JUDGMENT OF THE COURT

9 October 2001 *

In Case C-400/99,

Italian Republic, represented by U. Leanza, acting as Agent, assisted by P.G. Ferri, avvocato dello Stato,

applicant,

v

Commission of the European Communities, represented by E. De Persio and D. Triantafyllou, acting as Agents,

defendant,

APPLICATION for annulment of the Commission decision, notified to the Italian Republic by letter SG(99) D/6463 of 6 August 1999, published in the *Official Journal of the European Communities* of 23 October 1999 (OJ 1999 C 306, p. 2), to initiate the procedure under Article 88(2) EC concerning State aid C 64/99 (ex NN 68/99) — Italy — granted to undertakings in the Tirrenia di Navigazione group, in so far as that decision rules on the suspension of the aid in question,

* Language of the case: Italian.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), A. La Pergola, J.-P. Puissochet (Rapporteur), L. Sevón, M. Wathelet, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 9 January 2001, at which the Italian Republic was represented by M. Fiorilli, avvocato dello Stato, and the Commission by V. Di Bucci, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 October 1999, the Italian Republic brought an action under Article 230 EC for the annulment of the

Commission decision, notified to the Italian Republic by letter SG(99) D/6463 of 6 August 1999, published in the *Official Journal of the European Communities* of 23 October 1999 (OJ 1999 C 306, p. 2), to initiate the procedure under Article 88(2) EC concerning State aid C 64/99 (ex NN 68/99) — Italy — granted to undertakings in the Tirrenia di Navigazione group ('the contested decision'), in so far as that decision rules on the suspension of the aid in question.

Regulation (EC) No 659/1999

2 It should be noted at the outset that the contested decision falls within the procedural framework laid down by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1; 'the regulation on procedure in State aid cases'), which entered into force on 16 April 1999.

3 Article 1 of that regulation includes the following definitions:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;

(b) "existing aid" shall mean:

...

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission

or by the Council;

...

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article 93(3) of the Treaty;

...'

4 Under Article 4(4) of the regulation on procedure in State aid cases, 'where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article 93(2) of the Treaty (hereinafter referred to as a "decision to initiate the formal investigation procedure")'. Under Article 7(1) of the same regulation, the formal investigation procedure is to be closed by means of a decision as provided for in Article 7(2) and (5).

5 Articles 10, 11, 12 and 13 of the regulation on procedure in State aid cases, which appear in Chapter III, headed 'Procedure regarding unlawful aid', provide:

'Article 10

Examination, request for information and information injunction

1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned...

...

Article 11

Injunction to suspend or provisionally recover aid

1. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (hereinafter referred to as a "suspension injunction").

Article 12

Non-compliance with an injunction decision

If the Member State fails to comply with a suspension injunction..., the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Communities direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.

Article 13

Decisions of the Commission

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7....

...'

6 Articles 17, 18 and 19 of the regulation on procedure in State aid cases, which form Chapter V, headed 'Procedure regarding existing aid schemes', provide:

'Article 17

Cooperation pursuant to Article 93(1) of the Treaty

1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article 93(1) of the Treaty.

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments...

Article 18

Proposal for appropriate measures

Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme, or

(b) introduction of procedural requirements, or

(c) abolition of the aid scheme.

Article 19

Legal consequences of a proposal for appropriate measures

1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.'

7 Since the entry into force of the Amsterdam Treaty, Article 92 of the EC Treaty has, after amendment, become Article 87 EC and Article 93 of the EC Treaty has become Article 88 EC.

Facts and procedure

8 Having received complaints that the Italian authorities were granting unauthorised State aid to internal ferry transport services operated by undertakings of the Gruppo Tirrenia di Navigazione ('the Tirrenia group'), Commission officials questioned the Italian authorities on that subject by letter of 12 March 1999.

9 That request for information related in particular to the public service obligations incumbent on the undertakings of the Tirrenia group and to the conditions for determining the additional cost arising from those obligations and for compensating for such cost.

10 The Italian authorities gave a cursory reply by note of 11 May 1999, and a meeting was then held between Commission officials and representatives of the Italian authorities on 3 June 1999.

11 Following those exchanges, the Commission considered that there were serious doubts as to the compatibility with the common market of measures capable of constituting State aid in favour of undertakings in the Tirrenia group, and, by the contested decision, it initiated the procedure under Article 88(2) EC in relation to that presumed aid.

12 It notified that decision to the Italian authorities by letter SG(99) D/6463 of 6 August 1999. That letter was reproduced in Italian in the *Official Journal of the European Communities* of 23 October 1999 (OJ 1999 C 306, p. 2), accompanied by a summary in the other language versions, in accordance with Article 26(2) of the regulation on State aid procedure. The Italian authorities and the interested parties were invited to submit their comments.

13 In the part of its letter headed 'Conclusions', the Commission stated that it reserved the right to require the Italian authorities to suspend payment of any aid in excess of the net additional cost of providing services of general economic interest. It then invited the Italian authorities to confirm suspension of that payment within 10 working days, indicating that if the excess aid paid were not suspended and no justification given for the suspended amount, it could serve an injunction on the Italian authorities to that effect. The Commission stated that

the suspension was necessary to limit the impact of distortions of competition, but that it did not imply the suspension of the services themselves, which could continue in accordance with rules complying with Community law. The Commission added that, if the Italian authorities did not comply with the decision to suspend the aid, the Commission could refer the matter directly to the Court of Justice, in accordance with Article 88(2) EC and, if necessary, apply for a provisional suspending measure. Finally, the Commission drew the attention of the Italian authorities to the suspensory effect of Article 88(3) EC and the letter sent to Member States on 22 February 1995 in which it stated that any aid granted unlawfully could be recovered from the beneficiary.

14 By a memorandum of 19 August 1999, the Italian authorities first asked the Commission for an extension of the time-limit for replying on the substance of the matter, and also put a question to the Commission as to the scope of its statements in its letter of 6 August 1999 concerning the suspension of the financial aid measures in question.

15 By letter of 13 September 1999, the Commission's services granted the extension of the time-limit requested and replied as follows to the question concerning the suspension of the financial aid measures:

'In that respect, the Commission *invites* Italy to suspend immediately the granting of all aid that is excessive in amount and to notify it of such suspension (with detailed explanations as to the amount of the aid suspended) within 10 days following service of the Commission's letter to Italy. If Italy does not accede to that invitation, the Commission (in accordance with its normal practice) reserves the right to *require* Italy to suspend the aid in question ("injunction to suspend aid").

The aim of the initial invitation to Italy to suspend the aid is to communicate the position of the Commission, which considers there are grounds for immediate suspension, while at the same time leaving Italy the opportunity, within 10 days, to submit the arguments which in its view render suspension unnecessary or inappropriate in this case. The Commission will take account of any such arguments before deciding upon any suspension order. However, contrary to what the Italian authorities maintain, they are not being asked to comply with a 10-day time-limit to submit their arguments on the substance, the time-limit for which, by contrast, is one month (in this case 30 September 1999).'

16 On 18 October 1999, the Italian Republic brought the present action for the annulment of the contested decision 'in the part where it rules on the suspension [of the] aid declared unlawful'.

17 On 19 October 1999, Tirrenia di Navigazione SpA, Adriatica di Navigazione SpA, Caremar SpA, Toremar SpA, Siremar SpA and Saremar SpA, companies in the Tirrenia group, lodged an application at the Registry of the Court of First Instance, registered under number T-246/99, for the annulment of the contested decision as a whole.

18 By a separate document lodged at the Registry of the Court of Justice on 25 November 1999, the Commission requested the Court, under Article 91(1) of its Rules of Procedure, to declare that there was no need to adjudicate or to allow an objection of inadmissibility, without a hearing on the substance of the case.

19 The Italian Republic submitted its written observations on that application to the Court Registry on 10 February 2000.

The application for a declaration that there is no need to adjudicate, and the admissibility of the action

Arguments of the parties

20 In its application, the Italian Government grounds the admissibility of its action by reference to the principles laid down by the Court of Justice in its judgments in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, and by reference to its pleas on the substance of the case.

21 As its agents confirmed at the hearing, the Italian Government's pleas on the substance are based on the premiss that the contested decision involves suspension of the payment of the financial support measures in question.

22 On that premiss, the Italian Government puts forward several pleas for annulment.

23 In particular, the Italian Government maintains, essentially, that the Commission classified the three types of measure which, it claims, were enjoyed by the Tirrenia group as unlawful State aid — that is to say new or altered aid within the meaning of Article 88(3) EC, paid without prior authorisation — following an inadequate examination which did not enable it to establish that those measures indeed constituted State aid covered by Article 87 EC and that they did not, in certain cases, fall within the category of existing aid, within the meaning of Article 88(1) EC, the payment of which remains possible for as long as the Commission has not taken any negative decision in respect of them.

24 In that respect, the Italian Government states that, concerning first the payments made to the Tirrenia group in consideration of its public service obligations, the latter fall within the context of a public service contract concluded on 30 July 1991 between the Italian Ministry of Transport and the Tirrenia group. That contract is, it submits, covered by the provisions of 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), whereby 'existing public service contracts may remain in force up to the expiry date of the relevant contract'.

25 The Italian Government therefore considers that, even if payments to the Tirrenia group under the public service contract of 30 July 1991 did constitute State aid within the meaning of Article 87 EC — a point on which it does not adopt a position — this was in any event existing aid. In this connection, the government also points out that, between 1991 and 1997, it notified the Commission of the public service contract and a certain amount of information relating thereto.

26 Concerning, second, measures accompanying the Tirrenia group's industrial plan, which the Italian Government states are also affected by the suspension measure, the government explains that those measures have only been envisaged by the management of the Tirrenia group, that they have not been endorsed by the Italian public authorities or notified to the Commission and that, therefore, they could not form the subject-matter of an initiation of procedure under Article 88(3) EC or a suspension decision.

27 Third, and finally, concerning the tax concessions which the Commission maintains were granted to the Tirrenia group in the form of a preferential tax regime for fuels and lubricants, which the Italian Government states are also affected by the suspension measure, the government considers that, in basing its decision solely on the fact that the benefit of those measures is said to have been refused to the vessels of a complainant party, without obtaining the comments of

the Italian authorities, the Commission was in such a situation of uncertainty as to the existence of aid or not that it could not refer to those measures in its suspension decision.

28 In support of its claim that there is no need to adjudicate, or that the action should be declared inadmissible, the Commission argues, as a preliminary, that the formal examination procedure initiated by the contested decision particularly concerns the so-called 'balancing' subsidy, calculated in such a way as to cover the losses of each financial year, the measures connected with the Tirrenia group's industrial plan and the preferential tax treatment for fuels and lubricants, which constituted a public financing of the Tirrenia group. The Commission indicates that those measures affect trade between Member States following the 'normative' liberalisation of maritime transport and that they have never been either notified or authorised. The Commission argues in that respect that these are clearly not existing aids within the meaning of Article 88(1) EC and the regulation on procedure in State aid cases, and considers that that point is not seriously being challenged by the Italian Government. The Commission adds that, because it had doubts both as to the classification of the measures in question as State aid within the meaning of Article 87(1) EC and, in the affirmative, as to their compatibility with the common market (without, in particular, excluding the possibility that aid compensating for the additional cost incurred in meeting public service obligations might be compatible), it initiated the procedure provided for in Article 88(2) EC.

29 The Commission indicates, moreover, that, when it took the decision to initiate the procedure under Article 88(2) EC, it was being threatened by an action from one of the complainants for failure to act.

30 The Commission maintains that the action is devoid of purpose. It emphasises in that respect that the Italian Government challenges only that part of the contested decision which rules on the suspension of the aid considered unlawful.

31 But, the Commission argues, the contested decision does not in any way rule on the suspension of the measures in question. The decision merely made reference to the suspensory effect of Article 88(3) EC in relation to the payment of new or amended aid and informed the Italian Government that the Commission reserved the right subsequently to direct it to suspend payment of any aid exceeding what was necessary to compensate for the additional cost arising from the public service obligations incumbent on the Tirrenia group. The passage of the contested decision in which the Commission invites the Italian authorities to confirm within 10 days that the payment of such aid was suspended was, essentially, only a means of discovering whether that payment had actually been suspended or not, in order to study the appropriateness of issuing an injunction against the Italian Government to that effect, as provided for in Article 11(1) of the regulation on procedure in State aid cases, and first obtaining any comments which the government might have in that respect.

32 In particular, the Commission considers that, following such an invitation, the Italian authorities could have taken the view that there was no aid exceeding the additional costs arising from the public service obligations and argued that there was no need to suspend any payment at all. All those explanations were given to the Italian authorities in the Commission's letter of 13 September 1999, sent in reply to their memorandum of 19 August 1999.

33 The Commission considers that the contested decision does no more than request confirmation and invite comments and that, in the absence of a suspension decision, the application is unjustified and devoid of purpose. Therefore, all the applicant's arguments become nugatory.

34 Thus, in particular, there was no deficiency in reasoning when the procedure under Article 88(2) EC was initiated. It was the simple initiation of a procedure accompanied by a warning of the possibility of an injunction. The Commission had merely explained what public interest lay in the suspension of the excess aid.

35 Similarly, the doubts expressed by the Commission as to the classification of the measures in question as State aid within the meaning of Article 87(1) EC, or as aid compatible with the Treaty, were perfectly normal at the stage of initiating the procedure under Article 88(2) EC. The fact that the Commission sent the Italian authorities a request for comments concerning both those classifications and a possible subsequent injunction suspending the measures in question belies the arguments of the Italian Government based on the premiss that the suspension injunction has already been adopted.

36 In the alternative, the Commission also considers that the action is inadmissible. Since, in its submission, the contested decision does not rule on the suspension of aid and constitutes only a measure preparatory to a possible suspension injunction in the future, it is not, as such, an executory measure capable of adversely affecting persons and open to an action for annulment.

37 In its observations on the procedural objection raised by the Commission, the Italian Government begins by recalling that, in its application, it referred to the judgment in *Spain* v *Commission*, cited above, and, on the strength of that judgment, it argues that, according to the Court of Justice, in a situation where the Commission initiates the formal procedure in an aid case by applying Article 88(3) EC because it regards it as a new aid that has not been notified and, as such, subject to the suspension obligation, but the Member State concerned does not share that opinion, taking the view that the Commission is referring to an existing aid not subject to suspension, that State has the right to refer the matter to the Court of Justice, pursuant to Article 230 EC, in order to obtain the annulment of that part of the decision to initiate the procedure which concerns the classification of the aid as being aid which is subject to the suspensory effect.

38 The Italian Government then argues that that is the situation in this case. It emphasises that the Commission is relying here on Article 88(3) and that it itself, as is shown by the fourth plea in its action, is maintaining that it is Article 88(1) EC, concerning existing aid, which should have been used.

39 The Italian Government argues that the Commission, by maintaining that an injunction to suspend payments does not exist, is committing an obvious error as to the subject-matter of the action and is confusing conditions of admissibility with conditions as to the substance. It states that it is challenging a suspension order. An order has a broader meaning than an injunction, but in any event has the same content in relation to the substance and the same effects as an injunction.

40 In that respect, the Italian Government recalls that, in *Spain* v *Commission*, the Spanish authorities were held to be bringing an admissible action in challenging the decision to initiate the procedure, even though that decision did not comprise an injunction by the Commission either, but merely referred to the suspensory effect of the provisions of Article 93(3) of the Treaty.

41 The Italian Government also denies the Commission's claim that it admitted that the measures in question constituted new or amended aid, within the meaning of Article 88(3) EC, that is to say aid unlawfully paid and not existing aid within the meaning of Article 88(1) EC.

42 The Italian Government acknowledges that it pays the Tirrenia group the financing provided for in the public service contract of 30 July 1991, which was notified to the Commission at the time, and draws attention to its argument that, if such financing has to be classified as State aid within the meaning of Article 87(1) EC, notwithstanding that it is intended solely to compensate for expenses actually incurred by the Tirrenia group in the public interest, then it should be treated as existing aid, and the Commission ought at the very least to have verified that it did not fall within that category of aid.

43 The Italian Government considers finally that the Commission is maintaining the confusion in this case and that it has added to that confusion by maintaining, in

its application under Article 91(1) of the Rules of Procedure of the Court of Justice, that the statements on the matter of suspension appearing in the contested decision concern only excess aid.

44 The Italian Government is surprised at that new category of aid. It emphasises that, as regards the obligation to suspend aid, the only relevant distinction is that between new aid and existing aid and that, even if the excess nature of the aid has an influence on the assessment of its compatibility with the common market, to make the obligation to suspend the aid depend upon that character would constitute a clear infringement of the Treaty, since, in so doing, the Commission would have a discretionary power to assess which measures must to be suspended.

Findings of the Court

45 In accordance with Article 88 EC, as interpreted by the Court of Justice, and with the provisions of the regulation on procedure in State aid cases, where the Commission is aware of a measure already implemented which, after requesting information on the matter from the Member State concerned, it considers to be capable of constituting new aid or the amendment of existing aid which raises doubts as to its compatibility with the common market, it must initiate the procedure under Article 88(2) EC.

46 Where the Member State concerned does not suspend the implementation of the measure in order to comply with the duty under the last sentence of Article 88(3) EC and Article 3 of the regulation on procedure in State aid cases not to put new aid or the alteration of existing aid into effect before authorisation is obtained from the Commission or, as the case may be, from the Council, the Commission has the power under Article 11(1) of that regulation, having given the Member

State the opportunity to submit its comments, to adopt a decision requiring it to suspend such implementation until the final decision as to the compatibility of the aid. The Commission already had that power before the regulation on procedure in State aid cases came into force (See Case C-301/87 *France* v *Commission* [1990] ECR I-307 (known as '*Boussac*'), paragraphs 18 to 20).

47 The suspension injunction may take place at the same time as the decision to initiate the procedure under Article 88(2) EC (see, for example, Commission Decision 94/220/EC of 26 January 1994 requiring France to suspend the payment to Groupe Bull of aid granted in breach of Article 93(3) of the EC Treaty (OJ 1994 L 107, p. 61)), or may be subsequent thereto (see, for example, Commission Decision 92/35/EEC of 11 June 1991 requiring France to suspend the implementation of... aid... in favour of the Pari Mutuel Urbain (PMU), introduced in breach of Article 93(3) of the EEC Treaty (OJ 1992 L 14, p. 35)). According to the scenario, the prior invitation to the Member State concerned to submit its comments as to a possible suspension injunction will take place either before the initiation of the procedure under Article 88(2) EC, or in the context of the decision to initiate that procedure, or after that decision.

48 However, the effect of Article 88(1) and (2) EC and Articles 17 to 19 of the regulation on the procedure in State aid cases is that, if the Commission considers that there is existing aid whose compatibility with the common market it wishes to re-examine, it cannot require the Member State concerned to suspend that aid before a negative final decision holding it incompatible with the common market. For its part, the Member State is not under any obligation to suspend existing aid before such a negative final decision (*Spain* v *Commission*, paragraph 17; *Italy* v *Commission*, paragraph 25).

49 In this case, in order to give judgment on the claim that there is no need to adjudicate and, if appropriate, as to the admissibility of the action under

Article 230 EC brought by the Italian Republic, it needs to be verified whether that action does have a purpose in relation to the content of the contested decision and whether the latter produces legal effects.

50 The Italian Republic has brought its action against the contested decision in so far as it rules on the suspension of the measures in question, regarded by the Commission as unlawful new aid.

51 In that respect, if a decision of the Commission comprises an injunction to suspend a measure capable of constituting State aid, an action brought against the suspension obligation contained in that decision has a purpose and that decision, having an immediately binding character, produces legal effects.

52 In this case, despite a formulation which, in certain paragraphs of the part of the contested decision headed 'Conclusions', may appear to be ambiguous, and an order of paragraph presentation which may not assist in their understanding, it does not appear that the contested decision comprises a suspension injunction such as provided for in Article 11(1) of the regulation on procedure in State aid cases.

53 The Commission stated in the contested decision that it 'reserves the right to require the Italian authorities to suspend all aid payments in excess of those required in order to offset the net additional costs of providing services of general economic interest', and then 'invites' the Italian authorities to confirm that they are suspending that payment. The Commission then indicated, in particular, that, if that suspension did not happen, it could serve an injunction on the Member

State to that effect. The Commission added, finally, that, if the Italian authorities did not comply with the decision to suspend the aid, it could refer the matter directly to the Court of Justice pursuant to Article 88(2) EC.

54 It may be noted in this respect that the word 'invite' used by the Commission to obtain the suspension of the measures in question by the Italian authorities does not in itself have a binding character and that the Commission refers to the possibility which it reserves (that is to say, for the future) to demand suspension — or, in another expression used, to serve an injunction to that effect — and, should such a decision not be put into effect, to refer the matter directly to the Court of Justice pursuant to Article 88(2) EC.

55 It should however be verified whether, despite the absence of a suspension injunction, the contested decision does not imply that the Italian authorities must suspend the implementation of the measures referred to and whether the decision to initiate the procedure under Article 88(2) EC does not in itself entail legal effects.

56 As the Court of Justice held in paragraph 17 of *Spain* v *Commission* and paragraph 25 of *Italy* v *Commission*, the decision which marks the beginning of the procedure under Article 88(2) EC produces different effects according to whether the aid in question is new or existing aid. Whereas, in the former case, the Member State is prevented from implementing the aid proposal submitted to the Commission, that prohibition does not apply where the aid is existing aid.

57 Regarding aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, the contrary classification as new aid, even if provisional, adopted by the Commission in its

decision to initiate the procedure under Article 88(2) EC in relation to that aid, has independent legal effects.

58 It is true that the classification of the aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the procedure under Article 88(2) EC. However, a decision such as that envisaged in paragraph 57 of this judgment implies that the Commission does not intend to examine the aid in the context of the permanent examination of existing aid schemes provided for by Article 88(1) EC and Articles 17 to 19 of the regulation on procedure in State aid cases. That signifies that the Commission is not proposing to the Member State concerned appropriate measures for adapting the aid to the progressive development or functioning of the common market as provided for by those provisions before initiating the procedure, and that, from its point of view, the aid has been and is being unlawfully implemented, in disregard of the suspensory effect, in relation to new aid, which follows from the last sentence of Article 88(3) EC.

59 Such a decision to initiate the procedure under Article 88(2) EC in relation to a measure in the course of implementation and classified as new aid necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries, particularly as regards the pursuit of its implementation. Whereas, until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the measure is being lawfully carried out as an existing aid, after its adoption there is at the very least a significant element of doubt as to the legality of that measure which, without prejudice to the possibility of seeking interim relief from the court with the power to grant it, must lead the Member State to suspend payment, since the initiation of the procedure under Article 88(2) EC excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued. Such a decision might also be invoked before a national court called upon to draw all the consequences arising from the infringement of the last sentence of Article 88(3) EC. Finally, it is capable of leading the undertakings which are beneficiaries of the measure to refuse new payments in any event, or to hold the necessary sums as provision for possible subsequent repayments. Businesses will also take account, in their relations with those beneficiaries, of the fragile legal and financial situation of the latter.

60 It is true that, in such a context, unlike a suspension injunction addressed to a Member State, which is immediately binding in character and non-compliance with which permits the Commission to refer the matter directly to the Court of Justice pursuant to Article 12 of the regulation on procedure in State aid cases for a declaration that such non-compliance constitutes an infringement of the Treaty, the decision to initiate the procedure under Article 88(2) EC, taken in relation to measures in the course of implementation and classified by the Commission as new aid, produces legal effects the consequences of which it is for the Member State concerned and, in appropriate cases, economic operators themselves to draw. However, that procedural difference does not affect the scope of those legal effects.

61 On the other hand, where the Commission decides to deal with the measure concerned in the context of the permanent examination of existing aid schemes, the legal situation does not change until such time as the Member State concerned accepts proposals for appropriate measures or the Commission adopts a final decision.

62 Therefore, where the Commission initiates the procedure under Article 88(2) EC in relation to a measure in the course of implementation which it classifies as new aid, whereas the Member State concerned maintains that it is existing aid, the choice made by the Commission entails independent legal effects, particularly in relation to the suspension of the measure concerned.

63 Moreover, as the Court has also pointed out in paragraphs 21 to 23 of *Spain* v *Commission* and paragraphs 27 to 29 of *Italy* v *Commission*, Commission decisions such as the contested decision are not simply preparatory steps, in which case an action against the decision closing the procedure under Article 88(2) EC would ensure sufficient protection against any unlawfulness. In particular, the success of an action brought against the Commission's final decision that a measure was incompatible with the common market would do

nothing to eradicate the irreversible consequences that would result from the suspension of the aid.

64 In this case, it is undisputed that, by initiating the procedure under Article 88(2) EC, the Commission took the view that the measures examined raised doubts concerning the existence of new unauthorised State aid and invited the Italian authorities to suspend the payment of aid exceeding strict compensation for additional costs arising from public service obligations, reminding them of the suspensory effect of Article 88(3) EC.

65 Therefore, contrary to what the Commission maintains, the contested decision has direct consequences on the suspension of the measures in question, and the action by the Italian Republic seeking the annulment of that decision in so far as it rules on the suspension is not devoid of purpose.

66 Moreover, as the documents before the Court show, the Italian Government is challenging the classification of certain financing measures covered by the contested decision as new aid, arguing that if those measures were to constitute aid — as to which the Italian Government does not express an opinion — they are in any event existing aid. Such measures are those which flow from the performance of the public service contract of 30 July 1991.

67 It should be noted in this respect that, in its action, after referring to the judgments in *Spain* v *Commission* and *Italy* v *Commission*, which concern the question of the admissibility of an action for the annulment of a decision to initiate the procedure under Article 88(2) EC where a Member State challenges the classification of the measures referred to in that decision as new aid and maintains that they are existing aid, the Italian Government states that, if the

payments made pursuant to the public service contract of 30 July 1991 are to be regarded as aid, they cannot be regarded as new unnotified aid. In its observations on the cross application by the Commission, the Italian Government confirms that approach.

68 The action by the Italian Republic must therefore be declared admissible in so far as it seeks the annulment of the part of the contested decision which rules on the suspension of the payments made pursuant to the public service contract of 30 July 1991, concluded between the Italian Ministry of Transport and the Tirrenia group.

69 Concerning the other measures allegedly enjoyed by the Tirrenia group which are referred to by the decision to initiate the procedure under Article 88(2) EC, the Italian Government essentially argues that they do not constitute aid within the meaning of Article 87(1) EC. Therefore, for reasons similar to those set forth in paragraphs 59 and 60 of this judgment, the action must also be held admissible in so far as it refers to the part of the contested decision which refers to the suspension of those other measures.

70 The Commission's application under Article 91(1) of the Rules of Procedure must therefore be dismissed in its entirety.

Costs

71 Costs are reserved.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the application by the Commission of the European Communities, based on Article 91(1) of the Rules of Procedure of the Court of Justice, for a declaration that there is no need to adjudicate or that the action is inadmissible;**

2. **Declares that the proceedings are to continue as to the substance of the case;**

3. **Reserves the costs.**

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	La Pergola
Puissochet	Sevón	Wathelet
Skouris	Cunha Rodrigues	

Delivered in open court in Luxembourg on 9 October 2001.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President