# JUDGMENT OF THE COURT (Sixth Chamber)

26 September 2002 *

In Case C-351/98,

**Kingdom of Spain**, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by J. Guerra Fernández and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

APPLICATION for partial annulment of Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994 — December 1996) (OJ 1998 L 329, p. 23),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2002,

gives the following

## Judgment

1 By application lodged at the Court Registry on 25 September 1998 the Kingdom of Spain sought, under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), the annulment of Articles 3 and 4 of Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994 — December 1996) (OJ 1998 L 329, p. 23, hereinafter 'the contested decision').

### Factual background and the contested decision

2 By an agreement concluded on 27 September 1994 by the Spanish Ministry of Industry and Energy and the Instituto de Crédito Oficial, the Spanish authorities established a regime, applicable in the form at issue in this case from August 1994 to December 1996, called the 'Plan Renove Industrial' (hereinafter 'the Plan'), whose purpose was to facilitate the replacement of commercial vehicles belonging to natural persons, small and medium-sized enterprises (hereinafter 'SMEs'), regional public bodies and bodies providing local public services.

3 The mechanism consisted in the grant of an interest subsidy for loans to finance the purchase or hire-purchase of eligible new vehicles. The loans granted under the Plan covered up to 70% of the purchase price excluding VAT of the vehicle and the subsidy was granted on the condition that a commercial vehicle more than 10 years old (or more than seven years old in the case of tractor units) which met certain requirements that varied according to the type of vehicle purchased be withdrawn from circulation in return. Given the duration of the loans, the

subsidy was equivalent to aid of up to 6.5% of the VAT-exclusive purchase price of the new vehicle.

4 Taking the view that the measure in question did not amount to State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), the Spanish authorities did not notify it to the Commission under Article 93(3) of the EC Treaty (now Article 88(3) EC).

5 The Commission became aware of the measure from the press. It first asked the Spanish authorities for information on 9 February 1995 and, after several exchanges of correspondence with them, initiated the procedure provided for in Article 93(2) of the Treaty. It informed the Spanish authorities of this by a letter of 26 June 1996 and published that letter in the *Official Journal of the European Communities* (OJ 1996 C 266, p. 10), inviting any interested parties to submit their comments.

6 The Spanish authorities submitted their comments by a letter of 26 July 1996. No other Member State or other third party submitted comments. Following further requests for information and exchanges of correspondence, and a bilateral meeting between representatives of the Commission and the Spanish Government, the Commission adopted the contested decision.

7 In Part II of the grounds of that decision, the Commission first of all notes that the international market for the carriage of persons by road and the international road haulage market have been completely liberalised in the Community since 1 June 1992 and 1 January 1993 respectively. The Commission observes that

road passenger transport cabotage was liberalised on 30 August 1992 (except for regular services) and that road haulage cabotage was progressively liberalised between 1990 and 1 July 1998.

8 The Commission goes on to state, in Part IV of the grounds of the contested decision, that neither the subsidies granted to regional public bodies and bodies providing local public services, nor those granted to natural persons or SMEs for the purchase of small commercial vehicles, where they pursue a business other than transport (hereinafter 'non-transport companies') at a solely local or regional level, constitute State aid within the meaning of Article 92(1) of the Treaty. In the Commission's view such aid does not affect trade between Member States. In particular, with regard to non-transport companies operating at a solely local or regional level, the Commission considers that, because of the type of journey undertaken by small commercial vehicles and the lack of any economically viable alternative enabling those journeys to be contracted out to professional transport companies, there is no effect on trade between Member States or the transport market. That assessment is restated at Articles 1 and 2 of the operative part of the contested decision.

9 However, the Commission considers that all other aid awarded under the Plan to natural persons or SMEs (hereinafter 'the contested aid') constitutes State aid within the meaning of Article 92(1) of the Treaty that is illegal and incompatible with the common market. That assessment is restated at Article 3 of the operative part of the contested decision.

10 First of all, the Commission considers that the contested aid is financed from State resources, that it distorts competition by reducing the recipients' normal business expenses and that it affects trade in the road transport sector which is in the course of being completely liberalised. In that connection, the Commission

points out that the beneficiaries of the aid are in competition with transport companies established in Spain and other Member States which cannot benefit from it. It argues that, at least in practice, the Plan discriminates against carriers not established in Spain who, if they wish to benefit from it, first have to enter into an agreement with a Spanish operator willing to withdraw a suitable vehicle registered in Spain from circulation.

11 Secondly, the Commission considers that the contested aid cannot benefit from any derogation and that in particular it cannot fall within the exemption provided for in Article 92(3)(c) of the Treaty, which covers aid to facilitate the development of certain economic activities.

12 It explains that the *de minimis* rule, which provides that small amounts of aid are not caught by Article 92 of the Treaty and was established under the Community guidelines on State aid for SMEs adopted by the Commission (see OJ 1992 C 213, p. 2, OJ 1996 C 213, p. 4, and OJ 1996 C 68, p. 9, respectively) does not apply to the transport sector, which also encompasses transport undertaken by non-transport companies on their own account. Such transport is interchangeable with that provided by specialist companies.

13 Nor can the justification relied on by the Spanish authorities relating to the Plan's environmental protection objectives be upheld since, with some exceptions that are not relevant to this case, the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3, hereinafter 'the Environmental Guidelines') provide for the possibility of awarding aid only to encourage actions that go beyond what is prescribed by law in the environmental field, which the contested aid does not. The subsidies are calculated on the basis of the price of the new vehicle, irrespective of any ecological consideration. Furthermore, road

transport is characterised by overcapacity, which the Plan reinforces by enabling old vehicles to be exchanged for new vehicles of greater capacity. The Commission adds that it is its general aid practice to authorise aid for new investment which could not otherwise take place, but not aid just for replacement.

14 The Commission also considers that there is a risk of cumulation with other aid it has authorised elsewhere.

15 Finally, the Commission decided that the subsidies constituting State aid within the meaning of Article 92(1) of the Treaty should be recovered from the recipients in order to restore the competitive conditions that prevailed before they were granted. It points out that the contested aid was illegally granted and that it cannot have become lawful by virtue of the time that has elapsed since the Plan was implemented, and it rejects the Spanish authorities' argument that, in view of the small amount of aid, to recover it would contravene the principle of proportionality. The requirement that the aid be recovered is the subject of Article 4 of the contested decision.

## Procedure and forms of order sought

16 After the Kingdom of Spain had filed its action, the Confederación Española de Transporte de Mercancías (CETM) brought a parallel action before the Court of First Instance of the European Communities, also for annulment of Articles 3 and 4 of the contested decision. That action was registered under number T-55/99. The procedure before the Court of First Instance followed the normal course.

17 By an order of 25 January 2000, after the parties had submitted argument, the Court of Justice stayed proceedings under the third paragraph of Article 47 of the EC Statute of the Court of Justice and Article 82a(1)(a) of the Rules of Procedure, pending delivery of a final decision by the Court of First Instance in Case T-55/99. By judgment of 29 September 2000 (Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207), the Court of First Instance dismissed CETM's action.

18 When asked, the Spanish Government stated to the Court of Justice that the proceedings before it should continue notwithstanding delivery of the judgment of the Court of First Instance in *CETM* v *Commission*.

19 The Kingdom of Spain claims that the Court should:

— annul Articles 3 and 4 of the contested decision;

— order the Commission to pay the costs.

20 The Commission claims that the Court should:

— dismiss the action as unfounded;

— order the Kingdom of Spain to pay the costs.

## The application

21 The Spanish Government advances five pleas in law in support of its application for annulment. First of all, the contested aid does not fall within the scope of Article 92(1) of the Treaty. Secondly, even if it constituted aid falling within that provision, it should have been authorised under Article 92(3)(c) of the Treaty. Thirdly, the Commission infringed the principle of the protection of legitimate expectations. Fourthly, the obligation to recover the contested aid infringes the principle of proportionality. Fifthly and finally, the decision does not state reasons in regard to the obligation to recover the aid.

### *Plea alleging infringement of Article 92(1) of the Treaty*

#### Arguments of the parties

22 According to the Spanish Government the measures referred to in Article 3 of the contested decision do not constitute State aid within the meaning of Article 92(1) of the Treaty.

23 First of all, the contested aid does not favour certain undertakings or the production of certain goods. It targets an indeterminate group of potential beneficiaries. Nor is it discriminatory since carriers not established in Spain can benefit indirectly from the aid either by concluding an agreement with an owner of a vehicle registered in Spain willing to send that vehicle for scrap, or by registering their own vehicles in Spain and then sending them for scrap. The

Spanish Government adds that the exclusion of large undertakings from the Plan is consistent with the nature and scheme of the system, which is to encourage environmental protection, road safety and replacement of vehicles on the road. Large companies renew their fleets of vehicles earlier than smaller undertakings and do not therefore need aid for that purpose.

24 The Spanish Government refers to the definition of a 'specific subsidy' in Article 2.1(b) of the Agreement on Subsidies and Countervailing Measures set out in Annex 1A to the Agreement establishing the World Trade Organisation (hereinafter 'the Agreement on Subsidies'), which was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). According to the Spanish Government, that definition, as explained in footnote 2 to Article 2.1(b) of the Agreement on Subsidies, excludes subsidies accorded pursuant to criteria or conditions 'which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise'. It infers from that that the scope of the Plan fulfils the criterion for compatibility with the nature and scheme of the system, which enables it to escape classification as 'aid' within the meaning of Article 92(1) of the Treaty.

25 Secondly, the contested aid does not distort competition or affect trade between Member States.

26 The Spanish Government refers first of all to the Community guidelines on State aid for SMEs, cited above, adopted by the Commission and, in particular, to the *de minimis* rule established therein. The Commission set the amount of aid below which Article 92(1) of the Treaty does not apply at ECU 100 000 per undertaking

over a period of three years. According to the Spanish Government, even if the guidelines on State aid for SMEs do not apply to the transport sector, the reasons behind the *de minimis* rule should cause it to be applied in this case.

27 The Spanish Government then cites a number of factors to demonstrate the very modest effect of the contested aid on the common market. It argues, in particular, that the aid is, for the most part, directed only at undertakings transporting on their own account at local level, or at professional transport companies the vast majority of which have only a small number of vehicles. Accordingly, the Plan essentially targets vehicles that are not in competition with vehicles from other Member States.

28 With regard, more particularly, to non-transport companies which undertake transport only on their own account, the Spanish Government argues that the Commission itself recognised that such transport is not in competition with transport undertaken on behalf of third parties by professional transport companies in its report COM(1998) 47 final of 4 February 1998 on the implementation of Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1), which appraised cabotage activities from 1990 to 1995, and which left own-account cabotage undertaken by a person in a Member State other than that where he is established out of consideration because it was so insignificant.

29 The Spanish Government also advances several arguments to show that professional transport on behalf of third parties and own-account transport are not part of the same market.

30 In the Spanish Government's view, the Commission's grounds for finding an effect on competition and trade, namely the liberalisation of road transport of passengers and goods, are in any event insufficient to demonstrate any such effect. Referring to the Court's judgments in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809 and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, the Spanish Government maintains that a finding that trade between Member States is affected must be based on reasons relating in particular to the actual situation on the market under consideration, the market share of the undertakings receiving the aid, the position of competitor undertakings and trade patterns for the goods or services in question between Member States. None of those factors is mentioned in the grounds of the contested decision.

31 The Spanish Government says that it is clear that the only beneficiaries of the contested aid in fact able to compete with carriers from other Member States are those which bought the biggest vehicles, and subsidised vehicles in that category represent only 0.1% of the commercial vehicle fleet.

32 The Commission contests the argument that the Plan does not favour certain undertakings or the production of certain goods and therefore constitutes a general measure not amounting to an aid scheme for the purposes of Article 92(1) of the Treaty. First of all, the Plan benefits only undertakings that need commercial vehicles and those that do not need such vehicles therefore do not benefit from the contested aid. Secondly, SMEs are the only enterprises eligible for aid. Thirdly, the fact that the categories of beneficiary are defined impersonally does not alter the fact that the aid is selective. Fourthly, the exclusion of large enterprises is by no means justified by the 'nature and general scheme of the system' within the meaning of the case-law of the Court of Justice. Fifthly, the rules in the Agreement on Subsidies are not relevant to assessing a measure in the light of Article 92(1) of the Treaty, particularly as regards whether the measure is selective.

33 The Commission also contests the assertion that the Plan does not distort competition and does not affect trade between Member States.

34 It claims that the Kingdom of Spain cites the *de minimis* rule without demonstrating that the undertakings that benefit from the aid do not receive an amount above the applicable ceiling. It argues that that rule cannot in any event apply to the transport sector because the sector is characterised, first of all, by overcapacity which is exacerbated by any aid however small and, secondly, by a huge number of operators, particularly in Spain, which means that even a small amount of aid granted to all operators has a significant impact on the sector as a whole. The Commission argues that the total capacity of the Spanish commercial vehicle fleet has increased as a result of the adoption of the Plan.

35 The Commission also argues that professional transport on behalf of third parties and own-account transport are two segments of the same market, since the services are largely interchangeable. The fact that the report on cabotage of 4 February 1998 found that undertakings which engage in transport on their own behalf made little use of the possibility of cabotage in other Member States between 1990 and 1995 is entirely to be expected, since it was only when Commission Regulation (EC) No 792/94 of 8 April 1994 laying down detailed rules for the application of Council Regulation (EEC) No 3118/93 to road haulage operators on own account (OJ 1994 L 92, p. 13) entered into force that such enterprises gained free access to cabotage.

36 With regard to the effect on competition, the Commission also points out that, even if the contested aid does not have any impact on fees charged by the beneficiaries, owing to the vehicles' depreciation rate, it certainly strengthens their financial position. The fact that only 0.5% of the Spanish commercial

vehicle fleet was renewed using the Plan is not relevant. First of all, the Commission could not predict the actual effect of the aid in adopting the contested decision and, secondly, the reference figure to be taken into account is the number of vehicles over 10 years old eligible to benefit from the aid and not the entire commercial vehicle fleet.

37 With regard more particularly to the effect on trade between Member States, the Commission advances a number of arguments to show that there is such an effect and claims that in any event no analysis of the actual effects of the contested aid on intra-Community trade was necessary, because the circumstances from which it is obvious that trade would be adversely affected (sector open to competition, overcapacity, strengthening of financial capacity and recipient undertakings' scope for action compared with foreign competitors) are mentioned in the contested decision and the case-law does not require a detailed economic analysis, particularly in relation to unnotified aid. The Commission relies in that connection on case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717.

Findings of the Court

38 Article 92(1) of the Treaty defines aid governed by the Treaty as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States.

39 The Spanish Government's argument that the contested aid does not favour certain undertakings or the production of certain goods should be considered first.

40 It must first of all be observed that, irrespective of the question as to whether or not the Plan is discriminatory, it is not available to undertakings which are not SMEs and it is therefore targeted at certain undertakings in particular, albeit that they are not limited in number.

41 Next, the exclusion of undertakings that are not SMEs from the benefit of the Plan cannot be justified on the basis of the nature and scheme of the system of which it forms part, which would have enabled the Plan to escape classification as aid covered by Article 92(1) of the Treaty.

42 It is true that the concept of aid has been interpreted by the Court as not encompassing differential treatment of undertakings in the application of charges, where that differential treatment flows from the nature and general scheme of the system of charges in question (see, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 21; and Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 33).

43 However, in the present case the charges in question arise as a result of the undertakings' need to replace their commercial vehicles and normally come out of those undertakings' budgets. Accordingly, the support given to certain undertakings in funding part of those charges is not a consequence of the nature or general scheme of the system of charges in question and must be considered to favour those undertakings. In those circumstances the reasons cited by the Spanish Government to explain why large undertakings are ineligible under the Plan can only be viewed as justifying the way in which the measure is targeted, not as enabling the measure to escape classification as aid.

44 Finally, the fact that the contested aid would not be considered to be a 'specific subsidy' under the Agreement on Subsidies cannot reduce the scope of the definition of aid under Article 92(1) of the Treaty.

45 The Spanish Government's first argument in support of the claim that the contested aid does not fall within the scope of Article 92(1) of the Treaty must accordingly be rejected.

46 Turning secondly to the argument that the contested aid does not distort competition and does not affect trade between Member States, consideration must first of all be given to the factors relied on by the Spanish Government relating to non-transport companies which carry out transportation only on their own account. The Spanish Government essentially argues on this point that such undertakings are not in competition with professional transport companies and that the Commission should have applied the *de minimis* rule to them.

47 It is undoubtedly true that executive decisions taken by those undertakings as to whether their transport needs are to be outsourced or met within the company impact on the transport market. Where a non-transport company invests in vehicles in order to meet all or part of its transport needs, that company in principle diminishes for a given period the market open to professional transport companies. Indeed the same is true of all markets for goods or services which a company may elect either to produce or perform itself to meet its needs or to contract out to external suppliers.

48 However, the differences between the position of professional transport companies and companies which carry out transport only to meet their own

needs are such that the latter cannot be considered to operate on the transport market or to form part of the transport sector. In particular, non-transport companies do not have customers to whom they supply transport services or seek such customers, and the transport services which they undertake and are interchangeable with those offered by professional transport companies are confined to those that meet their own needs. The situation of professional transport companies and companies which carry out transport only on their own account are therefore not sufficiently homogeneous in order for both categories to belong to the same sector and be operational on the same market.

49 Therefore, whilst the Commission was entitled to examine the effect on the transport sector of the grant of the contested aid to non-transport companies, it could not simply treat those companies as if they were operators in the transport sector.

50 The Commission was therefore not entitled to refuse to examine whether, as the Spanish authorities claimed, the assistance given to non-transport companies could fall within the *de minimis* rule, the application of which, according to notices issued by the Commission itself, is excluded only in certain sectors and for export aid.

51 In that connection, whilst the Court has held that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected (see, in particular, Case C-142/87 *Belgium* v *Commission* (the '*Tubemeuse*' case) [1990] ECR I-959, paragraph 43), a small amount of aid to an undertaking over a given period does not affect trade between Member States in particular economic sectors.

52 The Commission was therefore entitled to reach the view, in the exercise of its discretion to assess the possible economic effects of aid, that, other than in certain sectors where competitive conditions are of a particular kind and except in respect of export aid, aid in amounts falling below those laid down in the Community guidelines on State aid for SMEs, and subsequently in its Notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9), does not affect trade and is therefore not caught by Articles 92 and 93 of the Treaty. The amounts laid down by the Commission have not hitherto been challenged.

53 The Commission is, however, bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 22; Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 36; and Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 43). The Commission may not therefore refuse to apply the *de minimis* rule to aid granted to undertakings in sectors which the various applicable provisions do not exclude from application of the rule.

54 In those circumstances, Articles 3 and 4 of the contested decision must be annulled in so far as they relate to aid granted to natural persons or SMEs which carry on business other than in the transport sector of amounts below the *de minimis* threshold laid down in the Commission's guidelines and notices in force at the time when the aid was granted.

55 With regard to aid to non-transport companies that exceeds the *de minimis* threshold, it is to be noted that the reasons stated in the contested decision for finding that such aid affects competition and trade between Member States relate exclusively to the transport sector.

56 The Commission argues in the contested decision that the contested aid affects competition with transport companies established both in Spain and in other Member States, since the liberalisation of road transport has opened up competition with undertakings from other Member States in the international transportation and cabotage sector. It states that in practice there is discrimination against undertakings from other Member States, since the mechanism implemented under the Plan makes access to aid more difficult for them.

57 It must first of all be pointed out that the Commission's argument that the Plan is discriminatory is without foundation. It is settled case-law that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences (see, in particular, Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 615, at p. 652; Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8; and *Banks*, cited above, paragraph 35). A measure to support investment adopted by a public authority can by definition apply only in respect of the territory for which it is responsible and the authority cannot be criticised for not extending the benefit of the measure to undertakings not established in its territory, since such undertakings are in a wholly different position *vis-à-vis* the authority from undertakings established within the territory. That statement does not, however, mean that such a measure of support cannot be classified as 'aid' within the meaning of Article 92(1) of the Treaty if it fulfils the conditions laid down by that provision.

58 In that connection, in certain cases the very circumstances in which the aid has been granted show that it is liable to affect trade between Member States and to distort or threaten to distort competition. In such cases, the Commission must set out those circumstances in the statement of reasons for its decision (see *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, cited above, paragraph 24; *Germany and Others* v *Commission*, cited above, paragraph 52; and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66). Contrary to what the Spanish Government

claims, the statement of reasons in the contested decision, as set out in the first sentence of paragraph 56 above, is sufficient to explain the effect of the Plan on competition and trade between Member States since the Plan applies to an indeterminate number of beneficiaries above the *de minimis* threshold, it relates to services the supply of which is liberalised between the Member States and those services are by nature liable to be the subject of inter-State supplies. The fact that only a small number of professional transport companies from other Member States actually engage in cabotage in Spain is irrelevant precisely because the Plan could have the effect of hampering growth in the supply of such services.

59 It follows from the foregoing that the Commission has demonstrated satisfactorily that the contested aid affects competition and trade between Member States with regard to such aid as exceeds the *de minimis* threshold awarded to non-transport companies.

60 The same arguments apply *a fortiori* to aid exceeding the *de minimis* threshold awarded to professional transport companies.

61 The question remains whether the Commission has satisfactorily established that aid awarded to professional transport companies in amounts below the *de minimis* threshold affects competition and trade. The Commission stated in that connection in the contested decision that the *de minimis* rule expressly excludes the transport sector from its scope because in that sector, which is characterised by a large number of small companies, relatively small sums can have an impact on competition and trade between Member States. It also pointed out that the road transport sector is characterised by overcapacity and that the Plan did, according to information from the Spanish authorities, result in a slight increase in transport capacity by volume.

62 The Spanish Government for its part maintains that the vast majority of the professional transport companies which received the contested aid have only a small number of vehicles. Specifically, 81% of those recipients who have bought vehicles in the highest categories have only one vehicle and 97% of them have fewer than five vehicles. Only about half of the vehicles in the lower categories belonging to professional transport companies have a transport permit at 'national' level. Of the vehicles with a 'national' transport permit, which are the only ones considered by the Spanish Government to be in a position to compete with carriers from other Member States, only 10% could have been replaced under the Plan because they were over 10 years old. Overall only 0.5% of the Spanish commercial vehicle fleet was replaced (with replaced vehicles in the highest categories representing, as indicated at paragraph 31 above, only 0.1% of that fleet). Finally, aid of a maximum of 6.5% of the VAT-exclusive purchase price of each vehicle cannot create a significant competitive advantage in relation to charges over the period of use of the vehicle concerned.

63 It must be recalled that aid of a relatively low amount is liable to affect competition and trade between Member States where there is strong competition in the sector in which undertakings receiving that aid operate (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27).

64 Except where operators on the market in question engage in anti-competitive conduct, a sector characterised by overcapacity, which is how the Commission classifies the road transport sector, and the Spanish Government has not challenged it on that point, must necessarily be one with strong competition. It is, moreover, true, as the Commission states in Part V of the grounds for the contested decision that, where a sector has a large number of small companies, aid potentially available to all or a very large number of undertakings in that

sector can, even if individual amounts are small, have an impact on competition and trade between Member States. In that connection, the figures provided by the Spanish Government confirm that the vast majority of recipients of the contested aid are small companies.

65 In those circumstances, the Commission has satisfactorily demonstrated that the aid granted to professional transport companies of an amount below the *de minimis* threshold falls within the scope of Article 92 of the Treaty.

66 The Spanish Government's arguments, as summarised at paragraph 62 above, do not affect that assessment. The fact that approximately half the replaced vehicles in the lower categories have only a local or regional transport permit does not mean that those vehicles cannot compete with carriers in other Member States who do or may engage in cabotage in Spain. Similarly, the fact that only 10% of vehicles with a 'national' transport permit could have been replaced under the Plan does not prevent their replacement, which the Plan makes possible, from having an effect on competition and trade between Member States. Finally, the fact that it was established *a posteriori* that only a small part of the Spanish commercial vehicle fleet was in fact replaced pursuant to the Plan is likewise not a valid argument against the contested decision.

67 First of all, under Article 93(3) of the Treaty, aid schemes must be notified to and authorised by the Commission before their entry into force and accordingly they can be examined only by reference to their general characteristics as they appear *a priori* and not in the light of results recorded *a posteriori*. Otherwise Member States which implement aid schemes before obtaining the Commission's permission to do so would unquestionably be in a more favourable position than those which comply with the obligation not to implement the contemplated measures prior to a final decision from the Commission. Secondly, even if the

findings made *a posteriori* in this case were taken into account, it would still be the case that several thousand commercial vehicles were replaced under the Plan, which, in a sector characterised by overcapacity and strong competition, is sufficient to cause the Plan to affect trade and competition, as stated at paragraph 64 of this judgment. The argument that the amount of the contested aid is too small to confer a significant competitive advantage on its recipients may be rejected on similar grounds.

68 It follows from the foregoing that the plea alleging infringement of Article 92(1) of the Treaty may be upheld only in relation to aid falling below the *de minimis* threshold granted to natural persons or SMEs which carry on business outside the transport sector, and that the remainder of the plea must be rejected.

*Plea alleging infringement of Article 92(3)(c) of the Treaty*

Arguments of the parties

69 The Spanish Government argues that the Commission should in any event have authorised the Plan under Article 92(3)(c) of the Treaty in the light of the road safety improvement objectives and environmental protection objectives of the Plan.

70 It states that there can be no doubt of the Plan's impact on those objectives. If the benefit attached to the contested aid is not a result of the fact that the new vehicles purchased comply with even more stringent standards than those

generally applicable to new vehicles, that is because the latter standards are already high and therefore replacing an old vehicle with a new one early will bring about a perceptible improvement with regard to the two abovementioned objectives. It is, in any event, an objective of the Plan to bring about an improvement in relation to the general standards in force for vehicles on the road, by encouraging the withdrawal of old, lower-performance vehicles that are, however, still allowed to be driven. The cost of the hoped-for improvement in this case must necessarily equate to the purchase price of the new vehicle and it is on that basis that the level of aid to which the subsidy corresponds should be calculated (6.5% at most). The subsidy does not constitute operating aid since it merely compensates for high interest rates to which undertakings established in Spain are subject, and which are higher than those in force in the other Member States. The Spanish Government adds that the very reason why carriers established in other Member States have no interest in requesting aid under the Plan is the level of interest rates, which are more attractive in other Member States, and is in no way attributable to any discrimination against them. As to an increase in transport capacity by volume owing to the replacement of vehicles more than 10 years' old by larger new vehicles, that occurred in only 12.3% of cases. Finally, the Spanish authorities have adopted measures to avoid cumulation of aid amongst beneficiaries.

71 According to the Commission, the Spanish Government has not demonstrated the positive effect of the Plan on the environment and road safety. The contested aid simply covers part of the cost of the new vehicle, regardless of any environmental or safety factor. Models which have been available for years, and which do not perform impressively on either of those points, are potentially eligible for aid. Environmental and safety standards in any event apply to all vehicles in circulation, including those whose withdrawal is encouraged by the Plan. Whilst those standards may be more stringent for vehicles newly put into circulation than for older vehicles, the possibility that some older vehicles in fact attain comparable performance levels to those of new vehicles cannot be ruled out. In any event the Plan can only encourage the application of existing standards.

72 The Commission's policy on State aid for environmental protection as set out in the Environmental Guidelines is based on the principle that only aid aimed at attaining objectives higher than the level of mandatory standards is necessary. It follows from those Guidelines that the Plan could have been exempted only if the contested aid had related purely to that part of the investment aimed at attaining environmental objectives rather than the whole of the investment and if, of those 'eligible costs', only a maximum of 15% had been covered. The basis for calculating the aid in the present case is, however, the cost of the new vehicle in its entirety and not simply the cost of improvements compared to old vehicles. It is therefore simply operating aid which relieves undertakings of costs which they normally have to pay and which, by its very nature, distorts trade to an extent contrary to the common interest.

73 Furthermore, the Plan's incompatibility with the common market is underlined by a number of factors including in particular overcapacity in the transport sector, which is increased rather than reduced by the Plan, and the real danger of the aid granted under the Plan being cumulated with aid previously authorised by the Commission. In that regard, the assurances which, according to the Commission, the Spanish Government provided for the first time in its reply, are imprecise and insufficient to avert that risk and in any event were not made known to the Commission prior to the adoption of the contested decision.

Findings of the Court

74 In the application of Article 92(3) of the Treaty, the Commission has a wide discretion the exercise of which involves economic and social assessments which must be made in a Community context (see, for example, *Deufil* v *Commission*, cited above, paragraph 18). Judicial review of the manner in which that discretion

is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers.

75 It is clear from the very wording of Articles 92(3)(c) and 93 of the Treaty that the Commission 'may' consider aid covered by the first of those provisions compatible with the common market. Accordingly, although the Commission always has to rule on the compatibility with the common market of State aid subject to review by it, even if that aid has not been notified to it (see Case C-301/87 *France* v *Commission* (the '*Boussac Saint Frères*' case) [1990] ECR I-307, paragraphs 15 to 24), it is not bound to declare such aid compatible with the common market.

76 None the less, as stated at paragraph 53 above, the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States. Secondly, under Article 190 of the EC Treaty (now Article 253 EC), the Commission must give reasons for its decisions, including decisions refusing to declare aid compatible with the common market under Article 92(3)(c) of the Treaty. Infringement of Article 190 of the Treaty may be raised by the Court of its own motion.

77 It is clear from the Environmental Guidelines that it is essential that aid be classified as aid for investment or operating aid in order to determine whether it may be authorised under those Guidelines.

78 Paragraph 3.2 of the Guidelines, which relates to aid for investment, states first of all at paragraph 3.2.1 that such aid, including aid for equipment intended to reduce pollution or nuisances, may be authorised within the limits laid down in

the Guidelines. The Guidelines state that eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives and that costs not attributable to environmental protection must be excluded. Thus, in the case of replacement plant, the cost of the basic investment involved merely to replace production capacity without improving environmental performance is not eligible. In any case, aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by the Guidelines.

79 Paragraph 3.2.3 of the Environmental Guidelines goes on to provide that aid for environmental investment can be authorised up to certain levels. It distinguishes between: (A) aid to help firms adapt to new mandatory standards, which is further subdivided into (A1) aid to assist with adaptation of existing plant and equipment and (A2) aid towards the replacement of plant; and (B) aid to encourage firms to improve on mandatory environmental standards.

80 On the other hand, paragraph 3.4 of the Guidelines makes it clear that the Commission will not approve operating aid, even where it is intended to meet environmental protection objectives, other than in very specific cases relating to waste management and temporary relief from environmental taxes.

81 It is not, however, possible to discern clearly from an examination of the contested decision in the present case whether the Commission considered the aid in question to be operating aid or aid for investment, despite the fact that the Environmental Guidelines establish different regimes for the two categories. The 12th, 13th and 15th paragraphs in Part V of the grounds for the contested decision rather indicate that the aid is for investment, whilst the 17th paragraph, on the other hand, gives the impression that it is operating aid.

82 The statement of reasons required by Article 190 of the Treaty must explain clearly and unambiguously the reasoning followed by the Community institution which has adopted the contested act, so as to enable interested parties to take cognisance of the justifications for the measure for the purpose of defending their rights and to enable the courts to exercise their powers of review.

83 Because the aid in question was not clearly classified either as aid for investment or as operating aid, the Kingdom of Spain was not in a position fully to defend its rights.

84 It is true that the Commission argued before the Court that the aid constituted operating aid. However, the statement of reasons must, unless there are exceptional circumstances, be notified to the person concerned at the same time as the decision adversely affecting him, and an infringement of Article 190 of the Treaty cannot be remedied before the Court of Justice (see, in particular, Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, at p. 2876).

85 The contested decision is therefore vitiated by a defect in the statement of reasons concerning the Plan's incompatibility with the criteria laid down in the Environmental Guidelines.

86 It should also be noted that the particular circumstances which, according to the Commission, make it impossible to declare the contested aid compatible in the light of the rules laid down in the Environmental Guidelines are not decisive.

87 With regard first of all to the fact that the Plan encourages overcapacity in the transport sector, it is to be observed that, under paragraph 2.1 of the Environmental Guidelines, the Guidelines apply to aid in all the sectors governed

by the EC Treaty (with the exception of a particular field in the agricultural sector) including those subject to specific Community rules on State aid (the transport sector is explicitly referred to), in so far as such rules do not provide otherwise. In that connection, it is not necessary to determine whether the specific rules in the transport sector prohibit any aid that increases transport capacity by volume: it need merely be stated that in the contested decision the Commission could have confined the declaration of incompatibility to aid enabling a vehicle in a higher category than that covering the vehicle withdrawn from circulation to be purchased.

88 As regards, secondly, the risk of the contested aid being cumulated with aid previously authorised by the Commission, the only provisions in the Environmental Guidelines on cumulation of aid, which appear at paragraph 3.8, are confined to stating that the limits set on the level of aid that may be granted for the various environmental purposes referred to in the Guidelines apply to aid from all sources. That statement does not in any way concern the question of possible cumulation of aid for different purposes within the same undertaking, on which the Commission relied in support of its arguments.

89 That question, on the other hand, is the subject of the Commission communication on the cumulation of aids for different purposes (OJ 1985 C 3, p. 2), which defines methods for notifying significant instances of cumulation of aid for different purposes awarded to a given investment project. However, it in no way follows from that communication that an aid scheme might not be declared compatible with the common market on the ground that some of the beneficiaries have already received aid authorised under another head.

90 Accordingly, if it fulfils the criteria laid down by the guidelines applicable to it and, where appropriate, by certain sectoral rules, an aid scheme intended to reduce pollution and nuisances cannot be declared incompatible as a whole with

the common market on the ground that some of the recipients have already received State aid authorised under another head. The Member State concerned has only, where appropriate, to notify the Commission of significant instances of cumulation of aid for different purposes awarded to a single undertaking, as provided by the communication on cumulation.

91 It follows from the foregoing that, with regard to the aid granted under the Plan to professional transport companies and the aid above the *de minimis* threshold granted to non-transport companies, the Commission infringed Articles 92(3)(c) and 190 of the Treaty by declaring, on the basis of the statement of reasons given in the contested decision, that all that aid was incompatible with the common market.

92 Having regard also to the finding at paragraph 68 of this judgment, the action must therefore be upheld and Articles 3 and 4 of the contested decision annulled, without it being necessary to examine the other pleas in law relied on by the Spanish Government.

## Costs

93 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls Articles 3 and 4 of Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994 — December 1996);

2. Orders the Commission of the European Communities to pay the costs.

Macken Gulmann Puissochet

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 26 September 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber