OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 13 April 2000 *

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1. In these joined actions, Italy and Sardegna Lines seek the annulment of a Commission decision declaring incompatible with the common market certain aids granted by the Region of Sardinia to local shipping companies. They concern, in particular, the distinction between existing and new or altered State aid for the purpose of Article 93(3) of the EC Treaty (now Article 88(3) EC), the extent of the Commission's obligation to give reasons for its State-aid decisions and the relevance for its analysis of suggested breaches of Treaty provisions other than those concerned with State aids.

I — The factual and legal context

A — *The Sardinian legal regime*

(i) The original regime

2. The aid scheme involved in the present case dates from 1951. It is necessary, therefore, to compare the original Sardinian provisions with later versions.

3. The original Sardinian regime, Sardinian Regional Law No 20 of 15 May 1951 (hereinafter 'the 1951 Regional Law'), [1] as modified by the Regional Law No 15 of 11 July 1954 (hereinafter 'the 1954 Regional Law'), [2] instituted a scheme of financial aids in favour of shipping companies (hereinafter 'the original regime'). It provided:

(i) for the establishment of a fund to be used to grant loans in favour of shipping undertakings for the construction, purchase, conversion or repair of ships (Article 1); [3]

1 — *Bolletino Ufficiale della Région Autonoma della Sardegna*, 15 October 1952.

2 — *Bolletino Ufficiale della Région Autonoma della Sardegna*, 23 August 1954.

3 — It is noteworthy that the original version of Article 1, as set out in the 1951 Regional Law, provided merely that the beneficiaries of the loans were required to be 'regional undertakings'.

(ii) that only undertakings having their seat, fiscal domicile and port of fitting-out in the Region of Sardinia were eligible for such loans (Article 2);[4]

(iii) that loans could not exceed 60% of the cost, reduced to 20% where (Article 5) similar national aids had been granted pursuant to (Italian) Law No 75 of 8 March 1949;

(iv) that the rate of interest payable was limited to 3.5% per year, raised to a maximum of 4.5% if the beneficiary had benefited from other national aids (Article 6);

(v) that loans were repayable in a maximum of twelve annual payments, commencing from the third year after the ship, the subject of the loan, was put into service (Article 9).

(ii) The 1988 modifications to the original regime

4. The original regime was amended by Articles 99 and 100 of Law No 11 of 1988 (hereinafter 'the 1988 Regional Law'), which inserted new Articles 2 and 13 into the 1951 Regional Law, as well as adding a second paragraph to the existing Article 9.[5] Article 2 of the modified regime (hereinafter 'the 1988 Law Regime') provided:

'(a) that the undertaking should have its head office, administrative headquarters and shipping business and, where applicable, its main stores, depots and accessory equipment in one of the ports of the region;

(b) that all of the vessels owned by the undertaking should be entered in the registry of one of the ports of the region;

(c) that the undertaking should use the ports of the region as the centre of its shipping activities, making them a normal port of call as part of those activities, and, where regular services are operated there, that these should terminate or regularly call at one or more of those ports;

(d) that the undertaking should commit itself to carrying out refitting work in the ports of the region, provided that

4 — The wording of the original version of Article 2 in the 1951 Regional Law, in addition to the conditions retained in the amended version, had required that beneficiaries principally have regional shipping interests and provide maritime services between Sardinian ports and Sardinian islands and/or other ports of call.

5 — *Bolletino Ufficiale della Régione Autonoma della Sardegna*, No 21, Supplement No 1, 6 June 1988.

shipyards have the operational capacity and that there are no grounds of *force majeure*, unavoidable chartering requirements or obvious economic or time constraints;

(e) that, as regards the crewing of vessels of more than 250 tonnes, the undertaking should establish a special complement, comprising all the seafarer categories needed to crew the vessel for which it was requesting aid, using solely crew members registered in the general duty roster of the port of registry, and to take from those rosters, whether general or special, all the crew required, the sole restrictions being the national legislation on the employment of seafarers ... .'

5. The new Article 13 instituted a fresh form of aid. The Region of Sardinia was permitted to provide aid to undertakings qualified to receive loans under the 1988 Law Regime but which wished instead to acquire their ships pursuant to a lease-purchase agreement. The subvention available could be equal to the difference between the actual cost of a loan calculated at 5% interest and its cost calculated at the commercial reference rate for shipping in Italy. At the end of the lease contract, the ships, the subject of the agreement, could be purchased by the lessee for an amount equal to 1% of their purchase price. [6]

(iii) The further 1996 modifications

6. Law No 9 of 15 February 1996 (hereinafter 'the 1996 Regional Law') repealed both Article 2 of the 1951 Regional Law and Article 99 of the 1988 Regional Law for the explicit purpose of rendering the former compatible with Community law. [7] The regime as amended by the 1996 Regional Law (hereinafter 'the 1996 Law Regime') has introduced two important innovations. First, Article 36(5) of the 1996 Regional Law defines the purpose of the fund established by the 1951 Regional Law as being 'to subsidise the interest to be paid on medium-term loans and ordinary leasing operations related to the purchasing, building and transformation of ships for the transport of passengers and/or goods to and from Sardinia and its smaller islands'. Second, Article 36(3) establishes a priority in favour of the grant of aids to beneficiaries who introduce innovatory and technologically advanced modes of transport. Aid of up to 70% of the cost of acquiring a vessel, but subject to a financial ceiling of ITL 40 000 million, may be granted.

B — *The aid received by Sardegna Lines*

7. By a loan agreement executed on 22 July 1992, Credito Industriale Sardo (a Sardinian credit institution, hereinafter 'Credito') agreed to provide to Sardegna

6 — The additional paragraph inserted into Article 9 of the 1951 Regional Law provided, in the case even of a partial failure to respect or observe the conditions of Article 2, that the Region could forthwith withdraw the benefit of the aid granted.

7 — *Bolletino Ufficiale della Régione Autonoma della Sardegna*, No 6, Supplement No 1, 17 February 1996.

Lines — Servizi Marittimi della Sardegna SpA, a company registered in Cagliari, Sardinia (hereinafter 'SL') — a loan of ITL 9 600 million towards the purchase of an ITL 16 000 million passenger ship named *Moby Dream*. The amount of the loan was equal to 60% of the total amount to be invested since SL had not previously benefited from national aids. The loan proceeds were to be provided in one payment after SL paid the difference between the loan and the total cost of acquiring the vessel. Repayments were scheduled not to begin until the third year following the date upon which the *Moby Dream* was put into service. There were to be 12 annual payments of ITL 993 445 913, which represented the total of the capital lent plus interest at the rate of 3.5%.

C — *The Commission Decision*

8. The Commission learned through a complaint of the regional aid scheme introduced by the 1951 Regional Law. Pursuant to Article 93(3) of the EC Treaty, the Commission, by letters of 10 November and 23 November 1993, invited the Italian authorities to supply information regarding the aid scheme. Certain information was supplied by letter of 20 December 1993. At a bilateral meeting held in Rome on 18 January 1994 between Commission and Italian officials, the Commission was informed that the file was the responsibility of the Ministry of Transport and Shipping, to which it would be forwarded for consideration of the Commission's queries. Despite several letters of reminder sent by the Commission in 1994 and 1995, no further reply was received from the Italian authorities.

9. Consequently, the Commission informed Italy by letter of 24 June 1996 (hereinafter 'Opening Letter I') of its decision to commence a contentious investigation under Article 93(2) of the EC Treaty (now Article 88(2) EC) regarding the aids granted pursuant to the 1988 Law Regime. [8] In Opening Letter I, the Commission characterised the aids in question as 'new' aids. It is common ground that neither Italy nor the Region of Sardinia contested this characterisation during the course of the consultative procedure. [9] Sardegna Lines, however, did not participate in that procedure.

10. A little over a year later the Commission adopted Commission Decision 98/95/EC of 21 October 1997 concerning aid granted by the Region of Sardinia (Italy) to shipping companies in Sardinia (hereinafter 'the 1997 Decision'). [10] In the 1997 Decision, the Commission concluded, *inter alia*, that: (i) the financial assistance granted under the 1988 Law Regime constituted State aid under Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC); (ii) it was granted unlawfully

8 — OJ 1996 C 368, p. 2.

9 — The adjective 'consultative' will be used throughout this Opinion to describe the examination procedure provided for in Article 93(2) of the EC Treaty, since it is the description used recently by the Court; see, for example, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 44.

10 — OJ 1998 L 20, p. 30.

in violation of Article 93(3) of the EC Treaty; (iii) it did not fulfil the criteria for the exceptions to Article 92(1) set out in either Article 92(2) or (3) thereof (Article 1). The Commission also directed Italy to recover the illegal aids granted pursuant to the 1988 Law Regime (Article 2). As regards the classification of the aid as State aid, the Commission stated, in Part IV of the recitals in the preamble to the 1997 Decision (hereinafter 'Part IV of the Decision'), that:

'The aid scheme constitutes State aid within the meaning of Article 92(1) of the EC Treaty, since: (a) the beneficiary companies are relieved of a financial burden which they would normally bear (normal commercial interest rates and other charges on loans/leases); (b) the burden is borne by State resources (the Sardinian authorities); (c) the aid is selective (being reserved to the shipping sector); (d) the aid affects trade between Member States. As regards point (d) above, it was noted in the decision opening the procedure that over 90% of goods from Member States are transported to Sardinia by sea and that over 90% of goods originating in Sardinia are transported to Member States in the same way. In addition, it was noted that 65% of tourist traffic (passengers and vehicles) between the Community and Sardinia is handled by shipping companies. The Italian authorities in their comments did not contest the above statistics, nor indeed the designation of the aid scheme as State aid within the meaning of Article 92(1).'

11. On 14 November 1997, the Commission notified Italy by letter (hereinafter 'Opening Letter II') of its decision to commence a separate consultative procedure under Article 93(2) of the EC Treaty in respect of the regime introduced by the 1996 Regional Law. [11] In Opening Letter II, the Commission explicitly stated that its appraisal of the 1996 Law Regime would not concern the 1988 Law Regime. While noting that the 1996 Law Regime 'no longer contains provisions which constitute discrimination on grounds of nationality ...', the Commission based its decision on several enumerated 'serious doubts' which it retained regarding the regime's compatibility. [12]

II — Scope of the applications

12. By an application lodged at the Court on 22 January 1998 (Case C-15/98), pursuant to the second paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), Italy requests that the Court annul both the 1997 Decision and the decision alleged to be contained in Opening Letter II and that it order the Commission to pay the costs. In its application (Case C-105/99), which has been transferred to the Court, SL seeks the

11 — OJ 1997 C 386, p. 6.

12 — Ibid., p. 7.

annulment of the 1997 Decision and an order of costs against the Commission. [13]

13. The Commission raises a number of objections regarding the admissibility of Italy's application. The grounds of annulment invoked by the applicants largely overlap. However, Italy also accuses the Commission of having improperly instituted two formal investigations instead of one and, thus, of changing the nature of the administrative procedure that led to the adoption of the 1997 Decision, as well as of violating Article 92(2) and (3) of the EC Treaty by considering the 1988 Law Regime to be incompatible with Community law because the conditions governing the aid granted thereunder infringed other fundamental Treaty provisions. For its part, SL contends that the 1997 Decision is invalid because it ignores the relevance of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding. [14]

14. Given the substantive overlap between both applications, I shall separately treat only the discrete grounds invoked by the applicants, as well as the Commission's pleas regarding admissibility.

13 — This action was initially lodged at the Court of First Instance on 6 April 1998 and registered under the number Case T-58/98. However, by an Order of 23 March 1999, the Court of First Instance declined jurisdiction, pursuant to Article 47 of the EC Statute, in favour of the Court.

14 — OJ 1990 L 380, p. 27 (hereinafter 'the Seventh Directive').

III — Admissibility

A — *Italy's application (Case C-15/98)*

(i) The material scope

15. The Commission accepts that a single application may include requests for the annulment of more than one act, but that: (i) the general principle should be that only a single act can be covered: Article 174 of the EC Treaty (now Article 231 EC) and Article 19 of the EC Statute of the Court of Justice speak of 'act' in the singular; (ii) where there is such a connection as to merit a single application, the grounds of complaint should be formulated precisely and clearly; (iii) the Court has recognised, in exceptional cases, that an application can attack several decisions, but only if they are parallel in terms of time, procedure and subject-matter, or if one is the logical consequence of or constitutes a preliminary step linked to the other, which is not so in the present case. [15]

16. In my view, there is no merit in the first point. The use of the singular 'act' in Article 174 of the EC Treaty cannot be decisive in view of the appearance of the

15 — The Commission cites, as examples, Joined Cases 12/64 and 29/64 *Ley* v *Commission* [1965] ECR 107 and Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33.

plural, 'acts', in Article 173 of the EC Treaty. A substantive approach is more appropriate.

17. The Commission does not dispute that several acts can 'be contested in a single action'. [16] I agree with the Commission that there must, however, be a sufficient connection between such acts to justify the Court's dealing with them in the context of one procedure encompassing the parties' observations or pleadings, written and oral, the Opinion of the Advocate General and the judgment of the Court.

18. I do not think, contrariwise, that it is appropriate to establish formal categories of connection such as those proposed by the Commission. It should suffice that the acts and the grounds for attacking them are sufficiently closely connected to warrant their being considered in one action. In the present case, I agree with Italy that there is a sufficient connection. The subject-matters of the 1997 Decision and of Opening Letter II are closely related. The grounds invoked by Italy as against each are almost identical, whatever their respective merits.

19. It follows, in my opinion, that Italy's application is admissible both as regards the 1997 Decision and the decision contained in Opening Letter II.

(ii) The characterisation of the 1988 Law Regime

20. The Commission also contests the admissibility of Italy's application in so far as it contests the characterisation of the 1988 Regional Law adopted by the 1997 Decision. Since the characterisation of the 1988 Law Regime as altered aid adopted by the Commission in Opening Letter I had binding legal effects in accordance with the *Cenemesa* [17] and *Italgrani* [18] case-law, that letter could, therefore, have been contested by Italy. These are effects *erga omnes* flowing from the letter that are not absorbed by the final decision. Not having challenged Opening Letter I, Italy is too late to contest the 1997 Decision in so far as it confirms that classification. Furthermore, the Commission asserts that the challenge to the characterisation adopted by it in Opening Letter II is also out of time as it has never authorised the 1988 Law Regime.

21. In *Cenemesa* and *Italgrani* the Court rejected the Commission's plea that there

16 — See Case 1/54 *France* v *High Authority* [1954-1956] ECR I. The Court explicitly agreed with Advocate General Lagrange that 'the three decisions [could] be contested in a single action' ([1954-1956] ECR I, p. 6), the latter having observed that there was 'an obvious connection between the three contested decisions' in that case ([1954-1956] ECR I, p. 21).

17 — Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 (hereinafter '*Cenemesa*').

18 — Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635 (hereinafter '*Italgrani*').

was no right to challenge a decision to open a consultative procedure. In this case, the Commission reasons *a contrario*; not only *may* a Member State challenge a classification of a measure as State aid adopted in a decision to open such a procedure but, in fact, it *must* do so or forgo the right later to challenge that classification if it is maintained in the Commission's final decision.

22. This view finds no support, in my opinion, in the Court's reasoning in those cases. Where the Commission, in opening a consultative procedure, forms the view that aid actually comprises new or altered State aid, this classification has significant legal consequences. It precludes the Member State concerned from granting the aid until the Commission decides that it is compatible with the common market — or that it does not, after all, constitute State aid. The Court was thus concerned to ensure that interested parties could challenge 'a choice by the Commission of the applicable rules of procedure ... [which] ha[d] legal effects'. [19]

23. I agree with Italy that it does not, on the other hand, follow that the failure of a Member State to institute an annulment action in respect of the initiating letter deprives it of the right to challenge the ultimate decision. It would not be either just or in the interests of procedural economy to encourage and/or compel Member States and other interested parties, desirous of preserving all their legal rights, to initiate annulment actions against the choice made by the Commission at the outset of the consultative procedure.

24. Since it is not contested that Italy's action was introduced against both the 1997 Decision and the decision adopted in Opening Letter II within the two-month period required by the fifth paragraph of Article 173 of the EC Treaty, as supplemented by the relevant delay for distance, there is no temporal bar to Italy's right to contest the Commission's classification of either the 1988 or the 1996 Law Regimes. [20]

B — *Sardegna Lines' application (Case C-105/99)*

25. The Commission does not contest the admissibility of SL's application. SL submits that the Court implicity accepted in *Germany and Pleuger Worthington* v *Commission* that beneficiaries of aid may challenge Commission decisions declaring such aid to be incompatible with the Common market. [21] It cannot be contended that SL's application is inadmissible because SL satisfies the requirements of direct and individual concern set out in the fourth

19 — *Italgrani*, loc. cit., paragraph 26.

20 — The impugned acts were notified to Italy on, respectively, 12 November and 14 November 1997, while its annulment action was lodged at the Court on 22 January 1998.

21 — Joined Cases C-324/90 and C-342/90 [1994] ECR I-1173 (hereinafter '*Pleuger*').

paragraph of Article 173 of the EC Treaty. In other words, although addressed to Italy, the 1997 Decision substantially affects SL's interests as a recipient of the impugned aid. The standing of an aid recipient to challenge a decision finding the aid to be incompatible with the common market is now well-established. [22] It is only in exceptional circumstances that such standing might be lacking. [23]

IV — Consideration of the applications

26. In the light of the considerable overlap between the pleas regarding the alleged inadequacy of the statement of reasons in the 1997 Decision and the supposedly unjustified classification of the aid as altered aid, I shall initially consider two discrete general pleas, of which each applicant advances one respectively, but both of which call into question the validity of the 1997 Decision as a whole.

A — *The alleged flaws in the administrative procedure*

27. Italy alleges that the Commission has infringed its right to a fair hearing by improperly separating into two procedures its examination of what constitutes substantially the same aid scheme. It asserts that it is a normal legal practice to review alterations effected to an aid regime in the procedure during which that regime is investigated. [24] The effect of this scission was to change the initial consultative procedure commenced by Opening Letter I from one concerned with the compatibility of the regime as a whole to one concerned with individual payments of aid in the period between 1988 and 1996. In Italy's view, the Commission's power to review aid schemes is limited to those that remain in force and pursuant to which aid may in future be granted. This was not the case with the 1988 Law Regime when the 1997 Decision was adopted. Moreover, by altering the effective nature of the ongoing investigation, the Commission infringed not only Italy's right to defend itself but also that of the other interested parties, who, like Italy, were entitled to conclude from the initial investigation that the Commission was concerned with assessing

22 — See, initially, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 5 (hereinafter '*Philip Morris*'), Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 5, and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 13 (hereinafter '*Leeuwarder*'. In Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 24, the Court explicitly acknowledged that the recipient of State aid could have challenged the Commission decision declaring the aid unlawful and incompatible with the common market pursuant to Article 173 of the EC Treaty. This was implicitly confirmed in *Pleuger*, ibid. It is clear from Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151 (hereinafter '*Bremer Vulkan*') that the transfer of an individual annulment action to the Court from the Court of First Instance cannot affect its admissibility.

23 — In Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, individual horticultural producers who had benefited from a preferential gas tariff were denied standing to challenge a Commission decision that the tariff amounted to an incompatible State aid because, as members of a broad group of growers, they lacked individual concern; see paragraph 15.

24 — Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* v *Inspecteur der Vennootschapsbelasting, Amsterdam and Utrecht* [1984] ECR 3435 (hereinafter '*Heineken*').

only the compatibility of the general characteristics of the Sardinian aid scheme.

28. The Commission submits that, under Article 93 of the EC Treaty, it is required to open a consultative procedure each time it believes that a plan to grant or alter State aid is not compatible with the common market. [25] This requirement applies to both the grant and the alteration of aid. Since it formed such a view of the amendments introduced by the 1996 Regional Law, it was obliged to take the decision set out in Opening Letter II. Moreover, that decision was justified in the interest of procedural economy. If it were obliged to consider new amendments to an aid regime within the framework of an existing investigation, a Member State could always prolong the procedure with continuing amendments to the regime under review. It was clear from Opening Letter I that the Commission intended to examine not an abstract regime but the particular aids granted pursuant to the 1988 Law Regime.

29. I am satisfied, for the reasons given by the Commission, that it has not improperly bifurcated its investigation of the 1988 and 1996 Law Regimes. It is clear from the language of Article 93 of the EC Treaty that the Commission has both the right and the duty to review State-aid regimes at all stages of their evolution. Pursuant to Article 93(1) of the EC Treaty the Commission must keep under review all systems of existing aid, while, under Article 93(3), it must review all proposals for alterations to existing aid or for the grant of new aid.

30. Moreover, this view is fully consistent with *Heineken*, where alterations were made to an aid proposal during the course of its adoption by the Netherlands Parliament. [26] The Court's statement that the aim of Article 93(3) of the EC Treaty 'could not be achieved if the Commission were informed only of the initial plans and not of subsequent alterations' and that 'such information [could] be supplied to the Commission in the course of the consultations which take place between the Commission and the Member States concerned following the initial notification' does not require, as Italy alleges, that the Commission always simultaneously examine an original aid scheme and subsequent amendments to it. [27] There is clearly no such obligation '... where the alteration in question is in actual fact a separate aid measure which should be assessed separately and which is therefore not such as to influence the assessment which the Commission has already made of the initial plan'. [28]

25 — It cites Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraphs 10 and 13 (hereinafter '*Rover*').

26 — Loc. cit., footnote 24 above.

27 — Ibid., paragraph 17.

28 — *Heineken*, paragraph 21.

31. The Commission is, therefore, not precluded from forming the view that the amendment, particularly after a considerable period of time (eight years in this case), has elapsed, of earlier amendments to an existing aid scheme must be assessed separately. Indeed, I agree with the Commission that, once it forms the view that new or altered aid has been granted without its having been notified, it must, in accordance with *Rover,* commence a fresh consultative examination of such supposed aid. [29] This is also the case where the earlier amendments have, as in this case, been under review — albeit not pursuant to an Article 93(2) of the EC Treaty consultative procedure — for a number of years prior to the adoption by the Member State concerned of later amendments.

32. Moreover, I have no doubt that Italy's argument that the Commission may only review aids granted under schemes that remain capable of being applied in the future is unfounded. The Court has consistently stressed that unlawfully granted aids must, in principle, be recovered so as to restore the *status quo ante.* [30] The distortion of competition caused by particular State aids that are incompatible with the Treaty does not cease merely because the aid scheme pursuant to which those aids were granted has ceased to exist. To accept Italy's argument would significantly reduce the Commission's power to control State aid and therefore call into question the effectiveness of Community law on State aid. [31]

33. I am satisfied that Italy's plea regarding an unjustified scission by the Commission of its investigations of the 1988 and 1996 Law Regimes should be rejected. As Italy does not advance any other autonomous plea capable of affecting the validity of the decision contained in Opening Letter II, and since its validity cannot, in my opinion, necessarily be affected by any successful plea made in respect of the 1997 Decision, I have no doubt that Italy's action, in so far as it is directed against Opening Letter II, although admissible, is unfounded.

B — *The infringement of the Seventh Directive*

34. SL asserts that the 1997 Decision is invalid because it failed to take account of

29 — Loc. cit., footnote 25 above. In *Rover*, the Court held that, where the Commission forms the view that a new aid has been paid which was not covered by its earlier examination and conditional approval of an aid scheme, it must commence a fresh consultative procedure, thereby permitting the parties concerned to submit observations (paragraphs 10 to 13).

30 — See, *inter alia*, Case C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* [1997] ECR I-1591 (hereinafter '*Alcan*'), paragraph 23. The Commission refers to Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, where Italy did not dispute that a recovery order follows from a declaration of the incompatibility of the aid (paragraph 10).

31 — See, in this respect, *Commission* v *Italy*, op. cit., paragraph 25.

the application of the Seventh Directive.[32] It submits that its scope covers aid to shipowners and that the Commission should therefore have assessed the compatibility of the 1988 Law Regime by reference to the criteria set out in that Directive alone. Moreover, in its reply, SL asserted that the Commission had failed to explain in the 1997 Decision why it considered the Seventh Directive to be inapplicable.

35. In its defence, the Commission points out that, although in its 1997 guidelines on State aid to shipping companies it accepts that those guidelines do not apply to aid to shipbuilding, it must, none the less, ensure that aid to shipowners does not effectively operate to benefit shipbuilding in contravention of the requirements of the Seventh Directive.[33] This, the Commission explains, is the meaning of the allusion in the 1997 Decision (Part VI of the Decision) to the absence of any 'mechanism' to ensure the adherence of the 1988 Law Regime to the shipbuilding rules. Since this finding has not been disputed by SL, it submits that SL's plea is unfounded. In its rejoinder, the Commission additionally contests SL's assumption that, as the Seventh Directive might be relevant, the provisions of that Directive are alone applicable to such aid to the exclusion of other Community rules.

36. Although it is clear from the wording of the Seventh Directive that it is primarily concerned with 'aid to shipbuilding', it emerges from Article 3 read in the light of the 12th recital in the preamble that it may also encompass aid to shipowners. Those provisions are worded, respectively, as follows:

'All forms of aid to shipowners or to third parties which are available as aid for the building or conversion of ships shall be subject to the notification rules in Article 11';

'Whereas there is every reason, for the sake of transparency and equity, to continue to include in the present aid policy indirect aid granted to shipbuilding through investment aid to shipowners for the building and conversion of ships.'

Thus, while SL may be correct in alleging that the Seventh Directive was applicable, that plea cannot assist it but, rather, is damaging to its case. This is because State aid to shipowners, in so far as it may fall to be considered as being '*available as aid for the building or conversion of ships*'

32 — Loc. cit., footnote 14 above. The Seventh Directive was repealed by Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding, OJ 1995 L 322, p. 1. However, since this Regulation only entered into force on 31 December 1997, as a result of Council Regulation (EC) No 1904/96 of 27 September 1996 amending Regulation (EC) No 3094/95 on aid to shipbuilding, OJ 1996 L 251, p. 5, reference will, hereinafter, be made only to the Seventh Directive. The fact that Regulations Nos 3094/95 and 1904/96 alone are referred to by the Commission in the 1997 Decision cannot affect the validity of the latter, since it is clear that they replaced the Seventh Directive and that none of the amendments they introduced is relevant for the present case.

33 — OJ 1997 C 205, p. 5.

(emphasis added), is subject to an additional mandatory 'special' notification requirement under Article 11 of the Seventh Directive. Article 11(1)(a) specifically provides for the notification of '... any aid scheme — new or existing — or any amendment of an existing scheme covered by this Directive'. To assert that the Seventh Directive alone applied to the aid provided under the 1988 Law Regime would, therefore, effectively amount to accepting that a supplementary violation of Community law was committed by the Italian authorities, viz. their failure to notify even the original regime to the Commission. As the Commission referred to no such alleged violation in Opening Letter I, it clearly correctly treated the 1988 Law Regime as an aid to shipowners that fell to be considered by reference only to the less onerous notification obligations imposed by the Treaty.

37. The possibility that an aid granted to a shipowner may enure ultimately for the benefit of a shipbuilder does not automatically render inapplicable the general Treaty provisions concerning State aid. It must be recalled that the Seventh Directive, being based principally on (what was then) Article 92(3)(d) of the EC Treaty, which 'allows the Council, acting by a qualified majority on a proposal from the Commission, to increase the range of categories of aid which may be regarded as being compatible with the common market over and above those set out in [the other subheadings of that provision]', 'introduces the possibility of derogating, in certain specified cases, from the prohibition of aid which would otherwise be incompatible'. [34] The Seventh Directive could, therefore, only have benefited SL if it had afforded an additional basis upon which the 1988 Law Regime could have been declared compatible with the common market. Yet SL refers to no such basis. Thus, its plea is without purpose inasmuch as it asserts that the Commission has infringed that Directive in confining its analysis in the 1997 Decision to the grounds of possible compatibility set out in Article 92(3) of the EC Treaty.

38. I am therefore satisfied that the plea alleging a violation by the Commission of the Seventh Directive should be rejected.

C — *The sufficiency of the Commission's statement of reasons*

39. It is clear, particularly from the applicants' oral observations, that their principal plea is that the Commission has inadequately reasoned its decision in so far as it found that the aid provided under the 1988 Law Regime was capable of *distorting or*

34 — See Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, paragraph 15. See also Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323, paragraphs 25 and 26. Since the entry into force of the Treaty on European Union, there have been four explicit subheadings under Article 92(3) of the EC Treaty — the Treaty of Amsterdam (Article 6(51)) having merely deleted, in the interest of simplification, the lapsed provision originally contained in the second sentence of Article 92(3)(c) of the EC Treaty.

threatening to distort competition and affecting trade between Member States.

(i) Synthesis of the observations

40. Italy, supported by SL, asserts that, although in certain cases it may result from the very circumstances in which aid is granted that these conditions are satisfied, the Commission must, none the less, refer to those circumstances in its decision. The 1997 Decision, however, contains no analysis of the aid's potential to distort competition and no discussion of its alleged effects on inter-State trade. The reasoning requirement prescribed by Article 190 of the EC Treaty (now Article 253 EC) for a secondary Community act, as defined by the Court, particularly in *Leeuwarder*, is not satisfied. [35] The reference to the statistics for the transport of goods and services between Sardinia and the Member States in Part IV of the Decision (quoted in paragraph 10 above) does not establish that the aid affected trade between Member States. Such a high degree of dependence on maritime transport is natural having regard to Sardinia's island status. In any event, even if the Commission had analysed in the 1997 Decision the extent to which shipping companies operating from France and Spain provided services to Sardinia, it would have found that the volume of trade in question was minimal. [36]

41. SL noted that the only point relevant to the possible adverse effects on competition and intra-Community trade of the aid to which allusion was made by the Commission in Opening Letter I was that 'since trade between the Italian continent, Sardinia and Corsica has a Community aspect, any aid granted by a company operating in the market in question may be regarded by the Commission as distorting or threatening to distort competition'. [37] This was not, however, repeated in the 1997 Decision. It is not possible to deduce from the island status of Sardinia alone, as the Commission would appear to have done, that aid to undertakings based there inevitably affects intra-Community trade. SL contends that the 1997 Decision contains no market analysis, no reference to the beneficiaries' share of the relevant market and no coherent discussion of the effect of the aid on trade.

42. The absence of reasoning regarding the relevant market is particularly telling when it is recalled that, by virtue of Article 6(2) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime

35 — Loc. cit., footnote 22 above.

36 — In its reply, Italy points out that 89% of goods transported from Sardinia are transported by sea to the Italian mainland, while the remaining 11% are transported to both Atlantic and Mediterranean ports in France and to ports in Spain. As regards passenger transport, traffic with the Italian mainland comprises 97%.

37 — See the last sentence of the eighth paragraph of the letter; OJ 1996 C 368, p. 1, at p. 2.

transport within Member States (maritime cabotage), 'island cabotage in the Mediterranean' was not liberalised until 1 January 1999.[38] In the absence of competition between Italian and other Community-based shipping companies at the material time (1988-1996), the aid could not, by definition, have affected intra-Community trade.

43. The Commission contends that the 1997 Decision is adequately reasoned since aid granted selectively to undertakings enables them to improve their position *vis-à-vis* their competitors and thus clearly distorts competition and affects trade between Member States.[39] The analysis employed replicates that used in Opening Letter I, which was not challenged by Italy during the consultative investigation. In such circumstances, neither a detailed market analysis nor a discussion of the effects of the aid on trade was, in the Commission's opinion, necessary.[40] This is borne out by the fact that the Court has held that even the relatively small amount or the relatively minor size of the recipient undertaking do not preclude the aid provided from being classified as State aid.[41] The Commission also denies that there is a disparity between Opening Letter I and the 1997 Decision; both refer to the same transport statistics while the former made a specific reference to the Community nature of trade between the Italian mainland, Sardinia and Corsica, which was not retained in the latter because it was self-evident. Moreover, the fact that aid recipients only engage in internal Member State trade does not suffice to preclude adverse effects on intra-Community trade from flowing from the aid because it may help them to maintain their competitive position.[42] SL's reference to Regulation No 3577/92 is irrelevant because the provisional derogation in respect of cabotage for which it provided did not preclude the provision of international-shipping services between Sardinia and other Member States or shipping companies from operating internal services between Sardinia and the Italian mainland. In its rejoinder in SL's action, the Commission adds that the Regulation did not, in addition, preclude non-Italians from registering their vessels in Italy and thus engaging in cabotage with Sardinia, a point repeated in answer to a written question from the Court.

(ii) Analysis

44. Although the reasoning employed in the 1997 Decision is (at best) laconic, the Commission effectively alleges that the applicants were well aware of the reasons underlying the Decision, which in any event, it alleges, are obvious. The alleged obviousness is thus a factor which should

38 — OJ 1992 L 364, p. 7.

39 — It cites *Philip Morris*, op. cit., footnote 22 above, paragraph 11 and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433 (hereinafter '*ENI-Lanerossi*'), paragraph 27.

40 — Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 67.

41 — Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103 (hereinafter '*Hytasa*'), paragraph 42.

42 — Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19.

be borne in mind in considering the applicants' plea.

45. The classic statement of the obligation of the Community institutions to provide an adequate statement of reasons for their decisions remains that set out by the Court in *Remia* v *Commission.* [43]

'[A]lthough under Article 190 of the EEC Treaty the Commission is required to state the factual matters justifying the adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings. The statement of reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.'

In later cases, the Court has stressed that the scope of the requirement depends 'on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations'. [44] Thus, 'the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'. [45]

46. In *Philip Morris*, the appropriate starting point in respect of the reasoning requirement in State-aid cases, the Court was faced with a plea that the impugned Commission decision [46] contained an 'inadequate or at least incomprehensible and/or contradictory' statement of reasons as regards the requirement that the proposed aid in question (to increase the production capacity of one of the applicant's Netherlands cigarette factories) have an effect on trade and distort competition. [47] In particular, the applicant alleged that the discussion contained no market analysis and that no account was taken of the negligible effect of the proposed aid on future production costs at the factory. The Court rejected the plea. It referred to the *accepted fact* that, when the planned investment was completed, the applicant

43 — Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 26.

44 — See Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719 (hereinafter '*Sytraval*'), paragraph 63. See also *Leeuwarder*, op. cit., paragraph 19, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86 of the judgment and paragraph 107 of my Opinion.

45 — *Sytraval*, ibid. See also the judgment of the Court in Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Dafra Lines* v *Commission* [2000] ECR I-136, paragraph 56 and paragraphs 43 to 45 of my Opinion in that case.

46 — Commission Decision 79/743/EEC of 27 July 1979 on proposed Netherlands Government assistance to increase the product capacity of a cigarette manufacturer, OJ 1979 L 217, p. 17.

47 — See the report for the hearing in *Philip Morris*, [1980] ECR 2671, p. 2676.

would 'account for nearly 50% of cigarette production in the Netherlands' and would 'expect[...] to export over 80% of its production to other Member States' and that the proposed aid 'amounted to ... 3.8% of the capital invested'. [48] It then held that: [49]

'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid. In this case the aid which the Netherlands Government proposed to grant was for an undertaking organised for international trade and this is proved by the high percentage of its production which it intends to export to other Member States. The aid in question was to help to enlarge its production capacity and consequently to increase its capacity to maintain the flow of trade including that between Member States. On the other hand the aid is said to have reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant.

These circumstances, *which have been mentioned in the recitals in the preamble to the disputed decision and which the applicant has not challenged*, justify the Commission's deciding that the proposed aid would be likely to affect trade between Member States and would threaten to distort competition between undertakings established in different Member States' (emphasis added).

47. The Court was, thus, satisfied that the information mentioned in the impugned decision supported the conclusion drawn by the Commission. I agree with SL that the Court did not enunciate a principle that the mere grant of aid to certain specific domestic undertakings, which, indeed, is inherent in the nature of State aid, *necessarily* justifies the conclusion that it satisfies all the criteria for constituting State aid for the purpose of the Treaty. [50] The Commission cannot merely assume that aid to particular undertakings affects intra-Community trade and distorts competition. Indeed, this emerges from the seminal statement-of-reasons case of *Germany* v *Commission*, where the Court found that the Commission had inadequately reasoned its decision to refuse a request for a tariff quota of 450 000 hectolitres of wine but to grant one for 100 000 hectolitres. [51] In particular, the Court noted that '[a]part from general considerations, which apply without distinction to other cases, or which are confined to repeating the wording of the Treaty, the Commission has been content to

48 — *Philip Morris*, op. cit., paragraph 10.

49 — Ibid., paragraphs 11 and 12.

50 — The information contained in the Commission's *Philip Morris* decision is summarised by Advocate General Capotorti in his Opinion; see [1980] ECR 2671, p. 2694. It is in this context that his unambiguous recommendation, which was followed by the Court, regarding the clear potential of the aid to distort competition and affect trade between Member States (see pp. 2696 to 2698) should be understood.

51 — Case 24/62 [1963] ECR 63.

rely upon "the information collected", without specifying any of it, in order to reach a conclusion "that the production of wines in question [i.e. within the Community] is amply sufficient"'.[52]

48. It emerges very clearly from *Leeuwarder* that the Commission may not rely on presumptions to form the basis of its statement of reasons in State-aid cases.[53] In that case, which concerned the acquisition by a public-development undertaking of a shareholding in a paperboard manufacturer, the Netherlands and Leeuwarder challenged the adequacy of the reasoning of the Commission in the contested decision in respect of both the classification of the acquisition as constituting aid and its finding that it was capable of distorting competition and affecting intra-Community trade. It was only in respect of the adequacy of the reasoning in the second respect that the applicants succeeded. The approach of the Court is highly relevant for considering the validity of the Commission's decision in the present case:[54]

'Even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, *the Commission must at least set out those circumstances in the statement of reasons for its decision*. In this case it has failed to do so since the contested decision does not contain the slightest information concerning the situation of the relevant market, the place of Leeuwarder in that market, the pattern of trade between Member States in the products in question or the undertaking's exports' (emphasis added).

49. *Bremer Vulcan* is also of assistance. The Court found in that case that 'the assertions in the contested act and the data quoted there [did] not constitute adequate reasons to support the conclusions it reached', namely that a guarantee to one undertaking (BV) to facilitate it acquiring another (KAE) could distort competition and affect intra-Community trade.[55] The reasoning as regards those criteria was found to be inadequate because:[56]

'... the contested act contains no information whatever as to the situation on the market in question, KAE's share of that market or the position of competing undertakings. As to the trade flows between Member States in the products concerned, the Commission does no more than cite the

52 — Op. cit., [1963] ECR 63, p. 69.

53 — Op. cit., footnote 22 above. See also *Intermills*, op. cit., paragraphs 37 to 39.

54 — Paragraph 24. It, thus, followed the advice of Advocate General Sir Gordon Slynn who, having referred to the relevant recitals in the preamble, observed that 'the Commission [had] confined itself to a bald assertion that the assistance distorted or threatened to distort competition in the Community without giving any indication as to how it arrived at this conclusion. Neither the reasons nor the facts are shown to support the general allegation made'; see *Leeuwarder*, loc. cit., p. 812.

55 — Op. cit., footnote 22 above, paragraph 51.

56 — Paragraph 53.

Member States' imports of products falling under three tariff headings, without determining KAE's share of those imports.'

50. I am satisfied that Part IV of the Decision (quoted in paragraph 10 above) fails to meet the standard applied by the abovementioned case-law. Apart from merely reciting, in effect, that the four principal conditions required for classification of aid as State aid for the purposes of the Treaty are met by the aid provided under the 1988 Law Regime, the Commission has relied — but even then only in support of its finding that intra-Community trade was affected — on some very general statistics on maritime transport of goods and tourist traffic between, respectively, the 'Member States' and 'Sardinia' and 'the Community' ('Stati membri' in the authentic Italian version) and 'Sardinia'. While the Commission's agent recognised in response to a question posed at the hearing that this allusion was a mistake and should — as is somewhat clearer from the French text of the 1997 Decision — have referred to trade between Italy and Sardinia, on the one hand, and between Sardinia and the other Member States, on the other, the recipients of the aid — and other interested parties who might have considered challenging it — were entitled to rely on the authentic Italian version and, thus, to assume that the Commission based its reasoning on global trade figures for trade between Sardinia and the Member States, including Italy.[57]

51. Since that reasoning is, at the very best, ambiguous, it provides little or no support for the Commission's classification of the aid as State aid. Furthermore, it is clear, to my mind, from the precision '[a]s regards point (d) above' ('[p]er quanto riguardo la lettra d)') which precedes the reference to those trade figures, that they were uniquely intended to substantiate the Commission's finding in respect of that point, namely that the 'aid affects trade between Member States' ('l'aiuto incide sugli scambi tra Stati membri'). The Commission contends that the criteria of distorting competition and affecting inter-State trade are so closely linked that the natural effect of the 'selective' ('selettivo', referred to in point (c)) nature of the aid was to reinforce the position of the recipients in comparison with that of their competitors. Even if this statement were statistically correct, it does not appear in the 1997 Decision as a *justification* for the conclusion that the aid distorted competition. It is, on the contrary, both a statement of fact and a conclusion which, in either case, would require justification but in respect of which none is furnished by the Commission in the 1997 Decision. In my view, the Commission's submission, based on *Philip Morris* and *Vlaams Gewest* v *Commission*, that once State or regional resources are provided selectively to certain undertakings the

57 — Although in respect of the transport of goods, the French version of the 1997 Decision refers to goods transported 'from Member States' ('provenant des États membres') to Sardinia and from Sardinia 'to the Member States' ('vers les États membres'), as regards tourist traffic the reference is to trade 'between the mainland and Sardinia' ('entre le continent et la Sardaigne').

invariable effect is that competition is distorted and intra-Community trade affected is misconceived.[58] The onus remains on the Commission to set out, *at least briefly*, the reasons why in each individual case it is of the view that the relevant aid has such effects. The Commission has manifestly failed to furnish those reasons in the 1997 Decision.

52. Furthermore, a contextual comparison of the 1997 Decision with Opening Letter I does not assist the Commission. As SL points out, that letter contained one clear statement regarding the 'Community aspect' of trade between the mainland of Italy, Sardinia and Corsica. Such a statement, which was accompanied by a reference to global trade figures that differed only marginally from those set out in the 1997 Decision, could easily have led recipients of the aid to form the impression that the Commission would concentrate its investigation on the aid's potential to distort competition on that particular section of the market for the provision of maritime-transport services. However, it seems from the Commission's rejoinder in Italy's action, from its answer to the Court's written question and from its oral observations that it actually had in mind the potential of the aid to exclude competition not only from Corsican-based shipping companies but, more generally, from undertakings operating from the French and Spanish mainlands. Although the statistics produced by Italy in its reply may well justify the Commission's cause for concern, nothing in the 1997 Decision does so.

53. I am also satisfied that SL's contention regarding the relevance of Regulation No 3577/92 is well founded and that the 1997 Decision is for that reason also inadequately reasoned. Since that Regulation permitted Italy to continue to preclude maritime cabotage[59] at the material time, recipients of aid under the 1988 Law Regime like SL would, given the reference to Corsica in Opening Letter I, have had all the more reason to assume that the Commission viewed only Italian-based shipping companies, providing services between mainland Italy, Sardinia and Corsica, as their potential competitors.[60] However, it emerges clearly from the Commission's oral observations and from its answer to the Court's written question that it considered Regulation No 3577/92 to be irrelevant because it did not preclude undertakings from other Member States — particularly from (mainland) France and Spain — from

58 — In *Vlaams Gewest*, loc. cit., footnote 40 above, the Court of First Instance held, citing, *inter alia*, *Bremer Vulkan*, that, '[w]hen applied to the classification of aid', Article 190 of the EC Treaty requires, 'even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition', that the 'Commission must at least set out those circumstances in the statement of reasons for its decision'. In applying that principle that Court was satisfied, on the basis of the information contained in the contested decision, that the Commission's 'assessment of the effects of the aid in question on competition and intra-Community trade *was not merely abstract*' (paragraph 65, emphasis added).

59 — Cabotage refers essentially to the 'gainful operation within a country of means of transport belonging to another country, the business being generated in the country of operation'; see *European Communities Glossary*, 5th ed., 1990, p. 205.

60 — Article 1 of Regulation No 3577/92 provided Community shipowners with the right 'to provide maritime transport services within a Member State (maritime cabotage)' as from 1 January 1993. However, 'island cabotage in the Mediterranean' was initially excluded until 1 January 1999 by Article 6(2). '[I]sland cabotage' is defined by Article 2(1) as being 'the carriage of passengers or goods by sea between: — ports situated on the mainland and on one or more of the islands of one and the same Member State, — ports situated on the islands of one and the same Member State ...'.

providing international maritime-transport services competing with those provided by the beneficiaries of aid under the 1988 Law Regime and because the benefit of the regime was not limited to undertakings engaged in the provision of cabotage services. In my opinion, the inclusion by the Commission of even a brief reference to such considerations in the 1997 Decision would probably have sufficed to render it compatible with Article 190 of the EC Treaty.

54. Moreover, such a reference would also have served to ensure consistency between that Decision and a number of contemporaneous Commission decisions concerning road haulage in Italy in which reference is made by the Commission to the relevance or otherwise of the corresponding Community legislation concerning the opening up of cabotage in respect of road-transport services. [61] I am therefore convinced that the 1997 Decision should be annulled.

55. I would, however, reject entirely the excuse offered by Italy for failing properly to cooperate with the Commission both prior to (see the eighth paragraph of Opening Letter I) and during the consultative investigation (Italy accepts in its defence that it failed to respond to a Commission request of 25 November 1996 for various information including a 'detailed note' on the structure of the maritime-transport services market). A Member State may not, merely because it considers that the Commission has unreasonably requested it to provide a detailed market analysis for the purpose of a consultative procedure, refuse to furnish those statistics which are available to it and which might facilitate the Commission's investigation. [62] Italy's conduct in this case would, in my opinion, have entitled the Commission to base the reasoning of its decision on whatever statistics in respect of competition from French and Spanish shipping companies regarding the provision of maritime-transport services to and from Sardinia were available to it. [63] No such statement was, however, made by the Commission. It merely assumed that the existence of such competition was obvious.

D — *The classification of the impugned aid as 'altered' aid*

56. If the Court were to agree with my recommendation regarding the inadequacy

61 — See Commission Decision 97/270/EC of 22 October 1996 on a tax credit scheme introduced by Italy for professional road hauliers, OJ 1997 L 106, p. 22, Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Guilia Region (Italy) to road haulage companies in the Region, OJ 1998 L 66, p. 18, and Commission Decision 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.

62 — In my view, this follows implicity from Article 93(2) of the EC Treaty and from the explicit duty of cooperation imposed by Article 5 of the EC Treaty (now Article 10 EC). See, in this respect also, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 43 and Case C-301/87 *France* v *Commission* [1990] ECR I-307 (hereinafter '*Boussac*'), paragraph 22.

63 — See, in this respect, Case C-241/94 *France* v *Commission* [1996] ECR I-4551 (hereinafter '*Kimberly Clark*'), paragraphs 32 to 37.

of the statement of reasons justifying the Commission's classification of the 1988 Law Regime as State aid, it would strictly not need to consider the compatibility of the further classification of the amendments introduced by that Law as notifiable alterations for the purposes of Article 93(3) of the EC Treaty. However, as the appropriateness of the approach underlying that classification constitutes one of the most important and certainly the most novel of the issues raised by the present actions, I propose to consider the various arguments invoked by the applicants.

(i) Synthesis of the observations

57. Italy contends that the obligation to notify the Commission of amendments to an existing aid scheme has no effect on the right of a Member State to continue to apply that scheme. The Commission may only open a consultative procedure in respect of amendments. Thus, any State aid granted in accordance with such amendments cannot be regarded as being unlawful unless those amendments contribute *significantly* to the incompatibility of that aid.

58. Counsel for Italy stressed at the hearing that none of the conditions introduced by the 1988 Regional Law, with the exception of the lease-purchase option (Article 100), constituted a real or substantial novelty. The lease-purchase facility was, however, never used. Thus, it could not be regarded as altering the nature of the aid. The requirements that a beneficiary have its head office and port of registration in Sardinia were already established by Article 2 of the original regime, while the obligation that all its ships be registered in Sardinian ports, that those ports be used as the centre of its shipping activity and that ship repairs be carried out in Sardinia had very limited practical effect because they applied to undertakings that already had to have their port of registry in Sardinia. The requirement for certain beneficiaries to use crew registered on the roll of their Sardinian port of registry derives from national legislation providing for the mandatory employment of seafarers registered on the roll of each port and its effect was, therefore, merely to favour Sardinian over other Italian ports.

59. SL submits that only amendments that have a real, rather than a formal or marginal, effect on a scheme of existing State aid may be regarded as new or altered. Since the 1997 Decision does not contain any assessment of the reasons why the Commission regarded the amendments introduced by the 1988 Regional Law to be substantial, when a simple comparison with the original regime would discount such a conclusion, the Commission committed a manifest error of appreciation. In support of this conclusion, it relies upon *Namur-Les Assurances du Crédit* v *OND*,[64] where the Court stressed the importance of having regard to the underlying legal provisions when considering whether an existing aid scheme has been

64 — Case C-44/93 [1994] ECR I-3829 (hereinafter '*Namur*').

'altered' and where Advocate General Lenz equated 'an alteration of aid' with a 'substantive change in a system of aid'. [65] At the hearing, counsel for SL submitted that the Commission should undertake a meticulous examination of whether new or altered aid has been granted, which, he alleged, was lacking in the 1997 Decision.

60. The Commission submits that it is unnecessary to conduct line-by-line comparisons of an existing aid with later amendments to it, since Article 93(3) of the EC Treaty requires the notification of all such amendments, whether to the underlying aid scheme or to the terms upon which individual aids are granted. In its view, it is for the Commission and not the Member States, subject to review by the Court, to determine whether amendments substantially affect existing aid. [66] Alternatively, it submits that, in the present case, the amendments, even considered separately, but *a fortiori* when assessed together, manifestly constituted a substantial alteration of the original regime. As for SL's reliance on *Namur*, it observes that there is not only a new law in the present case, viz. the 1988 Regional Law, but that the said Law introduced a number of substantial amendments, all of which were cited in Part III of the recitals in the preamble to the 1997 Decision (hereinafter 'Part III of the Decision'). [67] The new conditions were inseparable from the original regime and operated, by further restricting the circle of potential beneficiaries and augmenting the discriminatory nature of the scheme, to increase the distortion of competition thereby created.

(ii) Analysis

61. Essentially two important questions are raised by this aspect of the actions. The first is the correctness of approach adopted by the Commission in the 1997 Decision; the second is the question of the adequacy of the reasons given by the Commission for its conclusion that the original regime was altered by the 1988 Regional Law, which is intimately related to the question whether the Commission's assessment was substantively correct.

The approach adopted in the 1997 Decision

62. It is clear from the 1997 Decision that the Commission has not deemed the aid granted under 1988 Law Regime to be 'altered' aid merely because it was granted

65 — Ibid., paragraph 77 of his Opinion.

66 — It cites Case C-354/90 *FNCE* [1991] ECR I-5505, paragraph 14.

67 — The Commission refers, in its defence in both cases, to the amendments introduced by Articles 99 and 100 of the 1988 Regional Law, which are described in paragraphs 4 and 5 above.

pursuant to that regime rather than on the basis of the original regime. On the contrary, it took the view that '[by the 1988 Regional Law] *substantive* amendments were made to the aid scheme established by the [1951 Regional Law]'.[68] This approach is, to my mind, correct. However, in so far as the Commission has suggested, in its observations before the Court, that the mere fact that the 1988 Regional Law amended the 1951 and 1954 Regional Laws sufficed to render the 1988 Law Regime an 'alteration' of the original regime for the purpose of Article 93(3) of the EC Treaty, it is, in my opinion, misconceived. Only amendments which constitute substantive changes to a pre-existing regime should be viewed as notifiable for the purposes of Article 93(3) of the EC Treaty.

63. This emerges from a careful reading of *Namur*. The circumstances of that case were rather unusual. OND was a Belgian public undertaking which received State aid, pursuant to a 1939 Law, in the form of various advantages, which, '[a]part from adjustments not affecting the *substance* of those advantages, ... remained unchanged on 1 February 1989'.[69] The Court had to consider whether the fact that, from that date, OND could be regarded as having been permitted by the Belgian Ministers who ultimately controlled it to enlarge the field of its commercial insurance activities amounted to an alteration of the underlying existing State aid. The Court rejected this possibility. It held that:[70]

'[T]he emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment of the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new or as an alteration of existing aid must be determined by reference to the provisions providing for it.'

64. It was precisely because there was no change to the original legislative provisions and because they did not restrict the range of commercial activities open to OND that the Court was satisfied that a later renunciation of what had effectively been a voluntarily assumed restriction was not tantamount to an 'alteration' of the original scheme. In my view, *Namur* does not therefore support the proposition that once the legislation underpinning an existing aid scheme is modified the adjustments must be regarded as notifiable 'alterations'. On the contrary, the Court manifestly viewed changes to the scope of the aid as being indicative of whether it has been altered; if its scope is affected in *substance* by the alleged 'alteration' it must be notified. Only such a common-sense approach would permit a satisfactory degree of legal cer-

68 — See the fifth paragraph of Part III of the Decision (emphasis added) and the first paragraph of Opening Letter I. The authentic Italian version of the Decision speaks of 'modificata in modo *sostanziale*', while in Opening Letter I reference is made to '*sostanzialmente* modificata' (emphasis added).

69 — Loc. cit., footnote 64 above, paragraph 23.

70 — Ibid., paragraph 28.

tainty for aid recipients, Member States and interested third parties alike to be assured, by precluding the need 'to notify in advance widely differing measures, which could not then be put into place despite doubts as to whether they could be classified as new aid'. [71]

65. Support for this interpretation also emerges from the Opinion of Advocate General Lenz in *Namur*. He observed that: [72]

'[W]hether aid has been granted or altered depends ... on whether in the portfolio of measures of a Member State providing for advantages in the nature of aid for the benefit of undertakings a change has occurred which has affected the content or extent of those advantages. In this connection, it is clear from a comparison between paragraphs 1 and 3 of Article 93 that the term "aid" is synonymous with the expression "system of aid" in paragraph 1. It follows that an aid is granted within the meaning of Article 93(3) where a new system of aid is created, *whilst the alteration of aid presupposes a substantive change in a system of aid.*'

Furthermore, it is consistent with the unequivocal view expressed by Advocate General Mancini in *Heineken* that Article 93(3) of the EC Treaty: [73]

'[did] not require the imposition on Member States of an absolute obligation to notify the Commission of every aspect. In other words the State must notify the Commission of alterations which, because of the effect that they have on undertakings or their competitive relationship, may influence the Commission's decision. *It is not on the other hand necessary to communicate alterations which are merely formal and which do not pose a threat to the freedom of competition.*'

The adequacy of the statement of reasons

66. SL asserts that the reasons given in the 1997 Decision in support of the Commission's assessment that the amendments effected to the original regime by the 1988 Regional Law were substantial are inadequate. Having regard to the principles which are discussed above (paragraphs 44 to 54) regarding the requirement to give

71 — *Namur*, paragraph 33. The need for legal certainty in this respect has arguably been increased by the recent adoption, on the basis of Article 94 of the EC Treaty (now Article 89 EC), of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p. 1. Article 1(b) thereof includes in the definition of 'existing aid' aid which is so deemed '... 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'.

72 — Paragraph 77 of his Opinion (emphasis added).

73 — Loc. cit., paragraph 5 of his Opinion (emphasis added).

reasons, I am, not without some hesitation, satisfied that the reasons given in Part III of the Decision satisfy the requirements of Article 190 of the EC Treaty.

67. The Commission, despite criticising Italy and SL for conducting in their pleadings a line-by-line comparison of the provisions of the 1988 Regional Law with those of the 1951 and 1954 Regional Laws before the Court, effectively contents itself in Part III of the Decision with a not dissimilar approach. It summarises the main provisions of the original regime before declaring, as noted above, that the 1988 Regional Law made 'substantive amendments' to that regime and then setting out the pertinent new provisions of the latter Law. However, it does not seek in any way to substantiate its assertion that the amendments were substantial. On the contrary, later in Part V of the recitals in the preamble to the 1997 Decision (hereinafter 'Part V of the Decision'), it merely reasserts that the 1951 Regional Law 'was substantially amended by [the 1988 Regional Law] ...'. In substance, the Commission has effectively assumed that a mere comparison of the provisions of the original and the 1988 Law Regimes would reveal that the amendments were substantial.

68. The Commission should avoid such assumptions. The statement of reasons should explain explicitly why it considers certain amendments to be substantial. The reasons given need not be detailed, particularly where, as in the present case, it forms the view that the significance of the relevant amendments is obvious. Ideally, they should accompany its conclusion that the amendments were substantial, but, as the Court's case-law already discussed confirms, it would suffice if they emerged from other parts of the relevant decision. In the present case, notwithstanding the absence of explicit reasons for the Commission's conclusion that the 1988 Regional Law introduced substantive amendments to the original regime, I am satisfied that, viewed as a whole, the 1997 Decision satisfies the requirements of Article 190 of the EC Treaty.

69. First, it is clear from a mere comparison of the relevant provisions of the original and the 1998 Law Regimes set out in Part III of the Decision, and even without the benefit of the analysis provided by the Commission in its pleading before the Court, that a number of potentially important changes were introduced by the 1988 Regional Law. Thus, it is clear that the requirements relating to the aid beneficiary's place of administrative headquarters, shipping business, main stores, depots and accessory equipment were all new, as was that concerning making Sardinian ports the centre of its shipping activities and that of having all of its ships normally refitted at Sardinian shipyards. Novel too was the obligation for those beneficiaries acquiring ships with a gross tonnage of more than 250 tonnes to use locally registered crew, a fact which the Commission characterised as introducing a discrimination on grounds of nationality in

favour of 'Sardinian' seafarers both in Parts I and VI of the recitals in the preamble to the Decision (hereinafter 'Parts I and VI of the Decision'). As regards the lease-purchase option, the language used by the Commission ('the aid scheme also introduced') pointed clearly to its novelty. Second, the classification was not contested by either Italy or the Sardinian authorities during the consultative investigation which preceded the adoption of the 1997 Decision. While, for the reasons discussed above (paragraphs 20 to 24), this does not, of course, preclude that classification now being challenged, particularly by SL, it is a factor which may be taken into consideration by the Court in considering the adequacy of the Commission's statement of reasons provided some reasoning is given as to the substantive nature of the amendments. The Commission's clear description of the amendments as being 'substantial' constitutes such reasoning in this case. Finally, the analysis contained in Part VI of the Decision is significant. The Commission not only states there unequivocally its view that the 1988 Regional Law conflicts with fundamental principles of Community law, to wit the freedom of establishment and non-discrimination on grounds of nationality, but also identifies certain aspects of it which exacerbate the infringements of those principles already contained in the original regime. Thus, in the third paragraph of Part VI of the Decision, the Commission refers explicitly to the requirement that all of the aid recipient's vessels be registered in Sardinia, while in the fourth, it alludes to the discrimination on grounds of nationality that in practice results from the prerequisite of employing 'locally based crew'. Such reasoning clearly supports its conclusion that substantive amendments were made to the original regime by the 1988 Regional Law.

The correctness of the classification

70. Italy and SL have, however, also contested the correctness of the Commission's conclusion that the 1988 Regional Law amendments were substantial. They assert that they merely introduced points of detail or precision to the original regime which had little practical effect. I cannot share this benign assessment. Although to require aid recipients, in addition to having in Sardinia their head office and place of fiscal domicile as required under the original regime, also to have there their administrative headquarters might be regarded as a further detail designed to ensure that only local undertakings benefited from the financial assistance available, the same cannot be said of the new prerequisites that they also use Sardinian ports as the centre of their shipping activities, register *all* of their vessels at those ports and maintain there their main stores, depots and accessory equipment, presumably in respect of all those vessels. These amendments are *significant*. They effectively rendered it impossible for non-Sardinian undertakings to benefit from the financial assistance available, while they also extended, a point stressed by the Commission in Part VI of the Decision, the indirect benefit of the aid to various other, almost inevitably Sardinian, undertakings operating at Sardinian ports.

71. Furthermore, by imposing a general condition that the beneficiaries utilise local shipyards for all their refitting needs, the 1988 Regional Law was clearly capable, at least indirectly, of benefiting Sardinian shipyards. The Commission's concern that this novel provision could infringe the Seventh Directive is obviously justified. The intention underlying the requirement to employ Sardinian crew was equally unequivocal and important. In 1988, the relevant national Italian legislation, to which counsel for Italy alluded at the hearing, required the maintenance, *inter alia*, of registers of crew. Although he contended that the provision in the 1988 Regional Law was required to respect that legislation, he omitted to allude to the directly discriminatory nationality requirement contained in that legislation, a requirement which the Court explicitly considered to be incompatible with Community law in *Porto di Genova*. [74] Since the imposition of a requirement to engage Sardinian seafarers inevitably led to the exclusion of all non-Italian seafarers, the Commission was manifestly correct, particularly in the light of *Porto di Genova*, to characterise such a condition as a notifiable alteration.

72. Although the direct effect of the amendments introduced by the 1988 Regional Law was to reduce the range of the undertakings capable of benefiting from the original regime, and thus, potentially at least, to reduce the amount of aid granted, such a possibility does not preclude such amendments from being classified as 'alterations' for the purpose of Article 93(3) of the EC Treaty. First, as the Commission's agent pointed out, in answer to a question at the hearing, such a reduction in scope is irrelevant where it is achieved by amendments which exacerbate the discriminatory and, thus, potentially distorting effects of the underlying aid scheme. Secondly, I do not accept that amendments which, while reducing the potential number of direct beneficiaries of an aid, operate indirectly to extend its benefits to a wide range of other a priori national beneficiaries, such as the local shipyards and crew in the instant case, could ever be classified as insignificant and, therefore, as capable of falling outside the notification obligation imposed by Article 93(3) of the EC Treaty.

73. Finally, it is common ground that the introduction, by Article 100 of the 1988 Regional Law, of the lease-purchase option constituted, in principle, a notifiable alteration of the original regime. Italy, supported by SL, asserts, however, that as no aid was granted pursuant to this option during the relevant period (1988–96), it may not be considered for the purpose of determining whether Italy should have notified the other amendments. This argument is misconceived and should be rejected.

74. I agree with the view expressed by Advocate General Lenz in *Namur* that 'it is clear from a comparison between paragraphs 1 and 3 of Article 93 that the term "aid" is synonymous with the expression "system of aid" in paragraph 1' and that

74 — Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 (hereinafter '*Porto di Genova*'), paragraphs 11 to 13.

'[i]t follows that an aid is granted within the meaning of Article 93(3) of the EC Treaty where a new system of aid is created, *whilst the alteration of aid presupposes a substantive change in a system of aid*'. [75] The introduction of a wholly new method of providing effectively the same level of aid manifestly constituted a significant amendment of the original regime. To accept Italy's argument would permit Member States substantially to amend existing aid schemes, or to introduce what are in effect new aid schemes by way of an amendment to the legislation providing for an existing aid scheme, without having to notify such amendments to the Commission until such time as they propose to implement the amendments. It would, thus, ignore the fact that Article 93(3) of the EC Treaty explicitly requires Member States to inform the Commission 'of any *plans* to grant or alter aid'. The narrow construction of the Member States' obligation to notify amendments to existing aid that underlies Italy's submission would, in my opinion, also undermine the efficacy of the preventive review which the Treaty envisages the Commission exercising under Article 93(3) of the EC Treaty. The need to ensure the effectiveness of that control has consistently been upheld by the Court. [76] I have no doubt, therefore, that the Commission was entitled to have regard to the amendment introduced by Article 100 of the 1988 Regional Law when considering whether the various amendments introduced by that Law amounted overall to substantive 'alterations'. This is *a fortiori* the case since it only emerged in the procedure before the Court that no individual aid had been granted pursuant to the lease-purchase option during the relevant period.

75. Accordingly, I recommend that the Court reject the applicants' arguments contesting the validity of the Commission's classification of the amendments introduced by the 1988 Regional Law as substantive notifiable 'alterations' for the purpose of Article 93(3) of the EC Treaty.

E — *The compatibility of the impugned aid scheme with the common market*

76. If the Court rejects my principal recommendation regarding the inadequacy of the Commission's statement of reasons, but accepts my alternative recommendation as to the validity of its classification of the 1988 amendments as constituting substantive notifiable 'alterations' to the original regime, it will be necessary to consider the applicants' alternative pleas, which challenge the Commission's finding that the impugned aid was incompatible with the common market. I propose therefore only very briefly to consider those pleas.

75 — Paragraph 77 of his Opinion, quoted in full in paragraph 65 above, emphasis added.

76 — See *Heineken*, op. cit., paragraph 14, *Boussac*, op. cit., footnote 62 above, paragraph 17, *Cenemesa*, op. cit., paragraph 16 and *Italgrani*, op. cit., paragraph 24. It would also conflict with the rationale underlying Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio* v *International Factors Italia (IFITALIA) and Others* [1999] ECR I-3735, where the Court confirmed that the Commission has no discretion to classify as existing aid measures adopted after the entry into force of the EC Treaty where the measures in question have not been notified to it; see paragraphs 44 to 49.

(i) The infringement of other Treaty provisions

77. Italy's discrete plea that the 1997 Decision should be annulled because the Commission was not entitled to consider the impugned aid to be incompatible with the common market on the basis that the 1988 Law Regime supposedly violated Articles 6, 48(2) and 52 of the EC Treaty (now, after amendment, Articles 12 EC, 39 EC and 43 EC) raises an issue of considerable importance for the review by the Commission of State aids.

78. The Court has consistently held that Article 92 of the EC Treaty may not be used to frustrate the other Treaty rules such as those concerning the free movement of goods, 'since those rules and the Treaty provisions relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition'.[77] The Commission is, therefore, entitled to take account of possible infringements of other Treaty rules when considering the compatibility of a State aid scheme with the common market. While I would agree with the view expressed by Advocate General Saggio in his recent Opinion in *Germany* v *Commission* to the effect that the Commission may not use the procedure provided for in Article 93 of the EC Treaty to 'declare' a national measure *incompatible with other non-State aid Treaty rules*, no such issue arises in this case.[78] The Commission, in exercising the discretion that it enjoys under Article 92(3) of the EC Treaty, has simply refused to declare *compatible with the common market* State aid some of whose conditions may infringe a number of fundamental principles of Community law.

79. Support for this conclusion may also be drawn from the Court's decision in *Commission* v *France*, which concerned aid to farmers that was initially investigated by the Commission pursuant to a consultative procedure which the Commission then broke off to initiate an infringement procedure under Article 169 of the EC Treaty (now Article 226 EC).[79] The Court held that 'although the existence of [the] specific procedure' under Article 93(2) of the EC Treaty 'in no way prevents the compatibility of an aid scheme in relation to Community rules other than those contained in Article 92 from being assessed under the procedure provided for in Article 169, the Commission must, however, use the procedure laid down in Article 93(2) if it wishes to establish that *that scheme, as aid, is incompatible with the common market*'.[80]

77 — Case C-21/88 *Du Pont de Namours Italiana* [1990] ECR I-889, paragraph 20. See also Case 249/81 *Commission* v *Ireland* [1982] ECR 4005 (hereinafter '*Buy Irish*'), where the Court held (paragraph 18) that 'the fact that a substantial part of the campaign [to buy Irish goods] [was] financed by the Irish Government, and that Articles 92 and 93 of the Treaty may be applicable to financing of that kind, does not mean that the campaign itself may escape the prohibitions laid down in Article 30'.

78 — Case C-156/98, Opinion of 27 January 2000, paragraph 43.

79 — Case 290/83 [1985] ECR 439.

80 — Ibid., paragraph 17 (emphasis added). See also the Opinion of Advocate General Mancini, [1985] ECR 439, pp. 443 and 444.

(ii) The Commission's application of Article 92(3) of the EC Treaty

80. Italy and SL advance a number of arguments which call into question the Commission's assessment of the compatibility of the 1988 Law Regime, particularly as regards Article 92(3)(a) ('aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment') and Article 92(3)(c) ('aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest') of the EC Treaty. Having examined each of these pleas, I am satisfied that none of them is well founded.

81. The Court has consistently recognised that the Commission enjoys a wide margin of appreciation in determining the compatibility of State aid with the common market, since the performance of its task involves complex economic and social assessments which must be made in a Community context. [81] Thus, it will only annul a Commission State-aid decision, in this respect, if it is clear that the Commission has made a manifest error of assessment, the onus of establishing which lies with the party seeking its annulment, [82] or if the reasoning employed in the decision is clearly inconsistent. [83] Thus, the Commission's finding that the regime could not be classified as regional-development aid for the purpose of considering the possible applicability of Article 92(3)(a) is clearly not misconceived. While there is little doubt that Sardinia was an Objective 1 region, capable of benefiting at the material time from general regional aid, the Commission was justified, in my view, in taking the view that the aid in question constituted aid to shipping companies and that its centre of gravity was therefore sectoral. [84] Nor is the approach adopted in the 1997 Decision inconsistent, as SL asserts in its application, with earlier Commission decisions taken in respect of aids granted by Ireland to certain shipping companies. As the Commission points out, in its defence, those decisions were adopted at a time when a more generous policy than that established under the guidelines on State aid to shipping companies of 3 August 1989 [85] and on State aid in the maritime sector was applied. [86] The Commission must respect its own guidelines. [87]

81 — See *Philip Morris*, op. cit., paragraph 24. See also *Hytasa*, loc. cit., footnote 41 above, paragraph 51, Case C-311/94 *Ijssel-Vliet* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraph 27, *Belgium* v *Commission*, op. cit., footnote 44 above, paragraph 11 and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56.

82 — See, for example, *AIUFFASS and AKT* v *Commission*, ibid., paragraph 50, which was upheld on appeal by the Court; see Case C-55/97 P *AIUFFASS and AKT* v *Commission* [1997] ECR I-5383, paragraphs 22 to 26.

83 — See *Hytasa*, op. cit., paragraphs 51 to 58.

84 — See Commission Decision 94/629/EC of 29 July 1994 on the establishment of the Community support framework for Community structural assistance for the Italian regions concerned by Objective 1, which are Abruzzo, Basilicata, Calabria, Campania, Molise, Puglia, Sardinia and Sicily; OJ 1994 L 250, p. 21.

85 — SEC(89) 921 final.

86 — OJ 1997 C 205, p. 5.

87 — See Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 36 and 44 et seq.

82. The Commission has also not, to my mind, manifestly erred in rejecting the possible application of Article 92(3)(c) of the EC Treaty. The applicants have not referred to any factor that calls into question the aptness of the Commission's analysis that the 1988 Law Regime did not respect the transparency requirement imposed by both the abovementioned guidelines and the Seventh Directive. It could not approve aid where it was not satisfied that the aid ceiling permitted in respect of aid for Italian shipyards would not be circumvented by the indirect benefits flowing, for Sardinian shipyards in particular, from the 1988 Law Regime.

F — *Recovery*

83. In the event that the Court upholds the validity of the 1997 Decision, Italy and SL advance various arguments in support of their plea that Article 2 of the 1997 Decision, which requires Italy to recover from each aid beneficiary aid received pursuant to the 1988 Law Regime, should be annulled. Having considered each of those arguments, I am satisfied that they are all unfounded.

84. In particular, I find Italy's argument that Article 2 of the 1997 Decision infringes the legitimate expectations of the aid recipients unconvincing. It amounts to an assertion that those undertakings could reasonably have assumed that the Commission would not classify as 'alterations' the modifications introduced by the 1988 Regional Law. There is, in my opinion, no reason in principle to treat notifiable amendments to existing aid any differently from new aid. Whenever 'the Commission finds that aid granted by a State or through State resources is not compatible with the common market', it may decide 'that the State concerned shall abolish or alter such aid within a period of time to be determined by [it]', and that '[w]here, contrary to the provisions of Article 93(3), the proposed aid has already been granted, the decision may take the form of an order to the national authorities to recover the aid'. [88] Given 'the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article'. [89] In this case, it seems clear that it was simply assumed by all concerned, including SL, that the amendments introduced by that legislation would not 'alter' the underlying aid scheme for the purpose of the Treaty. That assumption cannot constitute an expectation capable of overriding the Com-

88 — See *Alcan*, op. cit., footnote 30 above, paragraph 22. See also Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 24, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 78. Several years before the adoption of the 1988 Regional Law, the Commission unambiguously informed 'potential recipients of State aid of the risk attaching to any aid granted to them illegally, in that any recipient of an aid so granted, i.e. without the Commission having reached a final decision, may have to refund the aid', OJ 1983 C 318, p. 3.

89 — *Alcan*, op. cit., paragraph 25. The Court added, in the same paragraph, that, '[a] diligent businessman should normally be able to determine whether that procedure has been followed'.

munity-law interest in ensuring respect for Article 93(3) of the EC Treaty.

85. Nor does the 1997 Decision introduce unjustifiable discrimination between beneficiaries of the Sardinian aid depending on whether their aid was approved before or after the entry into force of the 1988 Regional Law. I agree with the Commission that the difference in treatment, being based on the fundamental Treaty-based distinction between new and/or altered aid and existing aid, is clearly justified.

86. SL also asserts that the Commission may only require the recovery of illegally paid State aid for up to a maximum period of five years, thus excluding recovery from it as the 1997 Decision was adopted over five years after it received its aid. It relies on Council Regulation (EEC) No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, which prescribes, in general, a five-year limitation period. [90] However, I agree with the Commission that, in the absence of a statutory limitation period, it would be inappropriate to fix one by analogy with legislation that does not concern the Community State-aid rules. [91] This interpretation has been confirmed by the recent adoption of Council Regulation (EC) No 659/1999, whose Article 15(1) provides that '[t]he powers of the Commission to recover aid shall be subject to a limitation period of 10 years'. [92]

V — Costs

87. Under Article 69(2) of the Court's Rules of Procedure, '[t]he unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings'. However, Article 69(3) provides that '[w]here each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs'. As the applicants in these joined cases should succeed in respect of their general plea that the 1997 Decision be annulled because of the inadequacy of the Commission's statement of reasons and as they have applied for their costs, the latter should normally be awarded to them. However, as Italy has also unsuccessfully contested the validity of the decision contained in Opening Letter II and as the inadequacy in the Commission's statement of reasons in the 1997 Decision may, at least partially, be explained by reference to the Italian authorities' refusal fully to cooperate with it during the consultative procedure, I recommend that Italy be ordered to bear its own costs. As neither of these exceptional factors affects SL, the Commission should pay its costs.

90 — OJ 1974 L 319, p. 1.

91 — See Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraphs 67 and 68.

92 — Cited at footnote 71 above.

VI — Conclusion

88. In the light of the foregoing, I recommend that the Court:

(1) Annul Commission Decision 98/95/EC of 21 October 1997 concerning aid granted by the Region of Sardinia (Italy) to shipping companies in Sardinia;

(2) Order the Commission to pay the costs of Sardegna Lines in Case C-105/99 and order the Italian Republic and the Commission to bear their own costs in Case C-15/98.