JUDGMENT OF THE COURT (Grand Chamber)

10 May 2005 *

In Case C-400/99,

ACTION for annulment under Article 230 EC, brought on 18 October 1999,

Italian Republic, represented initially by U. Leanza, and subsequently by I. Braguglia, acting as Agents, assisted by P.G. Ferri and M. Fiorilli, avocati dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. De Persio, D. Triantafyllou and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, J.-P. Puissochet (Rapporteur), R. Schintgen, N. Colneric, S. von Bahr and J. N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2004,

gives the following

Judgment

1 By its application, the Italian Republic seeks the annulment of the decision of the Commission of the European Communities, notified to it by letter SG(99) D/6463 of 6 August 1999, 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 (OJ 1999 C 306, p. 2, 'the contested decision'), in so far as that decision rules on the suspension of the aid in question.

Facts and procedure

2 Having received complaints that the Italian authorities were granting unauthorised State aid to domestic ferry 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.

3 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 that cost.

4 Following various exchanges with the Italian authorities, the Commission took the view that serious doubts existed as to the compatibility with the common market of measures which might constitute State aid for undertakings in the Tirrenia group. Therefore, by the contested decision, it initiated in respect of that alleged aid the procedure provided for in Article 88(2) EC. In doing so, the Commission treated the measures at issue as new aid or changes to existing aid of the kind referred to in Article 88(3) EC (hereinafter 'new aid') and not as existing aid of the kind referred to in Article 88(1) EC (hereinafter 'existing aid'). It then notified that decision to the Italian authorities.

5 In the part of its decision headed Conclusions, the Commission stated among other things that it reserved the right to ask 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. In particular, the Commission drew the attention of the Italian authorities to the suspensory effect of Article 88(3) EC and to 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.

6 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'.

7 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 of the European Communities, registered under number T-246/99, for the annulment of the contested decision as a whole.

8 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, either to declare that there was no need to adjudicate, or to allow an objection of inadmissibility without considering the merits.

9 By judgment of 9 October 2001 (Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, hereinafter 'the interlocutory judgment') the Court of Justice dismissed that application and the proceedings continued on the substance. In essence, in that judgment, the Court held the application to be admissible on the ground that the

Commission had classified the measures at issue as new aid implemented unlawfully, whereas the Italian Government contended that, in some cases, the aid was existing aid legally paid, and that in other cases there was no element of aid in the measures, which implied that those measures should not be suspended, contrary to the purport of the contested decision. Against that background, the Court took the view that the decision in question entailed independent legal effects and therefore constituted a measure against which proceedings might be brought. For details of the analysis which prompted the Court to come to that conclusion, reference is made to the interlocutory judgment.

10 By order of 25 March 2003, the Court of First Instance suspended, as far as it was concerned, pursuant to the third paragraph of Article 54 of the Statute of the Court of Justice, the proceedings before it in case T-246/99 pending the judgment of the Court of Justice to be given in the present case.

11 In the meantime, the Commission closed the proceedings initiated by the contested decision as regards the measures in favour of one of the undertakings of the Tirrenia group, namely Tirrenia di Navigazione SpA, adopted under an agreement concluded with the Italian State in 1991 concerning the public service obligations of that undertaking (Decision of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ 2001 L 318, p. 9, hereinafter 'the decision of 21 June 2001')). The Commission declared to be compatible with the common market the aid paid as compensation for providing a public service from 1 January 1990 to 31 December 2000 and authorised, under certain conditions, the same type of aid for the period from 1 January 2001 to 31 December 2004. However, in that decision, the Commission retained for those measures the classification as new aid assigned to them in the contested decision, a classification which is objected to in the present proceedings by the Italian Republic.

12 By a second decision adopted after the end of the written procedure in the present case, the Commission closed the proceedings initiated by the contested decision as regards the other undertakings in the Tirrenia group (Commission Decision

2005/163/EC of 16 March 2004 on State aid awarded by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar maritime transport companies (Tirrenia group) (OJ 2005 L 53, p. 29)). The Commission nevertheless declared compatible with the common market most of the aid awarded to those undertakings as compensation for providing public services as from 1 January 1992 and subjected to certain conditions the continuing payment thereof as from 2004. The Commission nevertheless declared incompatible with the common market the aid granted to Adriatica in respect of a maritime connection between January 1992 and July 1994 and ordered the abolition as from 1 September 2004 of aid granted to Caremar for a high-speed passenger transport service. In that second decision closing proceedings, the Commission again classified as new aid all the measures mentioned above, as it had already done in the contested decision.

Forms of order sought

13 The Italian Republic claims that the Court should:

— annul the letter from the Commission of 6 August 1999 'in the part where it rules on the suspension [of the] aid declared illegal';

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— declare that the application has become devoid of purpose as regards the part of the contested decision concerning aid granted to Tirrenia di Navigazione;

— for the rest, dismiss the application;

— order the applicant to pay the costs.

The claim that the case should not proceed to judgment

15 In its rejoinder, the Commission contends that the application has become devoid of purpose so far concerns the aid granted to Tirrenia di Navigazione SpA. The decision of 21 June 2001 was not contested within the time-limit for bringing an action and therefore it is definitively established that, although compatible with the common market, the measures taken in favour of that company constituted unlawful aid, that is to say aid implemented without the prior authorisation required under Article 88(3) EC. With regard to such aid, the contested decision no longer has independent legal effects and the Italian Government no longer has any interest in securing its annulment.

16 The Commission's argument must be rejected.

17 It is true that, in its decision of 21 June 2001 partially closing the procedure initiated by the contested decision, the Commission confirmed its preliminary assessment that the subsidies paid to Tirrenia Navigazione SpA in respect of its public service obligations constituted new aid, of the kind with which Article 88(3) EC is concerned, and that decision, which was not contested within the time-limit for bringing an action, is no longer open to challenge. However, the essential aim of the action brought against the contested decision is to secure a judgment to the effect that the measures of which the Commission called for suspension in that decision should not be suspended pending the decision or decisions closing the proceedings

initiated by the contested decision. However, a question of that kind does not fall within the scope of a decision closing proceedings, as provided for in the first subparagraph of Article 88(2) EC and Article 7(2) to (5) and Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] Treaty (OJ 1999 L 83, p. 1 — hereinafter 'the regulation on procedure in State aid cases').

18 It follows that the application fully retains its purpose.

Substance

19 The Italian Government puts forward, in essence, four pleas in annulment. It maintains, first, that the contested decision is vitiated by a defective statement of reasons. Second, the Commission did not place the Italian authorities in a position to submit their comments prior to the adoption of the contested decision. Third, it misused its powers. Lastly, the contested decision is contrary to Articles 87(1) EC and 88(1) and (3) EC for a number of reasons.

The statement of reasons

Arguments of the parties

20 The Italian Government criticises the Commission for failing to refer, in the contested measure, to the regulation on procedure in State aid cases, even though that regulation had already entered into force.

21 The Commission replies that the legal basis of a decision to initiate the procedure provided for in Article 88(2) EC, such as the contested decision, is in the EC Treaty itself and that the regulation on procedure in State aid cases did not therefore have to be mentioned.

Findings of the Court

22 Article 253 EC provides, in particular, that decisions adopted by the Commission are to state the reasons on which they are based. The obligation to give reasons for a decision adversely affecting the addressee is intended to enable the Court to review the legality of the decision and to give the person concerned details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested (see, in particular, Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22).

23 In this case, the lack of any reference in the contested decision to the regulation on procedure in State aid cases or any provisions thereof might constitute a defective statement of reasons only if the Commission had applied provisions of that regulation that did not derive directly from the Treaty. It must be observed in that connection that that regulation is largely a measure codifying in detail the interpretation of the procedural provisions of the Treaty on State aid laid down by the Community judicature prior to the adoption of that regulation.

24 In this instance, the contested decision does not give effect to any procedural provision concerning the review of State aid that does not derive directly from the Treaty. By that decision, the Commission formally called on the Italian authorities to submit their comments on the measures referred to in it, pursuant to Article 88(2) EC, and, in making that request, provisionally classified that aid as new aid, thereby entailing the suspension thereof to the extent indicated in the same decision (see

Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 17, and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 25, and also the interlocutory judgment, paragraph 56). No procedure or legal effect of that decision is based on any innovative provision of the regulation on procedure in State aid cases.

25 The plea alleging that the statement of reasons for the contested decision is defective must therefore be rejected.

The plea that the Italian Government was not given an opportunity to submit comments

Arguments of the parties

26 The Italian Government maintains that the Commission should have enabled it to submit its comments before adopting the contested decision, which involves the suspension of certain payments. It considers that the failure to provide such an opportunity is particularly serious in relation to two types of measure covered by the contested decision, namely those concerning review of the Tirrenia group business plan for the period 1999 to 2002 and the tax measures concerning the supply of fuel and lubricating oil, which were never discussed with the Italian authorities before being included in the scope of the contested decision.

27 The Commission points out that the decision does not include an order to suspend the measures at issue. The provisions of Article 11(1) of the regulation on procedure in State aid cases relied on by the Italian Government in its application, which require comments to be obtained from the Member State concerned before the adoption of such an order, were not therefore, in its opinion, applicable. On the other hand, the contested decision contained a specific invitation to the addressee to submit comments on a possible order for suspension at a later stage.

28 The Commission adds that in the case of new aid not notified but implemented (the 'unlawful aid' referred to in Chapter III of the regulation on procedure in State aid cases), the decision to initiate the procedure provided for in Article 88(2) EC does not have to be preceded by correspondence with the Member State concerned. Article 10(2) of that regulation may indeed allow the Commission to seek information from the State in advance, but does not oblige it to do so. Article 13(1) of that regulation authorises initiation of the procedure but does not impose any prior obligation whatsoever.

Findings of the Court

29 In view of the legal consequences of a decision to initiate the procedure provided for in Article 88(2) EC, classifying the measures concerned as new aid even though the Member State concerned is unlikely to subscribe to that classification (see the interlocutory judgment, paragraphs 59 and 60), the Commission must first broach the subject of the measures in question with the Member State concerned so that the latter has an opportunity, if appropriate, to inform the Commission that, in its view, those measures do not constitute aid or else constitute existing aid.

30 Articles 10 and 13 of the regulation on procedure in State aid cases relied on by the Commission are compatible with that requirement. Thus, in Article 10, which covers a situation in which the Commission possesses information concerning allegedly unlawful aid, whatever the source thereof, the words '[i]f necessary' used in paragraph 2, which introduce the phrase '[the Commission, if necessary,] shall request information from the Member States concerned', express a reservation regarding cases in which the Commission has already adequately discussed the measure at issue with the Member State, for example if it is the latter itself that informed the Commission of the existence of that measure. They do not mean that the Commission is entitled to release itself from the obligation of discussing a

measure with the Member State concerned before initiating the procedure provided for in Article 88(2) EC against it. Similarly, Article 13, which indicates that the examination of possible unlawful aid may result in a decision to initiate that procedure does not release the Commission from its obligation to discuss the measure in question with the Member State concerned before adopting such a decision.

31 In this case, the Commission did not discuss with the Italian authorities the tax treatment which the Tirrenia group benefited from for supplies of fuel and lubricating oil for its vessels before adopting the contested decision, which entailed at least partial suspension of that treatment. If the Commission had done so, the Italian authorities could have drawn attention to information to show that such treatment should not be suspended as constituting unlawful aid. It must be observed in that connection that, in the decision partially closing the procedure of 21 June 2001 concerning Tirrenia di Navigazione, the Commission noted that the Italian authorities had extended the treatment to all vessels laid up in a port for maintenance operations following a decision of 2 March 1996, that is to say prior to the contested decision.

32 As regards, on the other hand, the Tirrenia group's business plan for the period 1999 to 2002, it is apparent from the file that, in its request for information made by letter of 12 March 1999, the Commission referred to the mechanism of multiannual economic plans which the Tirrenia group must submit to the Italian authorities. Accordingly, if a new plan, or measures supplementing an earlier plan, were being prepared, and were then presented by the group during the preliminary phase of examination of the measures covered by that letter, the Italian authorities could expect that the new plan or those additional measures would be included in the scope of any decision to initiate the procedure provided for in Article 88(2) EC. They could themselves have informed the Commission thereof, referring to any factors which might be conducive to avoiding their inclusion in such a decision as constituting allegedly new aid.

33 As regards the subsidies paid to the Tirrenia group in respect of its public service obligations, it is apparent from the file that those measures were dealt with both by Commission staff and by the Italian authorities in the Commission's request for information of 12 March 1999, in the reply thereto given by the Italian authorities and during a meeting between the two sides, all of which preceded the adoption of the contested decision. In relation thereto, the Italian Government cannot therefore claim not to have been allowed an opportunity to submit relevant information before the adoption of the contested decision.

34 The contested decision must therefore be annulled to the extent to which it entailed suspension of the tax treatment afforded to the Tirrenia group for supplies of fuel and lubricating oil for its vessels.

35 At this stage of the present judgment, the analysis that follows therefore relates only to the subsidies paid to the Tirrenia group undertakings in respect of their public service obligations, which, according to the Italian Government, although involving elements of aid, in any event constitute existing aid, and to the Tirrenia group's business plan for the period 1999 to 2002.

Misuse of powers

Arguments of the parties

36 The Italian Government considers that the contested decision, classifying the measures at issue as unlawful aid and entailing their suspension, does not include a

statement of reasons justifying that classification. The only reasons relating to the suspension are connected with the harm that the continuing implementation of those measures would cause to Tirrenia's competitors, but they fail to show that what is involved is aid, within the meaning of Article 87(1) EC, and new aid. The Commission thus took a decision to suspend the measures as a matter of precaution, in case the measures concerned were in fact new and unlawful aid, but that decision is not in any way based on an adequate examination justifying that conclusion.

37 The Commission emphasises in that connection that the contested decision contains no suspension order which would have necessitated proof of the existence of unlawful aid. It merely expresses doubts as to the existence of aid, the unlawful nature thereof and its compatibility with the common market. The considerations concerning any harm that the measures in question might entail for the Tirrenia group's competitors are connected only with the possibility of a later suspension injunction, on which the Italian authorities were invited to submit their comments.

Findings of the Court

38 The concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see, in particular, Case 817/79 *Buyl and Others* v *Commission* [1982] ECR 245, paragraph 28). A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated (see, in particular, Joined Cases 18/65 and 35/65 *Guttmann* [1966] ECR 103, at 117).

39 That is not the case here. As the Court held in the interlocutory judgment, the suspension of measures in course of implementation which the Commission classified as new aid in a decision to initiate the procedure under Article 88(2) EC derives directly from that classification, in conjunction with the provisions of the last sentence of Article 88(3) EC. Accordingly, a misuse of powers could only have been established if it had been shown that the Commission had deliberately classified as new aid measures about whose status as existing aid, subject to the review provided for by Article 88(1) EC, or as measures not falling within the scope of Articles 87 EC and 88 EC, it could have entertained no doubts, that is to say if it had been shown that the Commission had sought deliberately to bring about within a short period the suspension of measures about whose capability of being implemented legally, at least until closure of the procedure, it could not have entertained any doubts.

40 However, at the date of adoption of the contested decision and in the light of the information then available to the Commission, it did not appear to be beyond doubt that the subsidies paid to the Tirrenia group in excess of the net additional costs linked with the provision of services in the general economic interest, covered by the suspension deriving from that decision, constituted either existing aid, as described above, or measures not incorporating any element of aid.

41 The plea alleging misuse of powers is therefore unfounded.

Infringement of Articles 87(1) EC and 88(1) and (3) EC

Arguments of the parties

42 The Italian Government states that, in the contested decision, the Commission indicates that it is not possible, at this stage, to rule as to the existence of elements of aid. In view of such uncertainty, it was not permissible to initiate a procedure entailing suspension of the measures at issue. In that connection, the Italian Government refers to Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, in which, in relation to the question of the conformity of individual aid with a decision approving an aid scheme, the Court held as follows:

'33 Since Article [88(3) EC] authorises the Commission to order suspension of payment only of new aids, it is not enough that it should merely have doubts as to the conformity of individual aids with its decision approving the scheme of aids.

34 If the Commission has doubts as to the conformity of individual aids with its decision approving the general scheme, it is up to it to order the Member State concerned to supply to it, within such period as it may specify, all such documentation, information and data as are necessary in order that it may examine the compatibility of the aid in question with its decision approving the aids scheme.'

43 Moreover, according to the Italian Government, the Commission admitted in the contested decision that the aid needed to cover the excess costs of providing a public service, paid under public service contracts that existed before the entry into force 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), is authorised under Article 4(3) of that regulation, which provides that '[e]xisting public service contracts may remain in force up to the expiry date of the relevant contract'.

44 In that connection, the Italian Government states that all payments made to the Tirrenia group undertakings in return for their public service duties are covered by the public service contracts concluded on 30 July 1991 between the Ministry of Transport and those undertakings, that the Commission received notice of those contracts in 1991 and that certain information on the subject was transmitted to it between 1991 and 1997. It stated in its reply that any aid was thus implemented before the liberalisation introduced by Regulation No 3577/92, in that the essential elements of the public service obligations and the payments relating thereto dated even further back than the Treaty of Rome, and that, in any event, the Commission, having received notice of those contracts, explicitly or implicitly authorised that aid. Consequently, if payments made for the benefit of the Tirrenia group undertakings were to be classified as State aid, within the meaning of Article 87(1) EC, they would in any event constitute existing aid.

45 According to the Italian Government, the Commission disregarded the information that had been notified to it between 1991 in 1997 in determining whether existing aid or new aid was involved. The Commission chose the second option at the outset, without justification.

46 The Commission states that the fact of expressing uncertainties as to the existence of elements of aid in the measures examined is customary in the context of a

decision to initiate the procedure provided for in Article 88(2) EC. It states that, in the contested decision, it did not, on the other hand, express any doubt as to the fact that the measures at issue were new, since in their correspondence prior to the adoption of that decision, the Italian authorities had not in any way contended that the measures constituted existing aid. Consequently, the situation is not comparable to that dealt with in the abovementioned judgment in *Italy* v *Commission.*

Findings of the Court

47 As the Court has consistently held, when the Commission examines aid measures under Article 87 EC to determine whether they are compatible with the common market, it is required to initiate the procedure under Article 88(2) EC where, after the preliminary examination, it has been unable to overcome all the difficulties involved in determining whether those measures are compatible with the common market (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13). The same principles must naturally apply where the Commission also entertains doubts as to the actual classification as aid, within the meaning of Article 87(1) EC, of the measure examined. The Commission cannot therefore be criticised for initiating the procedure even where, in the decision adopted for that purpose, it expresses doubts as to the status as aid, within the meaning of Article 87(1) EC, of the measures covered by it.

48 However, in view of the legal consequences of initiating the procedure provided for in Article 88(2) EC with regard to measures treated as new aid, where the Member State concerned contends that those measures do not constitute aid within the meaning of Article 87(1) EC, the Commission must undertake a sufficient examination of the question on the basis of the information notified to it at that stage by that Member State, even if the outcome of that examination is not definitive. By virtue of the principle of sincere cooperation between Member States and institutions, as embodied in Article 10 EC, and in order not to delay the

procedure, it is the responsibility of a Member State which considers that the measures in question do not constitute aid to provide the Commission, at the earliest moment possible, after the Commission has drawn its attention to those measures, with the information on which its position is based. If that information is such as to remove any doubts as to the absence of any element of aid in the measures examined, the Commission cannot initiate the procedure provided for in Article 88(2) EC. Conversely, if that information is not such as to overturn the doubts as to the existence of elements of aid and if doubts also exist as to the compatibility thereof with the common market, the Commission must then initiate that procedure.

49 In this case, it is clear from the file that, in response to the first request for information from the Commission, the Italian authorities maintained that the subsidies deriving from the public service contracts concluded with the Tirrenia group undertakings in 1991 did not constitute State aid. However, in the absence of a possibility, at this stage, of verifying the extent to which the subsidies adequately reflected the extra costs resulting from the public service obligations, it was legitimate for the Commission to continue to entertain doubts as to the existence of elements of aid in those subsidies. Moreover, the Commission referred to the suspension of those subsidies only to the extent to which they exceeded the net additional cost of providing services in the general economic interest. In the context of the present proceedings, the Italian Government has also indicated that it did not consider it necessary to take a position as to the applicability of Article 87 EC to its relations with the Tirrenia group in so far as the latter was the holder of public service contracts. As regards the Tirrenia group's business plan for the period 1999 to 2002, the Italian authorities did not provide the Commission, before the adoption of the contested decision, with information relating to it such as to justify, if appropriate, ruling out the existence of State aid within the measures covered by it. In those circumstances, the Italian Government cannot criticise the Commission for having initiated the procedure provided for by Article 88(2) EC, when it had doubts as to the existence of elements of aid within the measures examined.

50 As regards, next, the complaint that the Commission improperly classified the measures at issue as new aid, when it possessed information enabling it to treat them

as existing aid, it relates only to the payment of aid under public service contracts concluded with the Tirrenia group undertakings in 1991. At this stage of the present judgment, the analysis thus no longer extends to the business plan for the period 1999 to 2002. Accordingly, the argument relied on by the Commission in its defence, to the effect that the Italian authorities did not make reference to the abovementioned information before the initiation of the procedure, must be partially rejected on the facts.

51 It is clear from the file that, as from the time of their response to the Commission's first request for information, the Italian authorities suggested that the public service contracts concluded with the Tirrenia group undertakings were covered by Article 4 (3) of Regulation No 3577/92, which amounted in substance to contending that the aid paid under those contracts was legal and did not therefore constitute new aid, but rather existing aid. On the other hand, the mere reference, in that response, to various exchanges of views with the Commission from 1991 to 1997, without any link having been established between the information provided in such exchanges and the possible classification of the measures at issue as aid, is insufficient to enable the Italian Government to criticise the Commission for failing to take account of that information in assessing the status as new or existing of the measures at issue, before initiating the procedure provided for in Article 88(2) EC.

52 The plea put forward by the Italian Government is therefore examined below only to the extent to which it is based on the allegation that the Commission failed to take account of the provisions of Article 4(3) of Regulation No 3577/92 in choosing whether to treat the measures at issue as constituting new aid and not existing aid.

53 The obligation to initiate, in certain circumstances, the procedure provided for in Article 88(2) EC, referred to in paragraph 46 of this judgment, does not prejudge the procedural framework within which that decision must be placed, that is to say either that of constant review of existing aid schemes, as provided for in the

combined provisions of Article 88(1) and (2) EC, or that of examination of new aid, as provided for in the combined provisions of Article 88(3) and (2) EC.

54 In view of the legal consequences of that choice of procedure when measures already implemented are at issue (see paragraphs 56 to 63 of the interlocutory judgment), the Commission cannot choose, by default, the second procedural framework where the Member State concerned alleges that the first framework should be applied. In such circumstances, the Commission must undertake an adequate examination of the question on the basis of the information already communicated to it by that stage by the Member State, even if the outcome of that examination is a non-definitive classification of the measures examined.

55 As is the case when the question arises of the very existence of elements of aid, in the context of the principle of sincere cooperation between Member States and the institutions, as provided for in Article 10 EC and in order not to delay the procedure, it is the responsibility of the Member State which considers that the aid in question is existing aid to provide the Commission at the earliest stage possible with the information on which that position is based, as soon as the Commission draws its attention to the measures concerned. If that information enables it, for the purposes of a provisional assessment, to take the view that the measures at issue probably in fact constitute existing aid, the Commission must then deal with them within the procedural framework provided for in Article 88(1) and (2) EC. On the other hand, if the information provided by the Member State is not such as to justify that provisional conclusion or if the Member State provides no information on the matter, the Commission must deal with those measures within the procedural framework provided for in Article 88(3) and (2).

56 The present case must be examined in the light of those principles.

57 The situation is not fully comparable with that which gave rise to the judgment in *Italy* v *Commission*, cited above, relied on by the Italian Government. In that judgment, the Court considered that, where the Commission has authorised an aid scheme, it would be contrary to the principles of the protection of legitimate expectations and of legal certainty for it to re-examine, as new aid, measures for the implementation of that scheme. That is why the Court held that, where the Member State concerned contends that measures are granted in implementation of a previously authorised scheme, the Commission cannot at the outset initiate the procedure provided for in Article 88(2) EC in relation to those measures on the basis that they constitute new aid, which would entail suspension thereof, but it must first determine whether or not those measures are covered by the scheme in question and, if they are, whether they satisfy the conditions laid down in the decision approving that scheme. It is only if a negative conclusion is reached after that examination that the Commission can then initiate the procedure provided for in Article 88(2) EC, on the view that the measures in question constitute new aid. Conversely, if a positive conclusion is reached, the Commission must treat those measures as constituting existing aid in accordance with the procedure provided for in Article 88(1) and (2) EC.

58 However, in this case, the possible classification of the measures at issue as existing aid would not derive from a decision which the parties agree to recognise as embodying approval of an aid scheme. The Italian Government maintains that Article 4(3) of Regulation No 3577/92 entails approval of the schemes provided for by the public service contracts referred to therein, but the Commission takes the opposite view. Accordingly, it cannot be argued that the Commission should have immediately examined the conformity of those measures with that regulation, which it does not regard as being tantamount to a decision approving aid schemes.

59 In this case, the first question that had to be dealt with in choosing the procedural approach for dealing with the measures in question as existing aid or as new aid was specifically whether Article 4(3) of Regulation No 3577/92 implies approval of all the aid provided for in the public service contracts to which it refers.

60 The Commission considered that question. Thus, the contested decision contains the following passage: 'Article 4(3) allows public service contracts already existing at the date of entry into force of the regulation to remain in force until their respective expiry dates. That "grandfather clause" must be interpreted restrictively, representing an exception to the general rule that [public service] contracts must be open to all EU operators concerned. Therefore, only the aid needed to ensure the availability of a public service can be covered by that clause. Aid which exceeds or is liable to exceed such limits must be examined by the Commission on the basis of the provisions on State aid under the normal procedures.' It is clear from that passage that the Commission classified as new aid only the funds provided in excess of the costs incurred as a result of the public service obligations. That analysis is, moreover, fully consistent with the invitation, set out in the contested decision, to suspend only the aid in excess of the net additional costs of providing services in the public interest, but not all the aid under the public service contracts concluded with the Tirrenia group undertakings.

61 The Italian Government cannot therefore criticise the Commission for taking the view at the outset that the measures whose suspension would follow from the contested decision constituted new aid, of the kind referred to in Article 88(3) EC, without having first examined the information provided by the Italian authorities in support of their position that the measures at issue should be treated as existing aid.

62 As regards the substance, it is therefore necessary to consider whether, contrary to the Commission's position, Article 4(3) of Regulation No 3577/92 should have prompted the Commission to adopt, for the measures at issue, the classification of existing aid at the stage of the procedure at which it was necessary to make a choice between treating them as existing aid or as new aid.

63 The Commission considers that Article 4(3) of Regulation No 3577/92 cannot authorise State aid and deem it to be existing aid solely because it is provided for in a public service contract which itself existed at the time of entry into force of that regulation. The latter, adopted on the basis of Article 84 of the EC Treaty (now, after amendment, Article 80 EC), concerned the freedom to provide maritime transport services and only an act having as its legal basis Article 94 of the EC Treaty (now Article 89 EC) could have authorised State aid. The sole purpose of Article 4 of that regulation was thus to allow the temporary continuation of certain hindrances to the free movement of services justified by the need to preserve certain transport services in the public interest. The Commission emphasises that, in any event, the international connections provided by certain companies in the Tirrenia group do not fall within the scope of Regulation No 3577/92, which concerns only maritime cabotage.

64 The Commission's argument is only partly correct. Article 4 of Regulation No 3577/92, which, so far as concerns the issue under consideration here, relates to public service contracts with maritime companies involved in regular services to and from islands and between islands, provides, in paragraph 3, that the public service contracts existing as at 1 January 1993 may remain in force until their expiry date. Contracts of that type by their nature contain financial provisions needed to cover the public service obligations for which they provide. In so far as the wording of Article 4(3) of Regulation No 3577/92 concerns the continuation of the contracts at issue, without limiting the scope of that provision to certain aspects of those contracts, the financial provisions necessary to cover the public service obligations mentioned therein are covered by the said Article 4(3). The Commission is therefore wrong to assert that that provision does no more than authorise the possible maintenance of exclusive or special rights deriving from such contracts. Moreover, in the contested decision, the Commission did not take such a restrictive position since there it acknowledged that, within the limits of funding the additional costs of public service obligations, the financing mechanisms of the contracts at issue were covered by Article 4(3) of Regulation No 3577/92.

65 However, contrary to the main thrust of the Italian Government's contention, any aid in excess of what is necessary to cover the public service obligations provided for in the contracts at issue cannot come within the scope of Article 4(3) of Regulation No 3577/92, precisely because it is not necessary for the stability, and therefore the maintenance, of those contracts. They cannot therefore, on the basis of that provision, be regarded as existing aid.

66 In this case, the only measures covered by the Italian Government's application are those to whose suspension the Commission referred in the contested decision, namely 'all the aid payments which exceed what is necessary to cover the additional net costs of providing services in the general economic interest, in accordance with the provisions on [public service obligations] laid down by the Italian authorities in accordance with the general economic interest'. That refers to any aid which is not needed to cover those obligations and which cannot therefore be regarded as existing aid on the basis of Article 4(3) of Regulation No 3577/92. The Commission was therefore entitled to treat any such aid as new aid, contrary to the Italian Government's contention.

67 The plea alleging infringement of Articles 87(1) EC and 88(1) and (3) EC is therefore unfounded.

68 It follows from all the foregoing considerations that the contested decision must be annulled to the extent to which it entailed, until notification to the Italian authorities of the decision closing the procedure in relation to the undertaking concerned, suspension of the tax treatment applied to the supply of fuel and lubricating oil for vessels of the Tirrenia group and that, for the rest, the application must be dismissed.

Costs

69 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs if each succeeds on some and fails on other heads of claim or where the circumstances are exceptional. In the present case, the parties should be ordered to bear their own costs.

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

1. **Annuls the Commission decision, notified to the Italian authorities by letter SG(99) D/6463, of 6 August 1999, to initiate the procedure under Article 88(2) EC concerning State aid C 64/99 (ex NN 68/99) to the extent to which it entailed, until notification to the Italian authorities of the decision closing the procedure in relation to the undertaking concerned (Commission Decision C(2001) 1684 of 21 June 2001 or Commission Decision C(2004) 470 final of 16 March 2004) suspension of the tax treatment applied for the supply of fuel and lubricating oil to the vessels of Gruppo Tirrenia di Navigazione;**

2. **For the rest, dismisses the application;**

3. **Orders the parties to bear their own costs.**

[Signatures]