

Joined Cases T-116/01 and T-118/01

P & O European Ferries (Vizcaya), SA
and Diputación Foral de Vizcaya

v

Commission of the European Communities

(State aid — Actions for annulment — Decision terminating a review procedure initiated under Article 88(2) EC — Concept of State aid — Purchase of services by the State at the market price — Aid having a social character granted without discrimination related to the origin of the products concerned — Failure to order a Member State to produce the necessary information — Obligation to repay aid — Legitimate expectations of recipients — Statement of reasons)

Judgment of the Court of First Instance (First Chamber, Extended Composition), 5 August 2003 II-2963

Summary of the Judgment

1. *State aid — Unnotified aid — Acceptance by the Commission of the notification of a new agreement between recipient and grantor — No effect on the unlawfulness of the aid*
(Art. 88(3) EC)

2. *Procedure — Force of res judicata attaching to a judgment — Scope — Inadmissibility of a second action — Conditions — Same parties, subject-matter and grounds in both actions*
3. *State aid — Definition — Purchases from an undertaking — Assessment on the basis of the private investor test — State aid excluded only in the case of a normal commercial transaction*
(Art. 87 EC)
4. *Acts of the institutions — Statement of reasons — Obligation — Scope*
(Art. 253 EC)
5. *State aid — Commission decision finding aid which has not been notified incompatible with the common market — Obligation to state reasons — Scope*
(Art. 88(3) EC)
6. *EC Treaty — Systems of property ownership — Principle of neutrality — Limits — Bound by the fundamental rules of the Treaty — No effect on the scope of the concept of State aid*
(Arts 87(1) EC and 295 EC)
7. *State aid — Prohibited — Derogations — Aid which may be considered compatible with the common market — Aid having a social character — Conditions*
(Art. 87(2)(a) EC)
8. *State aid — Recovery of unlawful aid — Aid granted in breach of the procedural rules in Article 88 EC — Possibility of legitimate expectation on the part of recipients only — Protection — Conditions and limits*
(Arts 87 EC and 88 EC)
9. *Community law — Principles — Need for judicial review — Recovery of unlawful aid notwithstanding the requirements of legal certainty*
(Arts 88 EC, 220 EC, 230, first para., EC and 233 EC; Charter of fundamental rights of the European Union, Art. 47; European Convention on Human Rights, Arts 6 and 13)

10. *State aid — Review by the Commission — Initiation of formal review procedure — Maximum period of two months — Inapplicable in the case of unnotified aid (Art. 88(2) and (3) EC; Council Regulation No 659/1999, Art. 4(6))*
11. *State aid — Proposed aid — Implementation before the final decision of the Commission — Commission decision ordering repayment of the aid — Obligation to state reasons — Scope (Art. 88(3) EC)*

1. The fact that the Commission has, without raising any objection concerning its validity, accepted the notification of a new agreement concerning unnotified aid between the territorial authority granting the aid and the recipient undertaking cannot under any circumstances alter the fact that the aid at issue is unlawful. The Commission cannot on any account permit a derogation from the notification procedure laid down in Article 88(3) EC and, by its conduct, alter the fact that aid is unlawful.

conditions necessarily being cumulative.

Since the measure whose annulment is sought is an essential element of the subject-matter of an action, *res judicata* cannot be pleaded where the actions in question do not relate to the same measure.

(see paras 77-78)

(see para. 70)

2. The force of *res judicata* attaching to a judgment can constitute a bar to the admissibility of an action if the action which gave rise to the judgment in question was between the same parties, had the same subject-matter and was founded on the same grounds, those
3. A State measure in favour of an undertaking cannot be excluded as a matter of principle from the concept of State aid in the sense contemplated in Article 87 EC merely because the parties undertake reciprocal commitments.

In addition, the mere fact that a Member State purchases goods and services on market conditions is not

sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted, or in other words a normal commercial transaction, if it turns out that the State did not have an actual need for those goods and services. It is all the more necessary for a Member State to demonstrate that such a purchase constitutes a normal commercial transaction where selection of the other contracting party has not been preceded by a sufficiently advertised open tender procedure. The fact that such a procedure is conducted is normally considered sufficient to rule out the possibility that the Member State is seeking to grant an advantage to the undertaking with which it is contracting.

(see paras 114, 117-118)

4. The statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend 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 addressees of the measure, or other parties to whom it is of direct and individual

concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

(see paras 139, 170)

5. In order to make a declaration of incompatibility in the case of State aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. Such an obligation would ultimately favour Member States which pay aid without complying with the duty to notify the aid laid down in Article 88(3) EC, to the detriment of those which notify the aid at the proposal stage.

(see para. 142)

6. Although the system of property ownership continues to be a matter for each Member State under Article 295 EC, that provision does

not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty. Article 295 EC cannot therefore be considered to restrict the scope of the concept of State aid for the purposes of Article 87(1) EC.

(see paras 151-152)

7. In order to determine whether aid having a social character granted to individual consumers is granted without discrimination related to the origin of the products concerned so that it may, pursuant to Article 87(2)(a) EC, be considered compatible with the common market, it must be ascertained whether those consumers benefit from the aid irrespective of the economic operator supplying the product or service capable of fulfilling the social objective relied on by the Member State concerned.

(see paras 162-163)

8. While it is true that a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be

lawful in order to decline to refund that aid, on the other hand a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 88 EC may not plead the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 EC and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions ineffectual. Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay such aid.

The fact that the Commission initially adopted a positive decision approving the aid in question cannot have caused the recipient undertaking to entertain a legitimate expectation if that decision was challenged in due time before the Community judicature, which annulled it.

(see paras 201-202, 205)

9. Whilst it is important to ensure compliance with requirements of legal certainty that protect private interests, those requirements must be balanced against requirements that protect public interests, which, in the field of State aid, are designed to prevent the operation of the market from being distorted by aid injurious to competition. The latter mean that unlawful aid must be repaid and competitors of the recipient of the aid must be able to challenge Commission measures which adversely affect them as otherwise the review, conducted by the Community judicature in accordance with Article 220 EC, the first paragraph of Article 230 EC and Article 233 EC, of the legality of measures adopted by the Community institutions would be rendered ineffective. The requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention on Human Rights. The right to an effective remedy has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.
10. The principle set down in Article 4(6) of Regulation No 659/1999 that the period available to the Commission for initiating the formal review procedure provided for in Article 88(2) EC may not exceed two months can be invoked only where aid has been notified in accordance with the procedure laid down in Article 88(3) EC and therefore does not apply where the Commission initiates a procedure in relation to unnotified aid.
11. In the matter of State aid, where, contrary to the provisions of Article 88(3) EC, the proposed aid has already been granted, the Commission, which has the power to require the national authorities to order its repayment, is not obliged to provide specific reasons in order to justify the exercise of that power.

(see para. 217)

(see paras 207-209)

(see para. 224)