the alternative, of the *de minimis* rule being inapplicable.

41 — See the judgments in Case 18/57 *Nold* v *High Authority* [1959] ECR 41, and Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 97, and the judgment of the Court of First Instance in Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931.

42 — Judgment in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66; see also the judgments in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 24, and Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52.

B — *Infringement of Article 92(3)(c) of the EC Treaty*

(1) Arguments of the parties

(a) Kingdom of Spain

95. The Spanish Government is of the opinion that the requirements for exemption from the prohibition of aid pursuant to Article 92(3)(c) of the EC Treaty are met, since the measures under the PRI contributed to improved environmental protection and road safety. The PRI did not increase capacity in the transport sector, nor were undertakings in other Member States placed at a disadvantage.

96. The mere fact that vehicles over 10 years old were replaced with new ones led to a reduction in the emission of harmful substances, so that there was no need to adopt separate measures to encourage that trend. The PRI resulted in the applicable standards being met prematurely, since vehicles were replaced earlier than required by law.

(b) Commission

97. The Commission begins by pointing out that the exemptions permitted by Article 92(3) of the EC Treaty are to be interpreted narrowly and that Member States must prove that the requirements for an exemption have been satisfied. Spain has not succeeded in doing this.

98. The amount of the subsidy depends solely on the purchase price, with no account taken of special factors relating to environmental protection or road safety. Subsidised vehicles — like those withdrawn — had merely to comply with the existing standards. Although stricter standards sometimes applied to new vehicles than to vehicles first registered before a given date, a vehicle that was withdrawn might already have met these standards.

99. According to the Community guidelines for aid to environmental protection, only additional costs attributable to environmental protection are eligible. In the case of aid for adjustments to new standards, not more than 15% of additional costs may be offset by the aid. Under the PRI, on the other hand, the calculation of the subsidy is based on the total purchase price.

100. As undertakings are relieved of costs which they would have to bear in the course of their normal business, what they receive constitutes operating aid, which in principle affects intra-Community trade in a way that goes against the Community interest. [43] The Commission also observes that the PRI has the effect of increasing capacity and is discriminatory and points to the risk of cumulation with other aid approved in 1993 and 1996.

(2) Analysis

101. According to Article 92(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities or of certain economic areas may be regarded as compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

102. In the application of this derogation the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. [44] However, the reasoning followed by the Commission must remain consistent. [45]

103. As explained above, the Commission may adopt a policy as to how it will exercise its discretion in the form of guidelines, provided that they are compatible with Community law. [46] It has taken advantage of this option by adopting the Community guidelines for environmental aid.

104. These guidelines permit investment aid (paragraph 3.2) and — in certain circumstances — operating aid (paragraph 3.4) and aid for the acquisition of environmentally friendly products (paragraph 3.5). The Community guidelines distinguish three types of investment aid: aid for adjustment to new mandatory environmental standards, aid to undertakings exceeding mandatory environmental standards and aid in the absence of mandatory environmental standards.

105. The Commission classified the PRI as a measure within the meaning of

43 — The Commission refers in this context to the judgment of the Court of First Instance in *Siemens* v *Commission* (cited in footnote 36).

44 — Judgment in *Maribel* (cited in footnote 8), paragraph 55 and judgment in Case C-303/88 *Italy* v *Commission* (cited in footnote 39), paragraph 34.

45 — See the judgment in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* (cited in footnote 40), paragraph 51.

46 — See point 50 above.

Article 92(3)(c) of the EC Treaty, but refused any exemption under the Community guidelines for aid to environmental protection. It is necessary to determine whether its evaluation of the PRI is free from manifest errors in the exercise of its discretion.

106. To this end, it is worth calling to mind once more how the PRI works. It offers a financial incentive to replace vehicles at least 10 years old with new vehicles. It must be assumed that both the withdrawn vehicles and the newly acquired vehicles complied or comply with the standards applicable to them. It must further be assumed that, in view of their age, the withdrawn vehicles would in any case have had to be replaced in the foreseeable future.

107. On the other hand, there is some likelihood that, at least for some undertakings, the subsidy gave them the impetus to scrap a vehicle, with the result that it was withdrawn sooner than would have been the case absent any subsidy. It is a matter of common sense, after all, that, given the developments in motor vehicle technology, the replacement vehicles are more advanced in terms of safety, fuel consumption and harmful emissions than the withdrawn vehicles, which are at least 10 years older.

108. To summarise, it can thus be said that the measure had certain favourable effects on road safety and environmental protection in that it resulted in old vehicles being replaced with new ones earlier — albeit perhaps only slightly earlier — than would have been the case had the subsidy not been available.

109. In the final analysis, however, the Commission's refusal to exempt the PRI pursuant to Article 92(3)(c) of the EC Treaty, in conjunction with the Community guidelines for aid to environmental protection, does not constitute a manifest error in the exercise of its discretion, since the favourable effect aid has on the environment is not in itself enough for it to be exempted. The effect it has on competition and intra-Community trade must be weighed up against the objectives of environmental protection. For this the Community guidelines lay down differing conditions.

110. The Commission must, on the other hand, be criticised for failing to state with the utmost clarity which of the categories established by the Community guidelines it ultimately classifies the PRI as belonging to.

111. The system of subsidies appears to satisfy the criteria which are characteristic

of the Commission's approach to and the case-law on operating aid: subsidies are in essence there to fund replacement investments which are necessary anyway, [47] although acquisitions may be brought forward a little as a result of the subsidy.

112. The Court of Justice has ruled that operating aid cannot as a rule be exempted pursuant to Article 92(3)(c) of the EC Treaty. [48]

113. Accordingly, the Commission states in the contested decision that aid for investments which are necessary anyway cannot as a rule be exempted because it seriously distorts competition and is contrary to the common European interest. However, it was only when appearing before the Court of Justice that it explicitly described the measures as operating aid, and not in the contested decision.

114. According to the Community guidelines, operating aid may be authorised in certain exceptional cases. [49] The Commission did not discuss these provisions in the contested decision. Nor, clearly, is the aid granted under the PRI comparable to cases in which the Commission exceptionally deems operating aid to be permissible under the Community guidelines.

115. The Commission seems, rather, first of all to have determined that the provisions on aid to undertakings that exceeds the mandatory environmental standards were applicable (paragraph 3.2, B, of the Community guidelines). It points out, for example, that the costs which are eligible to be subsidised are strictly confined to the extra investment costs necessary to meet environmental objectives by achieving standards higher than those required by law. It is right to refuse any exemption, however, because Spain has not proved that the PRI could provide an incentive to exceed existing standards.

116. On the one hand, the Commission found the provisions on aid for adjustment to new mandatory environmental stan-

47 — See the case-law cited in footnote 36.

48 — Judgments of the Court of Justice in Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 50, and, in particular, Case C-288/96 *Germany* v *Commission* (cited in footnote 17), paragraphs 89 and 90.

49 — There is some doubt whether the Community guidelines are compatible in this respect with Article 92(3)(c) of the EC Treaty and its interpretation by the Court of Justice with respect to operating aid. This issue does not need to be considered further here, however, since the requirements for exemption as operating aid are not in any case satisfied.

dards (paragraph 3.2, A, of the Community guidelines) to be inapplicable since they apply only to investment in certain kinds of equipment. However, this restriction is not supported by the wording of the Community guidelines. They merely refer in general terms to plant and equipment.

117. On the other hand, the Commission points out that the subsidy depends on the purchase price and not on environmental factors. In its submissions to the Court of Justice it even referred to the specific limits on the subsidy (15% of eligible costs) which the Community guidelines lay down for precisely this form of investment aid pursuant to paragraph 3.2, A, of the Community guidelines.

118. Notwithstanding its unclear presentation, however, the Commission did base its decision on pertinent considerations and especially on the fact that the PRI ultimately subsidises operating costs. Other than in certain exceptional cases, such operating aid may not be authorised even though it may incidentally have a favourable effect on the environment.

119. Even if the measures are regarded as investment aid, exemption is out of the question because Spain has not proved that the requirements for the exemption of adaptation aid or aid as an incentive to exceed environmental standards have been satisfied. It should be borne in mind that the Community guidelines apply under a derogation from the prohibition of aid in Article 92(1) of the EC Treaty and must therefore be interpreted narrowly. [50]

120. Another factor the Commission rightly took into account is that the PRI runs counter to the Community interest because it has resulted in an increase in transport capacity. The Spanish Government's denial that the PRI had this effect is not persuasive. After all, Spain itself admitted that some 12.3% of the beneficiaries received the subsidy for a commercial vehicle in a higher category than the withdrawn vehicle. The Commission is not prevented when applying guidelines in the context of Article 92(3)(c) of the EC Treaty from taking other aspects of Community interest into account in its overall appraisal.

121. Finally, the Spanish Government was unable to demonstrate convincingly that there was no cumulation with other aid.

50 — The same applies to derogations pursuant to Article 92(2)(c) of the EC Treaty: see the judgment in Case C-156/98 *Germany* v *Commission* (cited in footnote 8, paragraph 49).

Although it argued unchallenged that the measures implementing the aid authorised by the Commission in 1993 contain a rule on cumulation, it did not comment on the likelihood of cumulation with aid authorised in 1996. The Commission also rightly emphasises that only an appropriate prohibition in the PRI itself would definitely prevent cumulation with other aid, but the PRI contains no such prohibition.

122. As the Commission cannot, therefore, by its refusal of an exemption pursuant to Article 92(3)(c) of the EC Treaty, be accused of having committed a manifest error in the exercise of its discretion, the second plea must be dismissed.

C — *Infringement of the principle of the protection of legitimate expectations*

(1) Arguments of the parties

(a) Kingdom of Spain

123. The Spanish Government claims that the principle of the protection of legitimate expectations has been infringed on the basis that the administrative procedure took a total of 41 months. During this period the Commission took no action for a total of 32 months — spread over various stages of the procedure — whereas the Spanish authorities responded to requests for information without delay on each occasion.

124. The long periods during which the Commission failed to react led the Spanish Government to expect that there would be no objection to the aid. As a result, the number of authorised subsidies rose to about 14 500.

125. The Court of Justice has declined to apply the principle of the protection of legitimate expectations only when national authorities have been dilatory in forwarding information,[51] which, however, they were not in this case. In the *RSV* case[52] the Court annulled a Commission decision because a legitimate expectation arose based on the length of the procedure.

(b) Commission

126. The Commission begins by pointing out that where a Member State fails to fulfil

51 — See the judgment in Case C-303/88 *Italy* v *Commission* (cited in footnote 39), paragraph 43.

52 — Judgment in Case 223/85 *RSV* v *Commission* [1987] ECR 4617.

its obligation to notify pursuant to Article 93(3) of the EC Treaty it cannot rely on a legitimate expectation as to the permissibility of the aid. Nor, in this specific instance, was the duration of the procedure excessive. Delays were attributable to lack of cooperation on the part of the Spanish authorities.

127. In any case, the fact that a procedure is lengthy is not enough in itself to justify a legitimate expectation. It must be accompanied by actions or statements by the Commission from which the Member State could infer that the aid was compatible with the common market. In fact, the Commission gave no such indications at any time during the procedure.

128. The Spanish authorities granted a large proportion of the subsidies between July 1995 and July 1996 although they were aware as early as February 1995 that the Commission had launched an investigation on the grounds that the measure had not been notified and might be incompatible with the common market. In 1997 they even established a similar new programme although the formal procedure relating to the original PRI was already opened.

(2) Analysis

129. Reference must first be made to the settled case-law of the Court of Justice, according to which the recipient of aid may not entertain a legitimate expectation that aid is lawful unless it has been granted in compliance with the procedure laid down in Article 93 of the EC Treaty.[53] That finding applies in particular to any Member State which has granted aid without previously notifying it.

130. The Court of Justice ruled in the *RSV* case that, where the Commission causes delay during the administrative procedure, the recipient of aid may in certain circumstances entertain a legitimate expectation that the Commission will no longer order its recovery.[54] However, as the Commission rightly emphasises, there were in the *RSV* case, aside from the length of the procedure before the Commission, exceptional circumstances which could legitimately lead the recipient to entertain the expectation that the Commission would not object to the aid.

131. The Spanish Government has not referred to circumstances of this nature in

53 — Judgments in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25.

54 — Judgment in *RSV* (cited in footnote 52), paragraph 17.

the present case. It bases its argument solely on the length of the procedure. As a rule, however, the length of a procedure before the Commission alone cannot give rise to a legitimate expectation.

132. In practice, the Commission always closes the preliminary procedure — including preliminary procedures relating to unnotified aid — with a decision either initiating the formal procedure or stating that the measure does not constitute aid or that it has no objection to it. [55]

133. Once a Member State has been informed that the Commission has initiated a preliminary procedure, it can assume that the Commission will not object to the measure only when it has received a decision to that effect. This is equally true of the period after the opening of the formal procedure, since this stage of the procedure too is closed with a decision. The fact that the procedure has continued for a certain period cannot as a rule justify a legitimate expectation.

134. An unusually long period of inactivity on the Commission's part or delay without reason in the procedure that is attributable to it might, however, constitute an infringement of the principle of proper administration or lead to the forfeiture of the Commission's right to take action against the measure. Only in such cases might the Member State possibly rely on its legitimate expectation that there would be no further objection to the measure.

135. What must be taken into account in this context, however, is whether the length of the procedure is attributable to the Commission alone or is also due to the fact that the Member State did not forward all the necessary information to the Commission without delay, contrary to its obligation under Article 5 of the EC Treaty (now Article 10 EC). [56]

136. It is not apparent that the Commission took no action for an unusually long time or that the procedure was delayed for no reason. The length of the procedure is, rather, due also to the Spanish authorities' failure to forward all the necessary information to the Commission without delay.

137. The Commission asked the Spanish authorities for information on the PRI by letter of 9 February 1995. They forwarded

55 — See paragraph 4.2.3 of '*Guide to procedures in State aid cases*', reprinted in: *Rules applicable to State aid* Commission (ed.): *Competition Law in the European Communities*, Vol. II A, 1999; see also Article 13 of 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 was not yet applicable in the present case, however.

56 — Judgment in Case C-303/88 *Italy* v *Commission* (cited in footnote 39), paragraph 43.

no more than initial information by letter of 6 March 1995, which was received by the Commission on 7 April 1995. It was only in response to a further request on 6 July 1995 that the Spanish authorities forwarded a copy of the agreement of 27 September 1994 on the measures for implementing the PRI to the Commission by letter of 26 July 1995, i.e. more than six months after the first request for information.

138. Although some seven months elapsed before the Commission's further request on 20 February 1996, this is not an unusually long period of inaction entitling Spain to infer that the Commission (tacitly) approved of the PRI. The same is true of the next phase from the final communication of information on 18 March 1996 and the opening of the formal procedure in late June 1996.

139. The formal procedure continued for almost two years. This is admittedly longer than the (extendable) period of 18 months since laid down by the Council in Article 7(6) of Regulation No 659/1999 for formal investigation procedures relating to notified aid,[57] but it is not unusually long. Firstly, the PRI is not notified aid. Secondly, it should be remembered that even at this stage of the procedure the Spanish authorities did not forward all the necessary information in their initial observations, but waited until the Commission had submitted further requests. The Spanish Government failed to show that these further requests were unnecessary and led to the procedure being held up for no reason. It must therefore be concluded that the Commission alone was not to blame for the length of the formal procedure.

140. As the length of the formal procedure could not in these circumstances give rise to a legitimate expectation on the part of the Kingdom of Spain, the third plea must be dismissed.

D — *Infringement of the principle of proportionality in so far as an order for recovery was made*

(1) Arguments of the parties

141. In the Spanish Government's opinion, the recovery of aid which is incompatible with the common market is not an automatic consequence of an infringement of Article 92 of the EC Treaty, but is at the

57 — Regulation No 659/1999 had not yet entered into force when the decision was adopted and does not therefore apply in this case, but it does set a standard for comparison.

Commission's discretion. [58] It argues that it is evident from the Commission's communications on its approach to unnotified aid that recovery is ordered only 'as a rule', unless special circumstances obtain. The Spanish Government also cites a number of decisions in which the Commission has refrained from ordering recovery.

142. In view of the minimal adverse effects on competition, the order for recovery, which has serious consequences for the recipient SMEs, is wholly disproportionate. It is inconsistent with the ruling of the Court of First Instance in the *Cityflyer* case [59] that the principle of proportionality requires the measures taken to restore competition to be those which least harm harmonious economic development.

143. In its reply the Spanish Government claimed that at least the order for recovery in Article 4 of the contested decision should be annulled in order to protect the legitimate expectations of the aid recipients.

144. The Commission does not deny that it has some discretion to order recovery, but refers to settled case-law, according to which recovery is as a rule the logical consequence of the finding that aid is incompatible with the common market. [60] The serious consequences of recovery for the recipients did not justify a departure from the general rule.

(2) Analysis

145. According to settled case-law, 'recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted for the purpose of re-establishing the previously existing situation cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids.' [61]

146. This does not rule out the possibility of the Commission not ordering recovery where unusual circumstances obtain. In the case-law cited, the Court of Justice was simply providing the Commission with a guideline for the exercise of its discretion in normal circumstances.

58 — The Spanish Government refers to the judgment in Case 310/85 *Deufil* v *Commission* [1987] ECR 901.

59 — Judgment in Case T-16/96 *Cityflyer* v *Commission* [1998] ECR II-757, paragraph 55.

60 — It refers in this context to the judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66, '*Tubemeuse*'.

61 — Judgment in '*Tubemeuse*' (cited in footnote 60), paragraph 66; see also the judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 98.

147. The Spanish Government has not advanced any sound arguments to support its claim that recovery should not be required. It merely referred to serious implications for the recipients of aid, without giving any further details. It cannot therefore be regarded as an error in the exercise of its discretion for the Commission to order recovery and so award higher priority to the goal of restoring competitive conditions than to the interests of the aid recipients. [62]

148. It does not follow from the judgment of the Court of First Instance in *Cityflyer* [63] that the Commission should completely eschew recovery for reasons of proportionality in a case such as this. In fact, the Court of First Instance simply ruled that recovery should be restricted to what is necessary to eliminate the distortion of competition. In the case of a loan on preferential terms the whole capital should not therefore as a rule be repaid immediately, but only the difference between the preferential interest rate and the normal market rate.

149. Nor is recovery precluded where there is a legitimate expectation on the part of recipients of aid. As already stated, a recipient of unnotified aid cannot as a rule entertain a legitimate expectation that the aid is lawful. [64] Furthermore, the Commission published its decision on the opening of the formal procedure in the *Official Journal of the European Communities* on 13 September 1996. [65] It must therefore be assumed that the doubts expressed by the Commission in the decision about the compatibility of the aid with the common market were known. [66] Nor, for the reasons given above, [67] does the fact that the procedure then continued for two years constitute grounds for a legitimate expectation.

150. The fourth plea must therefore be dismissed.

E — *Infringement of Article 190 of the EC Treaty on the basis that the statement of the reasons for ordering recovery was inadequate*

(1) Arguments of the parties

151. The Spanish Government objects that the statement of reasons for ordering

62 — See the judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 99.

63 — Cited in footnote 59, paragraphs 55 and 56.

64 — See the case-law cited in footnote 53.

65 — OJ 1996 C 266, p. 10.

66 — See the judgment of the Court of First Instance in *CETM* (cited in footnote 3), paragraph 127.

67 — See point 139 above.

recovery is inadequate. The Commission merely states that repayment of the aid was necessary to restore competition.

152. The Commission, on the other hand, believes that, in view of the infringement of the prohibition of aid, and pursuant to the case-law, according to which recovery is the logical consequence of that prohibition, no further statement of reasons is needed. The Commission also refers to the case-law whereby Article 190 does not require every fact to be considered, and not just the wording but also the factual and legal context of the decision are relevant.

(2) Analysis

153. According to the case-law of the Court of Justice, no further statement of reasons is needed for the recovery of aid to be ordered where the aid has been granted contrary to Article 93(3).[68] This is especially true where the aid also proves to be substantively incompatible with the common market.

154. As the measures under the PRI were implemented without the Commission being previously notified, there was no need for a statement of reasons in regard to the order to recover the aid concerned. In any event, it was enough for the Commission to point out in the contested decision that the repayment of the aid was necessary to restore the competitive conditions obtaining before it was granted. The plea must consequently be rejected.

V — Costs

155. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. As the Commission has been unsuccessful and the Kingdom of Spain has applied for costs, the Commission must be ordered to pay the costs.

68 — Judgment in Case C-310/99 *Italy* v *Commission* (cited in footnote 17), paragraph 106 and judgment in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* (cited in footnote 40), paragraph 78.

VI — Conclusion

156. As the first plea is well founded, I propose that the Court:

(1) annul Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish 'Plan Renove Industrial' aid scheme for the purchase of commercial vehicles (August 1994 to December 1996);

(2) order the Commission to bear the costs of the proceedings.