JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

24 May 2011 *

In Joined Cases T-109/05 and T-444/05,

Navigazione Libera del Golfo Srl, formerly Navigazione Libera del Golfo SpA, established in Naples (Italy), represented by S. Ravenna, and A. Abate, lawyers,

applicant,

v

European Commission, represented by P. Costa de Oliveira and V. Di Bucci, acting as Agents,

defendant,

supported by

Italian Republic, represented initially by I.M. Braguglia, acting as Agent, and M. Fiorilli, lawyer, and subsequently by M. Fiorilli and R. Adam, acting as Agent, and finally by I. Bruni, lawyer,

* Language of the case: Italian.

Council of the European Union, represented by B. Driessen and A. Vitro, acting as Agents,

interveners in Case T-444/05,

and by

Caremar SpA, established in Naples, represented initially by G.M. Roberti, A. Franchi and G. Bellitti, and subsequently by Roberti, Bellitti and I. Perego, avocats,

intervener in Cases T-109/05 and T-444/05,

APPLICATION for the annulment of Commission Decisions D(2005) 997, of 3 February 2005, and D(2005) 9766, of 12 October 2005, refusing the applicant access to certain information which is not reproduced in the published version of Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia group) (OJ 2005, L 53, p. 29),

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka and K. O'Higgins (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 June 2010,

gives the following

Judgment

Legal context

1 In the words of Article 255 EC:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.'

2 In the words of Article 287 EC:

'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their

duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost elements.'

3 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), defines the principles, conditions and limits for the right of access to documents of those institutions laid down by Article 255 EC.

4 Under the heading 'Purpose', Article 1(a) of Regulation No 1049/2001 states that the purpose of that regulation is 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents".

5 Article 2(1) of that regulation provides:

'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.'

6 According to Article 3(a) of Regulation No 1049/2001, for the purposes of the regulation, 'document' means 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

7 Article 4 of Regulation No 1049/2001, which defines the exceptions to the right of access referred to above, provides as follows:

'…

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

8 Under the heading 'Processing of initial applications', Article 7 provides as follows:

'1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

...'

9 According to Article 8(1) of Regulation No 1049/2001:

'A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC], respectively.'

10 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) defines the procedures which apply to the exercise by the European Commission of the power conferred upon it by Article 88 EC to rule on the compatibility of State aid with the common market.

11 Under the heading 'Rights of interested parties', Article 20 of Regulation No 659/1999 provides as follows:

'1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the

information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.'

12 Under the heading 'Addressee of decisions', Article 25 provides as follows:

'Decisions taken pursuant to … shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give the latter the opportunity to indicate [to] the Commission which information it considers to be covered by the obligation of professional secrecy.'

13 Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions (OJ 2003 C 297, p. 6) ('Communication on professional secrecy in State aid decisions') sets out how the Commission intends to deal with requests by Member States, as addressees of State aid decisions, to consider parts of such decisions as covered by the obligation of professional secrecy and thus not to be disclosed when the decision is published. Point 3.1 of the Communication states as follows:

'Business secrets can only concern information relating to a business which has actual or potential economic value, the disclosure or use of which could result in economic benefits for other companies. For example, methods of assessing manufacturing and

distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organization of the firm.'

14 In particular, point 3.2, under the heading 'Other confidential information', also states that 'information regarding the organisation and costs of public services will not normally be considered "other confidential information", (although it may constitute a business secret, if the criteria laid down in section 3.1 are met).'

Background of the case and procedure

15 In Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia group) (OJ 2005 L 53, p. 29), the Commission granted in part a request by the Italian authorities for the removal, from the published version of the decision, of information relating to the cost elements of the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies ('the Tirrenia group') shown in the tables in paragraphs 128 and 140 of the decision.

16 The Commission notified the applicant, Navigazione Libera del Golfo Srl (NLG), of the non-confidential version of Decision 2005/163 in accordance with the second sentence of Article 20(1) of Regulation No 659/1999.

17 By letter of 24 November 2004, Mr Ravenna, the applicant's lawyer, requested the Commission, pursuant to Articles 6 and 7 of Regulation No 1049/2001, to provide him with the full text of Decision 2005/163, including the 'analytical data which [were] not reproduced in the tables in [paragraphs] 128 and 140 of [that] decision, including the detailed elements of the additional costs borne annually by Caremar and, in particular, relating to the passenger transport services on the Naples/Capri route by ferries and by high-speed connections'.

18 The Directorate-General for Energy and Transport of the Commission replied to the request for access to the said documents by letter of 7 December 2004 refusing access to the data in paragraphs 128 and 140 of Decision 2005/163. The Directorate-General considered that those paragraphs were covered by the exception laid down under Article 4(2), first indent, of Regulation No 1049/2001, which provides that the institutions are to refuse access to a document where disclosure would undermine the protection of the commercial interests of a natural or legal person. The Directorate-General added that the abovementioned information must be considered confidential in accordance with the Communication on professional secrecy in State aid decisions.

19 By letter of 4 January 2005, Mr Ravenna made a confirmatory application under Article 8 of Regulation No 1049/2001.

20 By letter of 3 February 2005 bearing reference D(2005) 997 ('the first contested decision'), the Secretariat General of the Commission confirmed the refusal of access to the documents on the ground that the disclosure of the information requested, concerning the breakdown of the costs for each company in the calculation of the annual compensation for services of public interest could damage the commercial interests of the companies of the Tirrenia group and constitute an advantage for other companies. According to the Commission, that type of information is not disclosed to the interested parties who are notified of the decision pursuant to Article 20 of

Regulation No 659/1999. Furthermore, the Commission is required, by virtue of Article 287 EC, not to disclose to interested persons information of the kind covered by the obligation of professional secrecy. In particular, the Commission justifies the refusal by reference to Article 4(2), first indent, of Regulation No 1049/2001 in so far as publication of the costs could damage the commercial interests of the companies concerned.

21 The Commission added that no overriding public interest justified disregarding the need to protect the commercial interests of companies by allowing access to information relating to their internal operations. The Commission also considered that partial access to a document, as provided for by Article 4(6) of Regulation No 1049/2001, had already been granted.

22 By an application lodged at the Registry of the Court on 8 March 2005, the applicant brought an action against the first contested decision, which was registered as Case T-109/05.

23 By order of 7 September 2005 of the President of the First Chamber of the Court, Caremar SpA was granted leave to intervene in support of the form of order sought by the Commission.

24 In its statement of defence the Commission raised the objection that the action was inadmissible on the ground that it had not been preceded by an initial application and then a confirmatory application by the applicant itself in accordance with Articles 6 and 8 of Regulation No 1049/2001. Mr Ravenna, stating expressly that he was instructed by the applicant, repeated his request for access to the documents in a letter of 9 June 2005. He specifically requested disclosure of only the documents containing information and detailed data provided by the Italian authorities to justify the various additional costs borne annually by Caremar in carrying out public service obligations

for the transport of passengers on the Naples-Beverello/Capri (Italy) route by ferries and high-speed connections.

25 By letter of 28 July 2005, the DG Energy and Transport refused access to the documents pursuant to Article 4(5) of Regulation No 1049/2001. The reason it gave for refusal was that, as the documents originated from the Italian authorities, it had consulted those authorities in accordance with Articles 4(4) and (5) of Regulation No 1049/2001 and Article 5(4)(b) of Decision 2001/937/EC, ECSC, Euratom, of 5 December 2001, amending its rules of procedure (OJ 2001 L 345, p. 94), and those authorities had informed the Commission that they objected to the disclosure of those documents.

26 By letter of 19 August 2005, the applicant presented a confirmatory request for access to the documents concerning the additional costs borne annually by Caremar in order to carry out its public service obligations for the transport of passengers on the Naples-Beverello/Capri (Italy) route.

27 By letter of 12 October 2005 bearing reference D(2005) 9766 ('the second contested decision'), the Secretariat General of the Commission confirmed the initial refusal by DG Energy and Transport of 28 July 2005. As the Italian authorities had objected to the disclosure of the information relating to the additional costs borne by Caremar for providing the public service on the routes concerned and the annual subsidy paid to the company for discharging that obligation, the Commission considered that the exception provided for by Article 4(5) of Regulation No 1049/2001 should be applied. The Commission added that, as the Italian authorities had expressly objected to the disclosure of the information, it was not in a position to grant partial access to the document in question pursuant to Article 4(6) of Regulation No 1049/2001. Moreover, according to the Commission, the submissions referred to by the applicant in its request, concerning Articles 87 EC and 88 EC, Council Regulation (EEC) No 3577/92

of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) and the Communication on professional secrecy in State aid decisions were irrelevant for assessing the confirmatory request because those provisions relate to the procedures concerning State aid and the parties' rights in the context of those procedures. The right of access to documents, laid down by Regulation No 1049/2001, did not depend on the applicant's capacity or specific interests.

28 By an application lodged at the Registry of the Court on 21 December 2005, the intervener brought an action for the annulment of the second contested decision. The action was registered as Case T-444/05.

29 By orders of 19 September 2006 of the President of the First Chamber of the Court, the Council of the European Union and the Italian Republic were given leave to intervene in support of the form of order sought by the Commission.

30 By order of 27 October 2006 the President of the First Chamber of the Court granted Caremar leave to intervene in support of the form of order sought by the Commission.

31 By order made by the President of the First Chamber of the Court on 11 December 2006, Cases T-109/05 and T-444/05 were joined for the purposes of the oral procedure and judgment.

32 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which, in consequence, the present case was assigned.

33 In accordance with Article 64 of its Rules of Procedure, the Court put two written questions to the parties. With the first question, of which the parties were given notice on 10 October 2008, the applicant was asked whether it still had a legal interest in bringing proceedings in Case T-109/05 in view of the Commission's adoption of the second contested decision, which is the subject of the action in Case T-444/05. With the second question, the Court requested the parties to submit their observations on the consequences, if any, for the present cases of the judgment of the Court of Justice in Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389.

34 The applicant replied that it still had a legal interest in bringing proceedings in Case T-109/05 as long as the Commission adhered to the first contested decision. The Commission for its part observed that, if the purpose of the two actions is, in essence, to obtain access to the same documents, the action in Case T-444/05 *de facto* replaced the action in Case T-109/05, which therefore becomes devoid of purpose.

35 In reply to the second question, the Commission pointed out that the Italian authorities had duly given their reasons for their objection on the basis of one of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 and that, even if no reasons had been stated, that did not affect the legality of the decision in the present case because the Italian authorities' reasoned refusal was binding on the Commission and obliged it to refuse the request for access.

36 On 22 January 2009 the Court adopted a second measure of organisation of procedure in accordance with Article 64 of the Rules of Procedure by requesting the Commission to clarify what it meant when it stated, in its reply to the Court's questions of 10 October 2008, that 'the action in Case T-444/05 de facto replaced the action in Case T-109/05', which therefore became devoid of purpose. The Court requested the Commission to clarify whether it was to conclude that it, the Commission, had in fact withdrawn the first contested decision, which was the subject of Case T-109/05, and, if that were not the case, whether it intended to withdraw the first decision.

37 The Commission replied that the action in Case T-444/05 had been brought solely by reason of the fact that the first action had not been duly preceded by the administrative stage on behalf of the applicant and that, therefore, the action had to be dismissed as inadmissible. For that reason the second action replaced the first, which could no longer exist independently and, in that sense, had become devoid of purpose.

38 Following the Court's judgment of 4 March 2009 in Joined Cases T-265/04, T-214/04 and T-504/04 *Tirrenia di Navigazione* v *Commission*, not published in the ECR, annulling Decision 2005/163, the Court put a third written question, in accordance with Article 64 of the Rules of Procedure, notified on 17 March 2009, asking the parties to submit their observations on the conclusions to be drawn from that judgment for Cases T-109/05 and T-444/05.

39 The applicant considered that it still had a very real legal interest in bringing proceedings in those two cases by reason of the need to have at its disposal the information on the costs actually borne by Caremar in respect of the public services on the Naples-Beverello/Capri route and on the annual subsidies received by Caremar in that respect, because those documents would enable the applicant to institute judicial proceedings, if necessary.

40 The Commission took the view that, following the Court's annulment of Decision 2005/163, the actions in Cases T-109/05 and T-444/05 had become devoid of purpose as the applicant no longer had any interest in seeking the annulment of the decisions refusing access to the documents in question.

41 On 7 April 2010 the Court adopted further measures of organisation of procedure in accordance with Article 64 of the Rules of Procedure.

42 By order of 12 April 2010, the Court ordered the Commission, pursuant to Article 65(b), Article 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, to produce a certain number of documents.

43 At the hearing of 1 June 2010 the Court took formal note that the Commission had withdrawn its objection of inadmissibility in Case T-444/05.

44 By order of 9 July 2010 the Court reopened the oral procedure by virtue of Article 62 of the Rules of Procedure. The parties were asked to state their views regarding the conclusions which they drew from the judgment of the Court of Justice in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885.

Forms of order sought by the parties

45 In Case T-109/05 the applicant claims that the Court should:

— annul the first contested decision;

— order the Commission to pay the costs.

46 The Commission contends that the Court should:

— dismiss the application as inadmissible or unfounded;

— order the applicant to pay the costs.

47 Caremar contends that the Court should:

— give judgment for the Commission in the terms sought by it;

— dismiss the application as inadmissible or unfounded;

— order the applicant to pay the costs.

48 In Case T-444/05, the applicant claims that the Court should:

— annul the second contested decision and, in the alternative, rule that Article 4(5) of Regulation No 1049/2001 is not applicable to the facts of the case;

— order the Commission to pay the costs.

49 The Commission contends that the Court should:

— dismiss the application as inadmissible or unfounded;

— order the applicant to pay the costs.

50 The Italian Republic claims that the Court should dismiss the action as inadmissible or unfounded.

51 The Council claims in essence that the Court should dismiss the action as unfounded.

52 Caremar claims that the Court should:

— give judgment for the Commission in the terms sought by it and dismiss the action as inadmissible or unfounded;

— order the applicant to pay the costs.

Law

A — *Case T-109/05*

1. *The subject-matter of the proceedings*

(a) Arguments of the parties

53 The Commission submits that the subject-matter of the proceedings is limited to the documents requested at the administrative stage and not, as the applicant claims, to the cost elements connected with Caremar's public service obligations for the 10 daily connections with the island of Capri. According to the Commission, the applicant has altered the subject-matter of the proceedings.

54 Furthermore, in its reply of 27 March 2009 to the written question from the Court, the Commission considers that, following the *Tirrenia di Navigazione* v *Commission* judgment, cited at paragraph 38 above, annulling Decision 2005/163, the actions in Cases T-109/05 and T-444/05 became devoid of purpose, as the applicant no longer had any interest in seeking the annulment of the decisions refusing access to the documents in question.

55 The applicant replies that its request consists in essence in obtaining the information and documents relating to the additional costs connected with Caremar's public service obligations on the Naples-Beverello/Capri route.

56 In its reply to the written question of which it was given notice on 10 October 2008, the applicant stated that it had a legal interest in bringing proceedings in Case T-109/05 as long as the Commission adhered to the first contested decision. The applicant reiterated that position in its reply of 23 March 2009 to the Court's question concerning the conclusions drawn for the present actions from the *Tirrenia di Navigazione* v *Commission* judgment, cited at paragraph 38 above, which annulled Decision 2005/163.

57 Caremar considers that the applicant's initial request is limited to the full version of Decision 2005/163 and the analytical data not reproduced in paragraphs 128 and 140 of the decision. At the hearing Caremar argued that the present action was devoid of purpose as, following the Court's annulment of Decision 2005/163 in *Tirrenia di Navigazione* v *Commission*, the data in paragraphs 128 and 140 of that decision no longer existed. Caremar concludes from this that it is not necessary to proceed to give judgment.

(b) Findings of the Court

58 The request for access to documents, as it appears in the letter of 24 November 2004, is for the complete text of Decision 2005/163, comprising the analytical data which are not reproduced in the tables in paragraphs 128 and 140 of the decision, including details of the additional cost elements borne annually by Caremar relating specifically to the passenger transport services on the Naples-Beverello/Capri (Italy) sea route.

59 In its action against the first contested decision, the applicant made it clear that it wished to obtain information concerning the additional costs arising from public service obligations borne by Caremar for the connections with the island of Capri.

60 It must be stated, contrary to the allegations of the Commission and Caremar, that in the present case there was no change in the subject-matter of the proceedings, which seek the annulment of the first contested decision, in that the applicant is said to have changed the wording of the documents as compared with its original request. Although, in the course of the written procedure, the applicant specified the documents which it wished to obtain, it must be noted that the detailed elements of additional costs borne annually by Caremar and, in particular, relating to the passenger transport services on the Naples/Capri route by ferries and by high-speed connections, formed part of the documents requested in its original request.

61 Nor can the Commission succeed in its argument that the present action is devoid of purpose because the applicant no longer has an interest in seeking the annulment of the first contested decision following the Court's annulment of Decision 2005/163 in the *Tirrenia di Navigazione* v *Commission* judgment, cited at paragraph 38 above, because the information in paragraphs 128 to 140 of that decision no longer exists.

62 It must be observed that any person may request access to any Commission document and is not required to give a reason for the request. It follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access (see, to that effect, Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraphs 66 and 67, and Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 26). Even though Decision 2005/163 has been annulled, the documents which are the source of the analytical data in paragraphs 128 and 140 of the decision still exist.

63 It follows that, in spite of the annulment of Decision 2005/163, the applicant retains a legal interest in bringing proceedings against the first contested decision in so far as the documents requested were not disclosed and that decision is still in force. Therefore the present action for the annulment of the decision has not become devoid of purpose.

2. *Admissibility*

(a) Arguments of the parties

64 Without raising a formal objection of inadmissibility, the Commission submits that the action is inadmissible on the ground that the mandatory preliminary stage was initiated by the applicant's lawyer in his own name and on his own behalf, not by the applicant itself.

65 While conceding that it was always aware that Mr Ravenna was acting in a professional capacity in the applicant's interest, the Commission nevertheless considers that he could not act on the applicant's behalf at the contentious stage because he had conducted the two initial stages of the access procedure in his own name.

66 In addition, the Commission submits that the applicant cannot claim an individual interest within the meaning of Article 230 EC because public access to the institutions' documents is not subject to the existence of any kind of interest, but is governed according to the principles and the conditions laid down by Regulation No 1049/2001.

67 The applicant replies that the Commission's arguments are too formalistic, because it knew that the applicant was duly represented and defended by Mr Ravenna. Furthermore, the request stated sufficient grounds to show that it was necessary to preserve its rights with a view to possible judicial proceedings.

68 The applicant also submits that it was fully entitled to be considered as directly and individually concerned within the meaning of the fourth paragraph of Article 230 EC in so far as Decision 2005/163 expressly refers to the applicant.

69 Caremar supports the Commission's submissions in considering that it was incumbent on Mr Ravenna, as the person making the request at the preliminary stage, to bring the action for annulment of the first contested decision.

(b) Findings of the Court

70 It should be borne in mind that the administrative procedure for access to documents which is governed by Regulation No 1049/2001 takes place over two successive stages in accordance with Articles 7 and 8 of the regulation. Article 7 governs the processing of initial requests. If a request is totally or partially refused or if no reply is received within the specified period, the applicant may make an application asking the institution to reconsider its position. Under Article 8 of the regulation, which governs the processing of confirmatory applications, if there is a total or partial refusal of access to the documents requested in a confirmatory request, the applicant may institute court proceedings against the institution under the conditions laid down for bringing an action for annulment.

71 It must be observed first of all that the initial application of 24 November 2004 and the confirmatory application for access to the documents of 4 January 2005 were made and signed by Mr Ravenna, the applicant's lawyer, without making reference as such to the fact that he represented the applicant.

72 However, it is clear from the wording of the initial request that Mr Ravenna was acting on the applicant's behalf as he had asked the Commission to provide them with the full text of Decision 2005/163 and had stated that the applicant needed the information in order to study the decision fully.

73 In addition, it must be observed that the Commission knew that Mr Ravenna represented the applicant, as the letter of 7 December 2004 from DG Energy and Transport replying to the initial request for access to the documents referred to 'the shipping company NLG which you represent'. Furthermore, the Directorate General used the phrases 'the decision notified to your client' and 'your client's interests' in the first contested decision.

74 It follows that, in view of the terms of the letters of both Mr Ravenna and the Commission, he was acting on the applicant's behalf during the administrative stage.

75 Therefore, contrary to the Commission's submission, the action is admissible.

3. *The substance of the case*

76 The applicant raises four pleas in support of its action. The first alleges an error of law on the Commission's part in applying the exception provided for under Article 4(2), first indent, of Regulation No 1049/2001, the second alleges a breach of the principle of non-discrimination, the third alleges a breach of the principle of proportionality, and the fourth alleges failure to state reasons.

77 The fourth plea should be examined first.

(a) The fourth plea, alleging failure to fulfil the obligation to state reasons

Arguments of the parties

78 The applicant considers that the Commission did not examine the subject-matter of its request for documents, which was for the production of the documents containing the information concerning the additional costs in connection with Caremar's public service obligations relating to the Naples-Beverello/Capri route. Likewise the Commission failed to examine the provisions of the Communication on professional secrecy in State aid decisions, points 14 and 17 of which expressly provide for the need to publish information concerning additional costs relating to public service obligations.

79 The applicant also submits that the Commission failed to consider the disclosure of information in the light of the case-law of the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, '*Altmark*', and read only part of the judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405.

80 The Commission and Caremar submit that the arguments concerning the lack of a statement of reasons in the first contested decision are entirely unfounded.

Findings of the Court

81 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 55 and the case-law cited, and Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 59).

82 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (see, by analogy, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 24). However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (see Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 37).

83 Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the scope of the exception relied on and, second, whether the need for protection relating to that exception is genuine.

84 Accordingly the statement of reasons for refusing access to documents must contain, for each category of documents concerned at least, the specific reasons why the institution in question considered that disclosure of the documents requested falls within the scope of one of the exceptions laid down by Regulation No 1049/2001 (see, to that effect, *Interporc* v *Commission,* paragraph 81 above, paragraph 56, and Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 101).

85 In the present case, it must be observed that the applicant's request for access concerns the following documents: the full text of Decision 2005/163, containing the analytical data which are not reproduced in the tables in paragraphs 128 and 140 of Decision 2005/163, including the detailed elements of the additional costs borne annually by Caremar and relating to the passenger transport services on the Naples-Beverello/Capri route provided by ferries and by high-speed connections.

86 The Commission set out the reasons for refusing to disclose the documents requested as follows:

'…

1. Subject-matter of the reference

Your request relates to certain documents with figures in the tables in [recitals] 128 and 140 of Decision 2005/163. In actual fact, in the public version of decision [2005/163] which is in your possession, the breakdown of the costs was omitted, but the total is shown.

2. Protection of commercial interests

The information omitted from the version of Decision [2005/163] intended for the public concerns the breakdown of costs which was taken into account for each of the regional companies, in the calculation of the annual compensation granted for carrying out services of general interest.

Disclosure of the information with figures could damage the interests of the companies concerned and be advantageous for other undertakings. The information in question relates to the internal operation of the Tirrenia group companies. Information of that nature is not disclosed to the interested parties who are notified of the decision pursuant to Article 20 of Regulation No 659/1999 laying down detailed rules for the application of Article 93 [EC]. Consequently the information covered by business secrecy was omitted from the document notified to your client, Navigazione Libera del Golfo [NLG] by registered letter of 20 July 2004.

According to the case-law, the Commission is required, under Article 287 … of the Treaty, not to disclose to interested parties information of the kind covered by the obligation of professional secrecy, in particular information relating to the internal operations of the recipient undertaking.

With all the more reason, Regulation No 1049/2001 regarding public access to documents prohibits the disclosure of that information. In fact, publication could damage the commercial interests of the undertakings concerned and would meet the provisions of Article 4(2), first indent, of that regulation.

3. Partial access

The request for access concerns only certain figures which were omitted from the published version. However, all that information is covered by the exception relating to the protection of business secrets. Partial access to the document, as laid down by Article 4(6) of Regulation No 1049/2001, has therefore already been granted.

…'

87 With regard to the reasons for the refusal to disclose the analytical data in the tables in paragraphs 128 and 140 of Decision 2005/163, it must be observed, first, that at point 2 of the first contested decision the Commission expressly points out that the disclosure of the figures requested by the applicant could damage the commercial interests of the undertakings concerned and be advantageous to other undertakings and would be contrary to Article 4(2), first indent, of Regulation No 1049/2001. The Commission adds that the figures are business secrets and, under Article 20 of Regulation No 659/1999, are not communicated to the interested parties. At point 4 of the first contested decision the Commission took the view that there was no overriding public interest that would justify disregarding the need to protect the commercial interests of undertakings by making information on their internal operation public.

88 With regard to the complaints that the Commission did not adequately explain the reasons why it did not apply the provisions of the Communication on professional secrecy in State aid decisions and did not explain the application of the *Altmark* judgment and the *British Airways and Others* v *Commission* judgment, paragraph 79 above, it must be borne in mind that, according to settled case-law, it is not necessary for the statement of reasons to specify all the relevant matters of law and of fact in so

far as the question whether the statement of reasons of a decision meets the requirements of Article 253 EC must be determined not only by reference to its wording, but also to its context and all the legal rules governing the subject in question (see *Co-Frutta* v *Commission*, paragraph 84 above, paragraph 100, and the cases cited).

89 Therefore, regarding the analytical data in paragraphs 128 and 140 of Decision 2005/163, the first contested decision clearly and unequivocally shows the Commission's reasoning, so that the applicant can see the reasons for the decision taken and the Court is enabled to exercise its power of review.

90 However, as appears from point 1 of the first contested decision, the Commission limited the request for documents to the figures in the tables in paragraphs 128 and 140 of Decision 2005/163. The Commission did not take into account the second part of the request, which related to the detailed figures used by the Commission to calculate the additional costs borne annually by Caremar relating specifically to the passenger transport services on the Naples/Capri route by ferries and by high-speed connections.

91 As there was no indication of the reasons why disclosure of the documents containing the abovementioned information would actually be capable of prejudicing any particular aspect of the protection of commercial interests, it was not possible for the applicant to know the reasons for the adoption of the measure and therefore to defend its interests and it is also impossible for the Court itself to assess why the documents to which access was refused fall within the exceptions laid down by Article 4 of Regulation No 1049/2001 (see, to that effect, *Svenska Journalistförbundet* v *Council*, paragraph 62 above, paragraphs 115 to 118, 122, 125 and 127).

92 It follows that the first contested decision lacks a statement of reasons in so far as the Commission did not set out the reasons enabling the applicant to know the justification for the refusal of access to the components of the additional costs borne annually by Caremar relating to the passenger transport services on the Naples-Beverello/Capri route by ferries and by high-speed connections.

93 Therefore the contested decision must be annulled, as it is vitiated by a failure to state reasons concerning the specific request for the detailed components of the additional costs borne annually by Caremar relating to the passenger transport services on the Naples-Beverello/Capri route by ferries and by high-speed connections.

94 However, it is necessary to examine the substantive legality of the first contested decision in so far as it concerns the analytical data in paragraphs 128 and 140 of Decision 2005/163 as the reasons given by the Commission on that point were sufficient.

(b) First plea: error of law in the application of the exception provided for under Article 4(2), first indent, of Regulation No 1049/2001

95 The first plea is divided into two parts, the first alleging an erroneous legal basis and the second alleging infringement of Article 4(2), first indent, of Regulation No 1049/2001.

First part: error of law in the choice of legal basis

— Arguments of the parties

96 The applicant observes that, in refusing access to the documents relating to the additional costs arising from Caremar's public service obligations, the Commission takes as a basis not only Article 4(2) of Regulation No 1049/2001, but also Article 20 of Regulation No 659/1999, Article 287 EC and the Communication on professional secrecy in State aid decisions.

97 The applicant considers that the Commission was wrong to act on the basis of the Communication on professional secrecy in State aid decisions in its letter of 7 December 2004. As the first contested decision confirms the refusal decision of 7 December 2004 and is therefore based on the same provisions, in particular the Communication on professional secrecy in State aid decisions, it has a formal defect.

98 Should it be necessary to refer to the Communication, the applicant submits that it takes priority over Regulation No 1049/2001 in so far as the concepts of professional secrecy and confidential information are more specific and more complete than Article 4 of the regulation.

99 The Commission submits that the first part has no factual basis because the first contested decision does not mention the Communication on professional secrecy in State aid decisions, but is based on Article 4(2) of Regulation No 1049/2001.

100 Caremar endorses the arguments put forward by the Commission.

— Findings of the Court

101 According to the case-law, by virtue of Article 8 of Regulation No 1049/2001, the response to the initial request is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 47, and *Co-Frutta* v *Commission*, paragraph 84 above, paragraph 35).

102 Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, in consequence, capable of being the subject of an action for annulment under Article 230 EC (see, to that effect, *Franchet and Byk* v *Commission*, paragraph 101 above, paragraphs 47 and 48; see also, to that effect, the judgment in *Co-Frutta* v *Commission*, paragraph 84 above, paragraphs 34 to 36). Accordingly, the response to the initial request does not produce legal effects and cannot be held to constitute an actionable measure.

103 In the present case, only the reply from DG Energy and Transport of 7 December 2004 refers to the Communication on professional secrecy in State aid decisions in finding that the information requested is confidential by virtue of the Communication.

104 The first contested decision, adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position of 7 December 2004 (see, to that effect, *Franchet and Byk* v *Commission*, paragraph 101

above, paragraphs 47 and 48; see also, to that effect, the judgment in *Co-Frutta* v *Commission*, paragraph 84 above, paragraphs 34 to 36), does not refer to the above-mentioned Communication, contrary to the applicant's submission.

105 Therefore the Court is not required to give a ruling on the reasoning of DG Energy and Transport in the initial statement of position and which was not referred to by the Secretary-General in the first contested decision (see, by analogy, Case T-47/01 *Co-Frutta* v *Commission* [2003] II-4441, paragraphs 28 to 33).

106 The first part of the first plea must therefore be rejected.

Second part: infringement of Article 4(2), first indent, of Regulation No 1049/2001

— Arguments of the parties

107 Alternatively, the applicant submits that the disclosure of information on the additional costs connected with Caremar's public service obligations cannot damage the latter's commercial interests. Information on the additional costs connected with public service obligations does not relate to methods of assessing production and distribution costs or to manufacturing secrets and is not therefore a business secret.

108 The applicant considers that the requirement of transparency imposed by the system for the supervision of State aid provided for in Articles 87 EC and 88 EC requires the disclosure of additional costs connected with public service obligations because they involve services of public interest. The requirement of disclosure and transparency arising from the Treaty rules has been upheld by the case-law and by Article 4(1)(h) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), and by Article 4(2) of Regulation No 3577/92. The requirement for transparency is all the more necessary in the present case in so far as Caremar was not selected as the result of a public invitation to tender.

109 The applicant also considers that the Commission's refusal to disclose the information concerning the additional costs in question is not consistent with the *Altmark* judgment, paragraph 79 above, in so far as the Commission has drawn up binding ad hoc rules by requiring in similar cases the use of comparative analyses of the costs of the services in question, in comparison with those of undertakings operating in similar conditions. Such analyses are not compatible with the requirements of confidentiality and/or the protection of Caremar's commercial interests.

110 The applicant also disputes the Commission's reference to the judgment in *British Airways and Others* v *Commission*, paragraph 79 above, as it is irrelevant to the present case.

111 According to the applicant, the public interest justifies the disclosure of the documents requested, having regard to the provisions of the EC Treaty relating to the supervision of State aid. The applicant considers that, as there is no commercial interest to protect, it is unnecessary to prove the existence of an overriding public interest justifying disclosure.

112 The applicant also observes that Caremar has not given any reasons for, or adduced the slightest evidence of, the confidential nature of the information requested or, in particular, of the commercial advantages that the applicant could gain if it had knowledge of them. The applicant considers that Caremar runs no business risk by disclosing the information, which relates to the losses and the subsidies granted by the Italian authorities and which are therefore not of commercial interest.

113 The applicant disputes the Commission's argument that the applicant's request has no connection with the subject-matter of the present proceedings on the ground that it relates to the complete text of Decision 2005/163. Although the applicant recognises that 'the tables in paragraphs 128 and 140 of the Decision [2005/163] merely reproduce the aggregate figures relating to all the activities of the [Tirrenia Group] companies', the applicant considers that the Commission is in possession of documents which made it possible to calculate the figures requested.

114 In its statement in reply, the applicant observes that the documents requested are partly historical as they relate to subsidies granted to Caremar prior to the five-year period laid down under the second indent of paragraph 14 of the Communication on professional secrecy in State aid decisions.

115 In response to the Court's written question on the conclusions to be drawn from the judgment in *Commission* v *Technische Glaswerke Ilmenau*, paragraph 44 above, the applicant submits, in essence, that the matters of law and of fact in that case are not the same as they relate to the interpretation of Article 4(2), third indent, of Regulation No 1049/2001 which is not referred to in the present case.

116 The Commission replies that it has in fact disclosed the global figures for the costs relating to public service obligations and that it has concealed only the figures relating to the cost price components, that is to say, concerning the structure of the company's production costs.

117 Observing that the subject-matter of the present dispute is the single document requested during the administrative stage, the Commission considers that the applicant fails to take account of the distinction made by the case-law between the concept of documents and that of information.

118 Regarding the implications of *Commission* v *Technische Glaswerke Ilmenau*, paragraph 44 above, the Commission submits that the need, stressed by the Court of Justice, to maintain consistency between the procedures relating to State aid and the treatment of requests for access to documents applies generally and also where the Commission has to protect third-party commercial interests, whether in connection with the publication of a State aid decision or with a request for access to documents under Regulation No 1049/2001.

119 Caremar submits that the Commission was correct in finding that all the information requested fell within the ambit of the exception relating to the protection of commercial interests, laid down under Article 4(2), first indent, of Regulation No 1049/2001. Caremar observes that the figures omitted from the tables in paragraphs 128 and 140 of Decision 2005/163 related to the total costs borne by each of the regional companies, the operating earnings and the total annual subsidies granted to them. Like the Commission, Caremar considers that the applicant has not shown an error of assessment in the application of the exception laid down under Article 4(2), first indent, of Regulation No 1049/2001, nor has it shown what the overriding public interest would be that could justify the disclosure of the documents requested. However, it is incumbent on the applicant to put this forward in connection with its request so that the Commission can be called upon to state its position on that point.

120 With regard to the implications of the judgment in *Commission* v *Technische Glaswerke Ilmenau*, paragraph 44 above, Caremar, like the Commission, submits that the Commission was right to base its interpretation of Article 4(2), first indent, of Regulation No 1049/2001, having regard to the general presumption arising from the State aid procedure of which the request for access to documents forms part.

— Findings of the Court

121 The purpose of Regulation No 1049/2001, as indicated by the fourth recital in its preamble and by its Article 1, is to give the public a right of access to the institutions' documents which is as wide as possible. The regulation applies to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union, in accordance with Article 2(3) of the regulation.

122 In accordance with Article 4(2), first indent, of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine protection of the commercial interests of a specific natural or legal person, unless there is an overriding public interest in disclosure.

123 According to settled case-law, the exceptions to document access fall to be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 36).

124 Furthermore, the examination required for the processing of a request for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. In principle, such an application can be justified only if the institution has previously determined, first, that access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest justifying disclosure of the document concerned (see *Co-Frutta* v *Commission*, paragraph 84 above, paragraph 123; see also, to that effect, *Sweden and Turco* v *Council*, paragraph 123 above, paragraph 49).

125 Furthermore, the risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (see, to that effect, Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69, and *Franchet and Byk* v *Commission*, paragraph 101 above, paragraph 115).

126 The Commission's application of the exception provided for by Article 4(2), first indent, of Regulation No 1049/2001 in refusing access to the documents requested must be examined in the light of those principles.

127 In the present case, the Commission refused access to the documents on the grounds that disclosure of the figures in paragraphs 128 and 140 of Decision 2005/163 could damage the commercial interests of the undertakings concerned and could be advantageous to other undertakings and would therefore contravene Article 4(2), first indent, of Regulation No 1049/2001.

128 In the first place, the documents for which the exception claimed may contain confidential information which falls within the ambit of the exception for the protection of

commercial interests. The figures which were not disclosed concern the breakdown of the Tirrenia Group's costs and earnings on the basis of which the annual compensation for services of public interest was calculated and which may therefore be a business secret.

129 It is true that the public's right of access to the institutions' documents covers only documents and not information in the wider sense of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (see, to that effect, *WWF European Policy Programme* v *Council*, paragraph 76 above, and cases cited). However, contrary to the Commission's allegation, the applicant actually requested access to documents containing analytical data which are not reproduced in Decision 2005/163.

130 In the second place, it is necessary to ascertain whether the Commission carried out a specific, individual assessment of the contents of the documents requested by the applicant.

131 The Court of Justice has acknowledged that it is, in principle, open to the Community institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 44 above, paragraph 54, and cases cited).

132 Accordingly the Court of Justice has held that, as regards procedures for reviewing State aid, such general presumptions may arise from Regulation No 659/1999 and from the case-law concerning the right to consult documents on the Commission's administrative file (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 44 above, paragraph 55).

133 The Court of Justice concluded from this that, for the purposes of interpreting the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, it is appropriate to take account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and, therefore, to acknowledge the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities (*Commission* v *Technische Glaswerke Ilmenau,* paragraph 44, paragraph 61).

134 In the present case, the documents requested are the confidential version of Decision 2005/163 and the documents used to obtain the figures which are not reproduced in paragraphs 128 and 140 of the non-confidential version.

135 Even if those documents form part of the Commission's administrative file in reviewing a State aid, the Court considers that it cannot be presumed that disclosure of the components of the additional costs connected with public service obligations and of all the documents used to obtain the figures in question would undermine the protection of Caremar's commercial interests, by virtue of Article 4(2), first indent, of Regulation No 1049/2001.

136 Furthermore, such a general presumption would be counter to the Communication on professional secrecy in State aid decisions, paragraph 17 of which states that information regarding the organisation and costs of public services will not normally be considered 'other confidential information'.

137 Consequently it was incumbent on the Commission in the present case to consider whether the disclosure of documents falling within the scope of the exception concerning the protection of commercial interests specifically and actually undermined the protected interest.

138 It appears from the contested decision that, in finding that the omitted information concerns the breakdown of costs which was taken into account for each of the regional companies in calculating the annual compensation granted for carrying out services of general interest and in finding that the disclosure of the information could damage Caremar's commercial interests, the Commission carried out a specific and effective examination of the documents in question. In view of the nature of the documents requested, which contain information of one and the same kind, namely Caremar's different cost components taken from its operating account, which were taken into account in calculating the annual compensation and the calculation methods for obtaining them, the Commission was able, by grouping them together under a common heading, to assess the information specifically and effectively.

139 With regard to the question of the justification for the Commission's refusal to disclose the documents requested, the analytical data which are not reproduced in paragraphs 128 and 140 of Decision 2005/163 are the different cost components taken into account for calculating the annual subsidy and are taken from a consultant's study evaluating the criteria for the layout of the operating accounts by route and by season of the Tirrenia group companies. The different cost components taken from Caremar's operating accounts for the year 2000 (paragraph 128 of Decision 2005/163) and the changes in the cost components which were taken into account for calculating the annual subsidy between 1992 and 2000 (paragraph 140 of Decision 2005/163) comprise: (i) agency commission and acquisition costs, (ii) port taxes, port transit costs and other traffic costs, (iii) operating costs, including the cost of the crew, (iv) maintenance costs of ships, (v) depreciation, (vi) net financial charges, (vii) cost of administrative personnel and general costs, (viii) other costs, including taxes and duties, excluding corporation tax.

140 In that connection, it must be observed that the Commission is required, under Article 287 EC, not to disclose to interested parties information of the kind covered by the obligation of professional secrecy, in particular information relating to the internal operations of the recipient undertaking (*British Airways and Others* v *Commission*, paragraph 79 above, paragraph 63). Business secrets are information of which not

only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests (see, to that effect, Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 87). Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. Accordingly, the assessment as to the confidentiality of an item of information requires, on the one hand, that the individual legitimate interests opposing disclosure of the information be weighed against, on the other, the public interest in ensuring that the activities of the Community institutions take place as openly as possible (see Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, paragraph 71, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 65).

141 In the present case, the information in question and the documents from which it is taken, which are the operating accounts as analysed by a firm of auditors, fall within the business secrets of the company concerned. By disclosing such information, the Commission would be passing to Caremar's competitors its profit and loss accounts for several years, which would amount to informing its competitors of its costing on the different transport routes and would be likely to damage its interests.

142 Therefore the Commission was right to find that the disclosure of such information on the cost components of Caremar's operating accounts could damage its commercial interests and would be contrary to Article 4(2), first indent, of Regulation No 1049/2001.

143 It is true, as the applicant observes, that information on the organisation and costs of public services are not normally regarded as confidential information, as appears from paragraph 17 of the Communication on professional secrecy in State aid decisions.

144 However, it must be observed that it is stated, at paragraph 3.1 of the Communication, that information regarding the costs and organisation of public services may constitute a business secret if it relates to a business which has actual or potential economic value and the disclosure or use of the information could result in economic benefits for other companies. Even if, as the applicant points out, the principle of transparency justifies the disclosure of the elements taken into account for calculating a government subsidy in a State aid decision, it is apparent from the scheme laid down by the Treaties, in particular Article 1 EU, Articles 254 EC and 255 EC, and the principle of openness and the requirement of transparency in acts of the Community institutions that are enshrined in those provisions, that, in the absence of provisions explicitly ordering or prohibiting publication, the rule is that the institutions have a power to publish acts which they adopt. However, there are exceptions to that rule in so far as Community law, by means of the provisions safeguarding professional secrecy, precludes the disclosure of such acts or of certain information which they contain (see, to that effect, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, paragraph 140 above, paragraph 61).

145 With regard to the *Altmark* judgment, paragraph 79 above, on the basis of which the applicant considers that the cost elements connected with public service obligations must be disclosed so that the criteria laid down by the Court of Justice can be applied to determine whether State compensation represents the consideration for the services provided by the recipient undertakings in carrying out public service obligations, that judgment is not relevant to the present case. In it the Court finds that the parameters on the basis of which compensation is calculated must be established beforehand in an objective and transparent manner, but the Court does not add that the cost components connected with public service obligations must be disclosed.

146 Thirdly, it is necessary to ascertain, as the claimant submits, whether there is an overriding public interest justifying the disclosure of the documents, notwithstanding undermining the protection of Caremar's commercial interests.

147 It must be observed that Regulation No 1049/2001 provides that the exceptions laid down by Article 4(2) and (3) of the regulation do not apply if the disclosure of the documents is justified by an overriding public interest. In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see *Sweden and Turco*, paragraph 123 above, paragraph 45).

148 The particular interest that may be claimed by a person requesting access to a document concerning him personally cannot be taken into account as an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 (see, to that effect, *Franchet and Byk*, paragraph 101 above, paragraph 137). It follows that the private interest claimed by the applicant, that is to say, the defence of its interests in order to bring an action, is not an overriding public interest within the meaning of that provision.

149 With regard to the applicant's argument that the information requested should be disclosed in so far as it relates to subsidies granted to Caremar for a period five years previously, it must be observed that, under the combined provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure, an application initiating proceedings must contain a summary of the pleas in law on which the application is based and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. A plea which may be regarded as amplifying a plea put forward previously — whether directly or by implication — in the originating application and which is closely connected therewith, must be held admissible. By contrast, a plea which cannot be regarded as based on matters of law or of fact which came to light in the course of the proceedings has to be held inadmissible. In those circumstances, there was nothing to prevent the applicant from raising such a plea at the stage of the application (see, to that effect, the

order of the President of the Third Chamber of the Court of Justice of 13 November 2001 in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraphs 17 to 19, and Case T-75/06 *Bayer CropScience and Others* v *Commission* [2008] ECR II-2081, paragraph 136).

150 In the present case, by alleging at the reply stage that the information is too old to be regarded as sensitive, the applicant was too late in raising a new argument to support its application for disclosure of the documents in question. It cannot be said that that complaint merely amplifies a plea put forward previously and it is therefore inadmissible.

151 The second part of the first plea must therefore be dismissed.

152 It follows from the foregoing that the first plea must be dismissed.

(c) Second plea: breach of the principle of non-discrimination

Arguments of the parties

153 The applicant considers that it has been discriminated against in so far as, in an earlier decision on State aid, the Commission published the additional costs connected with public service obligations and the amount of the corresponding aid (Commission Decision 2001/156/EC of 19 July 2000 on the State aid implemented by Spain in

favour of the maritime transport sector (new maritime public service contract) (OJ 2001 L 57, p. 32), 'the *Trasmediterranea* decision'). The applicant observes that this decision publishes information concerning public service obligations, route by route, thus enabling competitors to verify its correctness.

154 The Commission replies that the discrimination complained of by the applicant does not in fact exist because, in the abovementioned decision, the total profits or losses of the undertaking were concealed and the different cost components were not published.

155 In any case, the publication of information in a decision depends on the request for confidential treatment by the Member States and/or the interested parties. According to the Commission, a mere variation in administrative practice does not necessarily mean that a decision to publish or not to publish certain information is illegal. In its rejoinder the Commission adds that the legal context of the two decisions is different. In the *Trasmediterranea* decision it was necessary to analyse the costs of different routes because Spain awarded the aid by reference to each of the shipping routes, whereas in the present case Italy based the system on the global costs for each operator.

156 Caremar observes that the relative approach to confidentiality was similar in the *Trasmediterranea* decision. It points out that in that decision the figures for each cost component and the global management profits of the undertaking were concealed. All that was published was the global estimate of the costs and earnings of an undertaking carrying out a public service contract in high season and low season.

Findings of the Court

157 According to settled case-law, the principle of equal treatment, which constitutes a fundamental principle of law, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified (Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament* [2001] ECR II-2823, paragraph 150, and Case T-390/08 *Bank Melli Iran* v *Council* [2009] ECR II-3967, paragraph 56).

158 In the present case, the applicant considers that it has been discriminated against in so far as, in the Trasmediterranea decision the Commission disclosed the information concerning the public service obligations of each of the shipping routes.

159 Even if, as the applicant submits in essence, its situation is comparable with that of any person who wishes to know the figures for the additional costs connected with public service obligations in the *Trasmediterranea* decision, it must be observed that if, in the context of that decision, the Commission had presented those additional costs differently by distinguishing specifically, in comparison with Decision 2005/163, the variable costs and the fixed costs of the additional cost components connected with public service obligations, only the total costs connected with public service obligations was published in the *Trasmediterranea* decision and in Decision 2005/163, and not the details of each of the costs taken into account for calculating the annual compensation.

160 In view of the foregoing, it cannot be concluded that the applicant has been discriminated against.

161 Accordingly, the plea of breach of the principle of non-discrimination must be rejected.

(d) Third plea: breach of the principle of proportionality

Arguments of the parties

162 The applicant observes that, in the first contested decision, the Commission emphasises the requirement for the protection of all information without considering the specific nature of the request for access to the additional costs connected with public service obligations for the Naples-Beverello/Capri route. According to the applicant, the Commission, by referring to the request in general terms, is infringing Article 4(6) of Regulation No 1049/2001 which provides that, if parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released. The first contested decision does not show how far disclosure of the partial information concerning the Naples-Beverello/Capri route could damage Caremar's commercial interests.

163 The applicant submits that, in referring to the global figures published in Decision 2005/163, the Commission does not explain the precise reasons for refusing partial access, in accordance with Article 4(6) of Regulation No 1049/2001.

164 The Commission replies that the figures requested are those shown in the tables in paragraphs 128 and 140 of that decision, which do not contain the analytical costs relating to the Naples-Beverello/Capri route.

165 Caremar, like the Commission, submits that the present plea is unfounded because, in the present case, there could not be partial access to the information in accordance with Article 4(6) of Regulation No 1049/2001.

Findings of the Court

166 In support of this plea, the applicant complains that the Commission ignored part of its request, namely the request for access to the additional costs connected with the public service obligations for the Naples-Beverello/Capri route. This plea does not contain any particular complaints with regard to a breach by the Commission of the principle of proportionality.

167 As the applicant's complaints relate to an insufficient statement of reasons for the first contested decision, reference must be made to the plea of failure to fulfil the obligation to state reasons in paragraphs 81 to 93 above.

168 Therefore the fourth plea must be upheld in part, the first contested decision must be annulled in part, as stated at paragraph 93 above, and the remainder of the application in Case T-109/05 must be dismissed.

B — *Case T-444/05*

169 In its action in Case T-444/05 the applicant raises six pleas: the first alleges infringement of Article 8(1) of Regulation No 1049/2001, the second alleges failure to fulfil the obligation to state reasons, the third alleges infringement of Article 4(4) and (5) of Regulation No 1049/2001, the fourth — abuse of process and misuse of powers, and the fifth — breach of the principle of non-discrimination and the rights of defence. In the alternative, the applicant raises a sixth plea, alleging the illegality of Article 4(5) of Regulation No 1049/2001.

170 It is appropriate, first of all, to consider the plea in law alleging infringement of Article 4(4) and (5) of Regulation No 1049/2001.

1. *Arguments of the parties*

171 The applicant submits that the Commission erred in three respects by consulting the Italian authorities pursuant to Article 4(4) and (5) of Regulation No 1049/2001 and using their objection in order to justify the refusal to grant access to the information requested.

172 In the first place, the applicant considers that, by consulting the Italian authorities, the Commission failed to have regard to the publication rules for additional cost components connected with public service obligations. The rules do not permit the identification, classification and reporting of State aid. With regard to the additional costs connected with public service obligations which are compensated for by State aid, disclosure of the figures is required in view of the transparency requirement imposed by the State aid rules, the Communication on professional secrecy in State aid decisions and the *Altmark* judgment, paragraph 79 above.

173 Secondly, the applicant, pointing out that Article 4(4) and (5) of Regulation No 1049/2001 permits consultation only of the third party originating the document in question, submits that in the present case the Commission ought to have consulted Caremar and not the Italian authorities because the documents requested originate from Caremar. Therefore the wrong legal basis was chosen.

174 The applicant also submits that a comparison of the different language versions of Article 4(5) of Regulation No 1049/2001, examination of the rules laid down by Article 9 of the regulation and the terms of the judgment in Case T-187/03 *Scippacercola* v *Commission* [2005] ECR II-1029 lead to the conclusion that the exception laid down by Article 4(5) of Regulation No 1049/2001 must be interpreted as referring to documents of which the Member State is the author.

175 According to the applicant, if Article 4(5) of Regulation No 1049/2001 had to be interpreted as meaning that a Member State has a right of veto regarding the disclosure of a document originating from that State, individuals would automatically be deprived of the right to access to documents originating from that State.

176 Third, the applicant submits that consultation of the Italian authorities is irrelevant since they and Caremar were duly consulted in the context of the procedure referred to in Article 25 of Regulation No 659/1999.

177 The Commission replies that, first, the applicant's complaints are inadmissible and unfounded. The request by the Italian authorities not to disclose a document on the basis of Article 4(5) of Regulation No 1049/2001 is of a mandatory nature and can be challenged only before an Italian court, even if the request forms the basis of a subsequent decision.

178 Returning to the applicant's three complaints, first, the Commission submits that the arguments concerning alleged transparency requirements in State aid matters and the Communication on professional secrecy in State aid decisions are irrelevant because the second contested decision was adopted under Regulation No 1049/2001.

179 First, regarding its previous decision-making practice, the Commission observes that the publication of certain information in a decision may depend on whether the Member State and/or the persons interested request confidential treatment or, on the contrary, authorise the publication of certain information.

180 The Commission also considers that Article 4(4) of Regulation No 1049/2001 on the consultation of third parties in general is not applicable in the present case because the documents supplied by the Member States fall within the scope of the *lex specialis* of Article 4(5).

181 Secondly, the Commission considers that Article 4(5) of the regulation refers not only to documents of which the Member States are the authors, but also any document originating from those States.

182 The Commission also submits that it is clear from recital 15 to Regulation No 1049/2001 and the settled case-law of the Court that the Member States' power to veto the disclosure of documents, in accordance with Article 4(5) of Regulation No 1049/2001 is justified by the fact that that regulation has neither the object nor the effect of modifying national laws on access to documents.

183 Following a written question to the parties on 10 October 2008, asking them to submit their observations on the conclusions to be drawn from the judgment in *Sweden* v *Commission*, paragraph 33 above, the Commission enclosed with its reply a letter from the Italian authorities of 8 July 2005, from which it appears that they refused to disclose to the applicant the documents which had been requested on the ground that disclosure would undermine the protection of Caremar's commercial interests, in accordance with Article 4(2), first indent, of Regulation No 1049/2001. According to the Commission, the Italian authorities had consequently stated their reason for

opposition on the basis of one of the exceptions provided for by Article 4(1) to (3) of Regulation No 1049/2001. The Commission added that the omission of reasons had in any event no effect on the legality of the decision in the present case because the reasoned refusal of the Italian authorities was binding on the Commission and obliged it to refuse the request for access and that, in any case, it could only lead to the adoption of another decision identical in substance to the decision annulled (see, to that effect, Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraph 97, and Joined Cases T-217/03 and T-245/03 *FNCBV* v *Commission* [2006] ECR II-4987, paragraph 263).

184 Third, regarding the complaint that consultation of the Italian authorities was pointless as they had already been consulted pursuant to Article 25 of Regulation No 659/1999, the Commission replies that it is precisely because Italy had already opposed disclosure of the analytical data in the tables in paragraphs 128 and 140 of the confidential version of Decision 2005/163 that the Commission had a duty to consult Italy before giving a decision on access to similar data by virtue of Regulation No 1049/2001.

185 Italy, the Council and Caremar support the Commission in each of its arguments. In particular, Italy and Caremar observe that in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135, the Court clarified the meaning of Article 4(5) of Regulation No 1049/2001 by pointing out that Article 4(5) confers on a Member State the right to request an institution not to disclose a document originating from that Member State without its prior agreement. Thus, contrary to what the applicant argues, a request made by a Member State under Article 4(5) does constitute an instruction to the institution not to disclose the document in question.

2. *Findings of the Court*

186 First of all, it is necessary to examine the applicant's second complaint that the exception laid down by Article 4(5) of Regulation No 1049/2001 refers to documents of which the Member State is the author.

187 It should be noted that the Community legislature — in particular, by the adoption of Regulation No 1049/2001 — abolished the 'authorship rule' which had previously prevailed. As appears from Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Commission Decision 94/90/ECSC, EC, Euratom, of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), and Parliament Decision 97/632/EC, ECSC, Euratom, of 10 July 1997 on public access to European Parliament documents (OJ 1997 L 263, p. 27), such a rule meant that, where the author of a document held by an institution was a natural or legal person, a Member State, another Community institution or body, or any other national or international organisation, the request for access to the document had to be made directly to the author of the document (*Sweden* v *Commission*, paragraph 33 above, paragraph 56).

188 The Court of Justice added that, far from referring only to documents of which the Member States are the authors or which have been drawn up by them, Article 4(5) of Regulation No 1049/2001 potentially concerns every document 'originating' from a Member State, in other words, the entirety of the documents, whoever their author may be, that a Member State transmits to an institution. In this case the only relevant criterion is the origin of the document and the handing over by the Member State concerned of a document previously in its possession (*Sweden* v *Commission*, paragraph 33 above, paragraph 61).

189 In relation to that complaint, the applicant also submits that the Commission's view that the Member State has a right of veto on the disclosure of a document originating from that Member State and transmitted to the institutions amounts to depriving any individual of the right to access to documents originating from that State.

190 It must be observed that, in the second contested decision, the Commission refused to disclose to the applicant the document concerning Caremar's annual additional costs in discharging its public service obligations on the Naples-Beverello/Capri route on the ground that the Italian authorities had expressly objected to the disclosure of the information, in accordance with Article 4(5) of Regulation No 1049/2001.

191 In that connection, the Court of Justice has observed that to interpret Article 4(5) of Regulation No 1049/2001 as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution, simply because it originates from that Member State, is not compatible with the objectives of Regulation No 1049/2001 (*Sweden* v *Commission*, paragraph 33 above, paragraph 58).

192 On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the Community decision. Seen in that way, the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present (*Sweden* v *Commission*, paragraph 33 above, paragraph 76).

193 As to the procedural implications of Article 4(5) of Regulation No 1049/2001 so interpreted, it should be noted, in the first place, that where the implementation of rules of Community law is thus entrusted jointly to the institution and the Member State which has made use of the possibility granted by that provision, and such implementation consequently depends on the dialogue to be carried on between them, they are obliged in accordance with the duty of loyal cooperation set out in Article 10 EC to act and cooperate in such a way that those rules are effectively applied (*Sweden* v *Commission*, paragraph 33 above, paragraph 85).

194 It follows, first, that an institution which receives a request for access to a document originating from a Member State and that Member State must, once that request has been notified by the institution to the Member State, commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits within which Articles 7 and 8 of the regulation require it to decide on the request for access (*Sweden* v *Commission*, paragraph 33 above, paragraph 86).

195 A Member State which, following such dialogue, objects to disclosure of the document in question is obliged to state reasons for that objection with reference to those exceptions. Indeed, the institution concerned cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where, despite an express request to that effect by the institution concerned to the Member State, the Member State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for (*Sweden* v *Commission*, paragraph 33 above, paragraphs 87 and 88).

196 Finally, as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review (*Sweden* v *Commission*, paragraph 33 above, paragraph 89).

197 In the present case, it is clear from the second contested decision that the Commission refused access to the documents requested merely on the ground that the Italian authorities had expressly objected, without stating upon which exception under Article 4(1) to (3) of Regulation No 1049/2001 the Italian authorities had based their objection.

198 The Commission produced a letter from the Italian authorities of 8 July 2005 in reply to a written question from the Court concerning the conclusions to be drawn from the *Sweden* v *Commission* judgment, paragraph 33 above, to which the Commission replied on 30 October 2008. It appears from the Italian authorities' letter that they refused access to the documents requested by the applicant on the ground that disclosure would undermine the protection of Caremar's commercial interests, as laid down by Article 4(2), first indent, of Regulation No 1049/2001.

199 In the present case, it is not for the Court to assess the legality of the second contested decision by reference to additional reasons furnished by the Commission on 30 October 2008 following the judgment in *Sweden* v *Commission*, paragraph 33 above, after the closure of the written procedure. The reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account. It follows that the decision must be self-sufficient and that the reasons on which it is based may not be stated in written

or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Union judicature (Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 287).

200 Likewise it cannot be accepted that the lack of a statement of reasons should in any case affect the legality of the decision because, in the present case, the reasoned refusal of the Italian authorities was binding on the Commission and it could lead only to a similar new decision on the basis of the second contested decision.

201 The case-law cited by the Commission (*TDI*, paragraph 183 above, paragraph 97, and *FNCBV* v *Commission*, paragraph 183 above, paragraph 263) is not relevant to the present case because the lack of reasons in the second contested decision means that the Court cannot verify whether the Commission's refusal to disclose the documents originating from the Italian authorities is based on one of the reasons invoked by the Italian authorities in claiming that one of the exceptions to the right of access under Article 4(1) to (3) of Regulation No 1049/2001 should apply (see, to that effect, *Sweden* v *Commission*, paragraph 33 above, paragraph 89). The fact that the Commission intends to make a similar decision regarding the substance of the second contested decision by reason of the fact that it is bound by the refusal of the Italian authorities, in conformity with the judgment in *Sweden* v *Commission*, cannot however prevent the Court from examining the legality of the decision which is the subject of the present action.

202 Consequently the second contested decision must be annulled in so far as the Commission did not refer in it to the reasons put forward by the Italian authorities for claiming that one of the exceptions, provided for in Article 4(1) to (3) of Regulation No 1049/2001, to the right of access should apply. It is unnecessary to give a ruling on the other complaints in the context of the third plea or on the other five pleas raised by the applicant in support of its action.

Costs

A — *Case T-109/05*

203 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3) of those rules, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

204 In the present case, since the action in Case T-109/05 has been partially successful, the Court considers it fair, having regard to the circumstances of the case, to order the Commission to bear one third of its own costs and one third of the costs incurred by the applicant, the latter to bear two thirds of its own costs and two thirds of the costs incurred by the Commission.

205 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear his own costs. Caremar, which intervened in support of the form of order sought by the Commission, must therefore be ordered to bear its own costs.

B — *Case T-444/05*

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

207 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States intervening in the dispute are to bear their own costs. The Italian Republic must therefore be ordered to bear its own costs. The Council and Caremar, in conformity with Article 87(4) of the Rules of Procedure, are ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Annuls Commission Decision D(2005) 997 of 3 February 2005 in so far as it relates to the refusal of access to detailed elements of the additional costs borne annually by Caremar SpA in connection with the passenger transport services operated on the Naples-Beverello/Capri route by ferries and by high-speed connections;

2. Dismisses the application in Case T-109/05 as to the remainder;

3. Orders the European Commission to pay one third of its own costs and one third of the costs incurred by Navigazione Libera del Golfo Srl, the latter to bear two thirds of its own costs and two thirds of the costs incurred by the Commission in Case T-109/05;

4. Orders Caremar to pay its own costs in Case T-109/05;

5. Annuls Commission Decision D(2005) 9766 of 12 October 2005;

6. Orders the European Commission to pay the costs in Case T-444/05;

7. Orders the Italian Republic, the Council of the European Union and Caremar each to bear their own costs.

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 24 May 2011.

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