



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 13 September 2018¹

Case C-387/17

Presidenza del Consiglio dei Ministri
v
Fallimento Traghetti del Mediterraneo SpA

(Request for preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling — State aid — Existing aid and new aid — Classification — Aid granted prior to the liberalisation of a market that was initially closed to competition — Action for damages by a competitor of the undertaking which received the aid measures in the absence of a Commission decision — Enforceability of the rules on limitation provided for by Regulation (EC) No 659/1999)

Introduction

1. This case is one of a series of references for preliminary rulings concerning the payment of subsidies by the Italian Republic to the maritime shipping undertaking Tirrenia di Navigazione SpA ('Tirrenia') during the period 1976 to 1980, which were not notified to the European Commission.
2. This judicial 'saga' is undoubtedly due to the fact that the Italian authorities have demonstrated some inertia — and, in this regard, have shown bold ingenuity in the development of legal arguments — to avoid all the consequences of the classification of the contentious measures as State aid unlawfully granted. This is demonstrated, in particular, by the position they seek to defend in this case.
3. The dispute in the main proceedings concerns a claim for damages brought by a competitor of Tirrenia, Fallimento Traghetti del Mediterraneo SpA ('FTDM'), against the Italian Republic, seeking compensation for the loss allegedly suffered by it as a result of the grant of those subsidies. Such subsidies, which have been classified by the referring court as State aid within the meaning of Article 107(1) TFEU, were not, however, the subject of a Commission decision on their lawfulness and compatibility with the rules of the European Union (a case of 'stand-alone private enforcement').
4. The question arises as to whether, the fact that the subsidies in question were granted to an undertaking operating in a market that was not yet formally liberalised is relevant for the purposes of classification of the aid measures as 'existing' aid or 'new' aid. The Court is also asked whether, and, if so, to what extent, the rules contained in Regulation (EC) No 659/1999 concerning the limitation

¹ Original language: French.

period relating to action by the Commission² have a bearing on the validity of an action for damages such as that in the main proceedings. The case thus presents an opportunity to recall some of the key principles underlying the regime for monitoring State aid and the role that national courts are called upon to play in this context.

Legal Framework

EU law

5. Article 1, entitled ‘Definitions’, of Regulation No 659/1999 provides:

‘For the purposes of this Regulation:

...

(b) “existing aid” shall mean:

...

(iv) aid which is deemed to be existing aid pursuant to Article 15;

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

...’

6. Article 15, entitled ‘Limitation period’, of Regulation 659/1999 provides:

‘(1) The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

(2) The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

(3) Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.’

² Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). Regulation No 659/1999 was repealed and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article [108 TFEU] (OJ 2015 L 248, p. 9).

Italian law

7. The subsidies at issue in the main proceedings were granted to ‘Tirrenia’, a shipping company competitor of FTDM, under legge n. 684 — Ristrutturazione dei servizi marittimi di preminente interesse nazionale (Law No 684 on the restructuring of shipping services of major national interest) of 20 December 1974 (GURI No 336 of 24 December 1974, p. 9008, ‘Law No 684’), and more specifically Article 19 thereof.

8. Article 7 of Law No 684 provides:

‘The Minister for Merchant Shipping is authorised to grant subsidies for the provision of the services referred to in the preceding article, by concluding annual ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments.

The subsidies referred to in the preceding paragraph must provide, over a period of three years, for operation of the services under conditions of economic equilibrium. On a prospective basis, such subsidies are to be determined by reference to net income, the amortisation of investments, operating costs, organisational costs and financial burdens.

...’

9. Article 8 of Law No 684 provides:

‘The services linking the larger and smaller islands, referred to in Article 1(c), and any extensions which are technically and economically necessary, must satisfy requirements relating to the economic and social development of the regions concerned, particularly the Mezzogiorno.

The Minister for Merchant Shipping is consequently authorised to grant subsidies for the provision of those services, by concluding ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments, for a period of 20 years.’

10. Article 9 of Law No 684 states:

‘The agreements under the preceding article must stipulate:

- (1) the routes to be served;
- (2) the frequency of each service;
- (3) the types of vessels allocated to each route;
- (4) the subsidy, which must be determined on the basis of net income, the amortisation of investments, operating costs, organisational costs and financial burdens.

Before 30 June each year, the subsidy to be paid for the year shall be adjusted whenever, during the previous year, at least one of the economic components specified in the agreement was subject to variation by more than one twentieth of the value used for the same item when determining the previous year’s subsidy.’

11. Article 18 of Law No 684 provides:

‘The financial burden arising from the application of the present Law is to be met in the sum of ITL 93 billion by the amounts already entered in Chapter 3061 of the Ministry for Merchant Shipping’s estimate of expenditure for the financial year 1975 and by those which will be entered in the corresponding chapters for successive financial years.’

12. Article 19 of Law No 684 provides:

‘Until the date of approval of the agreements provided for under the present Law, the Minister for Merchant Shipping shall, in agreement with the Minister for the Treasury, make in deferred monthly instalments payments on account which may not in the aggregate exceed [90%] of the total amount indicated in Article 18.’

13. Law No 684 was subject to an implementing measure, decreto del presidente della Repubblica n. 501 — Regolamento di esecuzione della legge 20 dicembre 1974, n. 684 (Presidential Decree No 501 on the implementation of law No 684) of 1 June 1979 (GURI No 285 of 18 October 1979, p. 8531), Article 7 of which states that the payments on account referred to in Article 19 of that Law are to be paid to the undertakings providing services of major national interest until the date on which the documents relating to the conclusion of the new agreements are registered by the Court of auditors.

The dispute in the main proceedings, the questions referred and the procedure before the Court

14. As may be seen from the judgments of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391), and of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335) which resulted from requests for preliminary rulings introduced in the main proceedings in those cases and to which reference is made for a fuller account of the facts and the procedure prior to those judgments, FTDM and Tirrenia are two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily.

15. In 1981, FTDM brought proceedings against Tirrenia before the Tribunale di Napoli (District Court of Naples, Italy) seeking compensation for the damage which it claimed to have suffered as a result of the low-fare policy operated by Tirrenia between 1976 and 1980, relating to its ferry services. FTDM argued, in particular, that this low-fare policy had been made possible by the payment of public subsidies in breach of Community rules on State aid.

16. FTDM’s action was dismissed by decision of 26 May 1993, upheld on appeal by judgment of the Corte d’appello di Napoli (Court of Appeal, Naples, Italy) of 13 December 1996.

17. The appeal brought against that judgment by the insolvency administrator for FTDM was dismissed by judgment of the Corte suprema di cassazione (Supreme Court of Cassation, Italy) of 19 April 2000, which, in particular, refused to accede to the request of the administrator to submit questions of interpretation of European Union law to the Court of Justice, on the ground that the approach adopted by the court ruling on the substance of the case complied with the relevant legislative provisions and was consistent with the Court’s case-law.

18. By writ of summons of 15 April 2002, the insolvency administrator of FTDM instituted proceedings against the Italian Republic before the Tribunale di Genova (District Court of Genoa, Italy), alleging liability on the part of that State on various grounds: first, in its legislative capacity, for having granted aid under Law No 684, which was incompatible with the EC Treaty; second, in its judicial capacity, for having failed, through the decision of the Corte suprema di cassazione (Supreme Court of Cassation), to fulfil its obligation to refer questions to the Court of Justice for a preliminary

ruling on the compatibility with EU law of Law No 684; and, finally, in its administrative capacity, for having failed to inform the Corte suprema di cassazione (Supreme Court of Cassation) about the initiation of infringement proceedings by the Commission in relation to that Law, thereby failing to fulfil its obligation of loyal cooperation with the European institutions.

19. FTDM claimed compensation from the Italian Republic for the losses incurred by it, assessed at EUR 9 240 000.

20. On 14 April 2003, the Tribunale di Genova (District Court of Genoa) made the reference for a preliminary ruling to the Court of Justice which gave rise to the judgment of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391).

21. Further to that judgment, by decision of 27 February 2009, the Tribunale di Genova (District Court of Genoa) found that the ‘State judiciary [had] acted unlawfully’, and by a separate order, directed that the proceedings should continue so that the claim for damages from that unlawful conduct could be heard. It was at that stage of the proceedings that, uncertain as to the interpretation of EU law on State aid, the Tribunale di Genova (District Court of Genoa) made a further reference to the Court of Justice which gave rise to the judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335), in which the Court ruled:

‘Under European Union law subsidies paid in circumstances such as those in the main proceedings, pursuant to national legislation providing for payments on account prior to the approval of an agreement, constitute State aid if those subsidies are liable to affect trade between Member States and distort or threaten to distort competition, which it is for the national court to determine.’

22. On 30 July 2012, the Tribunale di Genova (District Court, Genoa) ordered the Italian Republic to pay FTDM the sum of EUR 2 330 355.78, increased to reflect changes in monetary values, together with interest at the statutory rate, in respect of compensation for the damage suffered because of the unlawful conduct of the State in its judicial capacity.

23. That decision was also challenged, principally by the Italian Republic and, incidentally, by FTDM.

24. By judgment of 24 July 2014, the Corte d’appello di Genova (Court of Appeal, Genoa, Italy) set aside the first instance decision and ruled on the merits of the case.

25. That court, while rejecting the claims for compensation which FTDM based on the liability of the Italian Republic in its judicial and administrative capacities, upheld the claim based on the liability of that Member State in its legislative capacity, due to the adoption by the Italian Parliament of Law No 684, and therefore ordered that State to pay compensation to FTDM in respect of the loss suffered by it, assessed at EUR 2 330 355.78, increased to reflect changes in monetary values, together with interest at the statutory rate.

26. In particular, the Corte d’appello di Genova (Court of Appeal, Genoa) considered that the State aid in question, in so far as it did not predate the entry into force of the Treaty establishing the European Community, had to be regarded as ‘new aid’, subject to the notification obligation under Article 93(3) of the EC Treaty (subsequently Article 88(3) EC, now Article 108(3) TFEU) so that, in the absence of such notification, it had to be found to be in breach of EU law.

27. The judgment of the Corte d’appello di Genova (Court of Appeal, Genoa) was challenged before the referring court by the Presidenzia del Consiglio dei Ministri (Presidency of the Council of Ministers). The latter argues, in particular, that the aid granted to Tirrenia was wrongly classified as new aid instead of existing aid.

28. The referring court notes that, for the purposes of the legal classification of a State aid in the context of a non-liberalised market such as that at issue in the main proceedings, as existing aid or new aid, it is appropriate to examine, first, the applicability *ratione temporis* and the scope of Article 1(b)(v) of Regulation No 659/1999.

29. Next, that court emphasises the importance of one of the characteristics of the relevant market, namely the absence of liberalisation of that market. It considers that, in paragraph 143 of its judgment of 15 June 2000, *Alzetta and Others v Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151) (the ‘Alzetta judgment’), the General Court established a principle according to which a system of aid established in a market that was initially closed to competition had, when that market was liberalised, to be regarded as an existing aid system. That statement of the General Court was confirmed in paragraphs 66 to 69 of the judgment of 29 April 2004, *Italie v Commission* (C-298/00 P, EU:C:2004:240). Thus, for the purposes of the legal classification of the State aid at issue in the main proceedings as existing aid or new aid, it is necessary to examine the scope of that principle.

30. Finally, the referring court has doubts about the applicability of Article 1(b)(iv) of Regulation No 659/1999, read in conjunction with Article 15 of that Regulation, to State aid granted before the entry into force of that Regulation. According to the referring court, it appears from the judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235) that those provisions could apply to facts preceding the entry into force of that Regulation.

31. In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘(1) For the purposes of classifying the aid in question (as “existing” and, therefore, not “new” aid), is Article 1(b)(v) of Regulation No 659/1999, according to which “aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation”, applicable and, if so, under what conditions; or is the principle (formally different in scope from that of the abovementioned substantive law provision) established by the General Court [in its *Alzetta* judgment, paragraph 143], and confirmed, by the ruling, of interest in the present case, of the Court of Justice in its judgment of 29 April 2004, *Italy v Commission* (Case C-298/00 P, EU:C:2004:240, paragraphs 66 to 69) — according to which “... a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, since at the time of its establishment it did not come within the scope of Article 92(1) of the [EC] Treaty [subsequently Article 87(1) EC], which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition” — applicable and, if so, under what conditions?
- (2) For the purposes of classifying the aid at issue, is Article 1(b)(iv) of Regulation No 659/1999, according to which “existing” aid is “aid which is deemed to be existing aid pursuant to Article 15” — Article 15 establishing a 10 year limitation period for recovering unlawfully granted aid — applicable and, if so, under what conditions — or are the well-established principles of the Court of Justice of the protection of legitimate expectations and legal certainty applicable and, if so, under what conditions (whether or not similar to the principle set out in the substantive law provision referred to above)?’

32. Written observations have been submitted by FTDM, the Italian and French Governments and the Commission. A hearing, attended by those interested parties, took place on 7 June 2018.

Analysis

33. As I indicated in the introduction to this Opinion and as is apparent from the facts set out above, the Italian authorities have shown a certain amount of inertia in order to avoid liability for the granting of the contentious subsidies, and, in my view, a disregard for the rules on State aid.

34. What is unique about this case is that, notwithstanding the fact that the Corte d'appello di Genova (Court of Appeal, Genoa) allowed the claim for compensation from FTDM largely on the ground that the aid at issue had to be classified as 'new' aid, unlawfully granted, the Italian authorities have continued to claim, before the Court of Cassation, that the aid should actually be classified as 'existing' aid. The Italian authorities argue, first, that such aid had been granted at a time when the activity of maritime cabotage had not yet been liberalised and, second, that it had not been contested by the Commission within the limitation period of 10 years referred to in Article 15 of Regulation No 659/1999 (see Article 1(b)(iv) of that Regulation).

35. Even though, in support of the first ground put forward for classifying the disputed aid as existing aid, the Italian authorities argue that the definition in Article 1(b)(v) of Regulation No 659/1999 is not relevant in that it does not reflect the law applicable at the time of the grant of the disputed aid, they do, however, claim, in support of their second ground, that the aid falls within the definition of existing aid contained in Article 1(b)(iv) of that Regulation.³

36. Thus, before considering each of the questions referred by the national court, it seems to me appropriate to review the scope and significance of the distinction between existing aid and new aid, and, in this particular context, of the influence which the definitions in Regulation No 659/1999 may have for the classification of aid as existing or new.

Preliminary remarks on the distinction between existing aid and new aid and on the scope of Regulation No 659/1999 in this respect

37. It is well established that the classification of a State aid measure as 'new' or 'existing' has some important legal consequences, particularly in terms of its procedural treatment.

38. First of all, *new aid* must be notified by Member States to the Commission and must be authorised by the Commission before being implemented. It also follows from Article 108(2) and (3) TFEU that the Commission is required, either at the stage of the preliminary examination or the formal investigation stage, to examine the compatibility of the new aid with the internal market. Articles 2 to 7 of Regulation No 659/1999 (now Articles 2 to 7 of Regulation 2015/1589) specify, in the interests of legal certainty, the detailed rules on the application of the Commission's monitoring of plans to grant new aid.

39. Second, it is well established that, where new aid is granted without the Commission's authorisation, it becomes unlawful (see Article 1(f) of Regulation No 659/1999, now Article 1(f) of Regulation 2015/1589). This classification as new aid entails two sets of consequences. First, the Commission is required to examine the measures in question and, where it finds that they are incompatible with the internal market, it must order its recovery. Second, national courts, which are not authorised to rule on the compatibility of aid measures, may, nonetheless, in certain circumstances, order the recovery of the aid.⁴

³ According to the Italian authorities, the latter provision applies to all aid measures including those granted prior to the entry into force of Regulation No 659/1999 (see judgment of 10 April 2003, *Scott v Commission*, T-366/00, EU:T:2003:113, paragraph 53).

⁴ See judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79).

40. So-called ‘existing’ aid is subject to different procedural treatment under Article 108(1) TFEU. That provision stipulates that the Commission is, in cooperation with Member States, to keep under constant review all systems of existing aid in those States and that it shall propose to the latter any appropriate measures required by the progressive development or functioning of the internal market under a scheme set out in Articles 17 to 19 of Regulation No 659/1999 (now Articles 21 to 23 of Regulation 2015/1589).

41. Under that scheme, existing aid may be implemented, provided that the Commission has not found it to be incompatible.⁵ Unlike new aid, existing aid does not therefore have to be notified to the Commission and cannot be classified as unlawful. Furthermore, the appropriate measures which the Commission is required to take for existing aid schemes can apply only to the future modification or future abolition of such schemes and may not under any circumstances require their recovery.

42. Although it entails significant legal consequences, the distinction between new aid and existing aid is not always easily understood.

43. It should be remembered that the concept of ‘existing’ aid (and, if it not be such, the concept of ‘new’ aid), which finds its origins in the Treaties, is not defined as such therein, and reference must therefore be made to the definitions contained in secondary legislation, particularly in that governing the rules of procedure on State aid, namely Regulation No 659/1999, at issue in the present case, (and Regulation 2015/1589 which has succeeded it), and to the clarification provided by the Court of Justice and the General Court in the cases brought before them.

44. These ‘procedural’ Regulations aim to codify and clarify the decision-making practice of the Commission, with a view, not only to ensuring effective and efficient procedures pursuant to the provisions of the Treaties⁶ but also to meet the need for transparency and legal certainty.⁷ Their primary objective is to clarify and regulate the powers of the Commission and the courses of action it may take in the field of State aid.

45. Those regulations contain important clarifications on both the categories of aid that must be considered to be existing aid (and, if it is not such, new aid) and the regime which applies to each different category of State aid in the context of the Commission’s centralised review of aid measures.

46. While those regulations contain guidelines which are largely in conformity with the lessons to be drawn from the case-law of the EU courts — case-law which, in this context, is still the primary reference point for the interpretation of Treaty provisions⁸ — they can also be innovative in certain respects.

47. This is particularly so as regards the categories of existing aid referred to in Regulation No 659/1999.

⁵ See, for example, judgment of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 20).

⁶ See recital 2 of Regulation No 659/1999.

⁷ See, in particular, recitals 3, 4, 7, 11, 14, 17 and 21 of Regulation No 659/1999.

⁸ See, in that respect, communication of the Commission on the concept of ‘State aid’ referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1, paragraph 3).

48. As the Court has stated in its case-law prior to the entry into force of Regulation No 659/1999, it is clear from both the content and the purpose of the provisions of Article 93 of the EC Treaty (now Article 108 TFEU) that aid which existed before the entry into force of the Treaty (so-called ‘pre-accession’ aid) and that which could properly be put into effect under the conditions laid down by Article 93(3) of the EC Treaty, including that arising from the interpretation of that Article given by the Court in its judgment of 11 December 1973, *Lorenz* (120/73, EU:C:1973:152, paragraphs 4 to 6)⁹ — must be regarded as existing aid within the meaning of that article.

49. It follows that three of the five categories of existing aid covered by Article 1(b) of Regulation No 659/1999 reflect those which had already been identified by the EU judicature, namely aid put into effect before the entry into force of the Treaty in the Member State concerned (Article 1(b)(i)) and the two categories of aid deemed to be authorised (Article 1(b)(ii) and (iii)).

50. On the other hand, in comparison with what could emerge from the text of the Treaty, read in the light of the case-law of the Court, the remaining two categories of aid, namely aid in respect of which the limitation period has expired (Article 1(b)(iv), read in conjunction with Article 15 of Regulation No 659/1999) and aid measures which, it can be established, did not constitute aid at the time they were put into effect and which subsequently became aid due to the evolution of the market (Article 1(b)(v) of that regulation), are innovative.

51. The present case requires the scope of these provisions to be addressed. The first question relates to the existing aid referred to in Article 1(b)(v) of Regulation No 659/1999. The second question concerns the nature of the aid for which it may be considered that the limitation period has expired (see Article 1(b)(iv) and Article 15 of Regulation No 659/1999).

52. The application *ratione temporis* of Regulation No 659/1999 — and thus the applicability of its innovative provisions regarding the definition of ‘existing’ aid in the action for damages in the main proceedings — seems to me to be ripe for discussion as regards subsidies granted prior to the entry into force of that instrument.¹⁰

53. While it is undeniable that Regulation No 659/1999 largely reproduces the *acquis communautaire* relating to the procedure for implementing the provisions of the Treaties concerning State aid and that it is essentially procedural in scope — implying, in principle, that it is meant to apply from the date on which it entered into force,¹¹ the fact remains that the definition in Article 1(b) of that regulation of the circumstances in which aid is to be regarded as existing appears broader than that resulting from the previous case-law of the Court.¹²

54. In the present case, I doubt that the Italian authorities can, in any event, rely on the categories of existing aid referred to in Article 1(b)(iv) of Regulation No 659/1999 and Article 1(b)(v) of that regulation to preclude actions for damages by FTDM designed to punish the infringement of the obligation to give notice of the contested measures, which, there was every reason to believe, constituted new aid at the relevant time.

55. In that regard, it is noteworthy that, it was only at a very advanced stage of the examination by the national courts of the actions for damages brought by FTDM, an examination which spanned several decades, that the Italian authorities considered it appropriate to rely on those provisions.

⁹ See judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311, paragraph 13), and of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313, paragraph 48).

¹⁰ This issue is discussed by FTDM which submits, in essence, that the provisions of Regulation No 659/1999 cannot be applied retroactively in order to classify as existing aid measures which, at the time of their introduction, could not be categorised as such.

¹¹ See, in particular, judgment of 26 March 2015, *Commission v Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 33 and the case-law cited).

¹² See, in particular, judgment of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313, paragraph 48), delivered shortly before the entry into force of Regulation No 659/1999.

56. Finally, it should be noted that the primary purpose of the provisions of Regulation No 659/1999 (and of Regulation 2015/1589 which succeeded it) is to clarify the practice and rules of procedure to be followed *by the Commission* in its assessment of aid measures. The purpose of these regulations is not a priori to govern the examination by the national courts of the aid measures on which they are required,¹³ to adjudicate, albeit that the definitions contained therein may guide national courts.¹⁴

57. It is with all these considerations in mind, which are all important in the event that the Court considers that the contentious aid can be classified as existing aid pursuant to the provisions of Article 1(b) of Regulation No 659/1999 — which, as I shall explain, does not seem to me to be the case — that I will examine the questions referred.

The first question: relevant criteria for the classification of aid as new or existing in a market not yet liberalised

58. By its first question, the referring court seeks to ascertain the relevant criteria for the classification of the State aid referred to in the main proceedings as ‘new’ or ‘existing’ in the case of a market which is not yet formally liberalised.

59. According to the referring court, there is a conflict between the criterion referred to in the first sentence of Article 1(b)(v) of Regulation No 659/1999 and that established by the General Court at paragraph 143 of the *Alzetta* judgment.

60. In my view and, irrespective of whether there is such a conflict, this question is based on a false premiss.¹⁵

61. To properly understand the scope of the category of existing aid referred to in Article 1(b)(v) of Regulation No 659/1999, reference should be made to recital 4 of that regulation, which states that ‘the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; ... following these developments, certain *measures, which at the moment they were put into effect did not constitute State aid, may since have become aid*’.¹⁶

62. In accordance with Article 1(b)(v) of Regulation No 659/1999, the date on which an activity is liberalised by EU law must therefore be taken into consideration solely in order to rule out that, after that date, a measure which did not constitute aid before that liberalisation will be classified, subsequently, as existing aid. However, the mere fact that a date for liberalisation has been fixed as a result of the entry into force of European legislation is not sufficient to prevent a measure from being classified as new aid if, by reference to market developments, it can be established that the measure was adopted on a market that was already open, wholly or partly, to competition before the date set for the liberalisation of the activity in question by EU law.¹⁷

63. In other words, for the purposes of applying that provision, it is assumed that the State measures in question, at the time of their adoption, did not constitute State aid, precisely because they did not satisfy the conditions of influencing trade between Member States and of distorting competition.

¹³ In this regard, it should be noted that Article 23a of Regulation No 659/1999 (now Article 29 of Regulation 2015/1589) specifically provides for mechanisms of cooperation with national courts which are intended, in particular, to ensure a coherent application of Articles 107 and 108 TFEU.

¹⁴ See, in particular, in that respect, as regards the classification as existing aid within the meaning of Article 1(b)(i) of Regulation No 659/1999, judgments of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraphs 42 to 44), and of 19 March 2015, *OTP Bank* (C-672/13, EU:C:2015:185, paragraph 61).

¹⁵ This was finally admitted at the hearing by the French Republic, which initially intervened in support of the Italian Republic on this point.

¹⁶ Emphasis added.

¹⁷ See, most recently, judgment of 16 January 2018, *EDF v Commission* (T-747/15, EU:T:2018:6, paragraph 369), currently under appeal before the Court of Justice (Case C-221/18 P).

64. This assumption is also present in the *Alzetta* judgment. In that judgment, the General Court, in order to prevent the measures at issue from being classified as new aid, took into consideration the fact that ‘the systems of aid in question did not, at the time of their introduction in 1981 and 1985, come within the scope of Article 92(1) of the Treaty (now Article 107(1) TFEU) as regards aid granted in the local, regional or national transport sector’.¹⁸

65. In this regard, it should be recalled that, in order to qualify as State aid within the meaning of Article 107(1), a measure must fulfil four cumulative conditions. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on its recipient. Fourth, it must distort or threaten to distort competition.¹⁹

66. As regards markets which are not yet open to competition, while it is true that State aid can, in principle, be deemed to be existing aid because it can be established that it was not an aid when put into effect, in particular because the market concerned was not liberalised, the Court has, however, already held that such an absence of liberalisation does not necessarily exclude the possibility that the State aid is liable to affect trade between Member States and is capable of distorting or threatening to distort competition.²⁰

67. Consequently, the fact that the maritime cabotage market at issue in the main proceedings was not liberalised by legislation until after the payment of the subsidies at issue²¹ does not necessarily mean that those subsidies do not fulfil the conditions referred to above.

68. In particular, as is apparent from paragraph 50 of the judgment in the *Fallimento Traghetti del Mediterraneo* case, it cannot be excluded, first, that Tirrenia was in competition with undertakings from other Member States on the domestic routes concerned and, second, that it was in competition with such undertakings on international routes. Nor can it be excluded that, in the absence of any separate accounting for its various activities, there was a risk of cross-subsidisation, that is to say, in the present case, a risk that the revenue from its cabotage activity which received the subsidies at issue in the main proceedings, was used for the benefit of activities carried on by it on its international routes.²²

69. As indeed the referring court has stated, it is clear from a series of cases concerning undertakings of the Gruppo Tirrenia di Navigazione which gave rise to the judgments of 10 May 2005, *Italy v Commission* (C-400/99, EU:C:2005:275); of 20 June 2007, *Tirrenia di Navigazione and Others v Commission* (T-246/99, not published, EU:T:2007:186); and of 4 March 2009, *Tirrenia di Navigazione and Others v Commission* (T-265/04, T-292/04 and T-504/04, not published, EU:T:2009:48) that the absence of formal liberalisation of the maritime cabotage market was irrelevant as regards the classification of some of the State aid measures at issue in those cases as new aid.

70. Thus, the fact that the State aid concerned was intended to support undertakings in markets that had not yet been liberalised did not exempt the State authorities concerned from compliance with the Treaty provisions relating to new State aid.

¹⁸ See paragraph 146 of the judgment in *Alzetta*.

¹⁹ See, in particular, judgments of 21 December 2016, *Commission v Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); of 21 December 2016, *Commission v World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53); and of 27 June 2017, *Congregación de Escuelas oficiales Pías Provincia Betania*, (C-74/16, EU:C:2017:496, paragraph 38).

²⁰ See, in this respect, judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335, paragraph 49).

²¹ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) liberalised maritime transport services from 1 January 1993. Article 6(2) of that regulation provided, inter alia, that the island cabotage services in the Mediterranean were temporarily exempted from the implementation of the regulation until 1 January 1999.

²² Judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraphs 49 and 50).

71. Provided that a national measure, when it is implemented, falls within the concept of State aid because it fulfils all the conditions referred to above, and provided it is accepted, *inter alia*, that it is liable to affect trade between Member States and to distort or threaten to distort competition, it cannot, in principle, be classified as existing aid purely because of the absence of a formal liberalisation of the market concerned.

72. In the present case, it is apparent from the file submitted to the Court that the national court has verified that the conditions for classification of the subsidies at issue as State aid were met. That court has, in all likelihood, endorsed the findings of the Corte d'appello di Genova (Court of Appeal, Genoa) that the relevant market was, at the material time, a competitive market. In particular, it is apparent from paragraphs 22 and 54 of the order for reference, that, according to the referring court, the subsidies granted to Tirrenia were liable to affect trade between Member States and that 'they are potentially liable to affect trade and free competition'. The referring court itself therefore considers that these subsidies were liable to distort or threaten to distort competition.²³

73. Therefore, in order to answer the first question, it must be considered that the subsidies at issue in the main proceedings cannot be classified as existing State aid purely because of the formal absence of liberalisation since it is agreed, first, that it was capable of affecting trade between Member States and, second, that it distorted or threatened to distort competition.

74. Additionally, neither Article 1(b)(v) of Regulation No 659/1999 nor the principle established by the General Court in the *Alzetta* judgment seem to me to be applicable to the present case.

75. I therefore fully concur with the view of the Commission that, in order to reply to the first question, it must be considered that the subsidies at issue in the main proceedings cannot be classified as State aid purely because of the formal absence of liberalisation, since it is common ground, first, that the aid was liable to affect trade between Member States and, second, that it distorted or threatened to distort competition.

76. Having regard to all those considerations, and without my needing to examine any further whether the provisions of Regulation No 659/1999 are applicable *rationae temporis*, the answer to the first question should be that, for the purposes of classifying the State aid at issue in the main proceedings as existing aid or new aid, it is not necessary to apply the rule in Article 1(b)(v) of Regulation No 659/1999 or the principle established in the *Alzetta* judgment that aid paid to undertakings operating in a market which has not yet been liberalised must be considered to be existing aid.

The second question: applicability of Article 1(b)(iv) of Regulation No 659/1999 or of the principles of legitimate expectations and legal certainty

77. By its second question, the referring court seeks to ascertain whether, for the purposes of the classification of the aid at issue in the main proceedings as existing or new, it is possible to rely on Article 1(b)(iv) of Regulation No 659/1999, which defines existing aid as 'aid which is deemed to be existing pursuant to Article 15' of that regulation, or whether reference should instead be made to the principles of protection of legitimate expectations and legal certainty.

²³ At the hearing, the Italian Republic maintained, however, that there could be no question of distortion of competition in the relevant market; which it had specifically contested, by different claims, before the referring court.

Reference to Article (1)(b)(iv) of Regulation No 659/1999

78. It is important to note that the case in the main proceedings concerns an action regarding State liability for breach of State aid rules, and, in particular, for breach of its obligation to give prior notification of aid measures, in breach of Article 108(3) TFEU. The applicant in the main proceedings, a competitor of the aid beneficiary, is seeking compensation for the loss which it claims to have suffered as a result of the unlawful grant of the disputed subsidies.

79. Furthermore, it is apparent from the file submitted to the Court that the Commission has not adopted a decision on the lawfulness and compatibility of the State aid at issue in the main proceedings (a case of stand-alone private enforcement).

80. As the Court has already had occasion to clarify, in its judgment in *Transalpine Ölleitung in Österreich*, while the procedural rules contained in Regulation No 659/1999 apply to all administrative procedures in the matter of State aid pending before the Commission at the time when the regulation entered into force, namely 16 April 1999, that regulation does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty, as interpreted by the Court.²⁴

81. Indeed, there is well-established case-law that, as regards supervision of compliance by Member States with their obligations under Articles 107 and 108 TFEU, the roles played by the Commission and the national courts are complementary and separate. Whilst assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission and is thus subject to review by the EU Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) TFEU is infringed.²⁵

82. In the exercise of their functions of safeguarding the rights of individuals, national courts enjoy a degree of independence and autonomy as regards intervention from the Commission.

83. This is particularly so where they are called upon to rule on claims for compensation, submitted by competitors of the undertakings which have been the beneficiaries of the aid measures, for losses allegedly caused by the unlawful grant of that aid.

84. Thus, the possibility of claiming damages is, in principle, independent of any parallel Commission investigation relating to the aid in question.

85. In that regard, the Court has already held several times that the initiation by the Commission of the formal investigation procedure cannot release national courts from their duty to safeguard the rights of individuals faced with a possible breach of Article 108(3) TFEU.²⁶

86. Likewise, it should be recalled that, as regards the level of autonomy of the national courts, a Commission decision finding aid that was not notified to be compatible with the internal market does not have the effect of regularising *ex post facto* implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 108(3) TFEU,

²⁴ Judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraphs 34 and 35).

²⁵ See judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraphs 37 and 38 and the case-law cited).

²⁶ See, *inter alia*, judgments of 11 July 1996, *SFEI and Others* (C-39/94, EU:C:1996:285, paragraph 44), and of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 32).

since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness.²⁷

87. Therefore, where a claimant can establish before the national court that he has suffered damage caused by the premature implementation of the aid, and, more specifically, by the unlawful competitive advantage thereby gained by the beneficiary, the action for damages can be upheld even if, at the time when the national court decides the claim, the Commission has already approved the aid in question.

88. That finding applies, *mutatis mutandis*, in a situation where, as in the present case, the Commission has not adopted a decision on the legality of the aid in question. In the same way as a decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising the measures implementing the aid *ex post facto*, which were originally invalid on the grounds that they had been adopted in breach of the notification and standstill obligations provided for by the Treaty, the absence of a Commission decision on aid measures cannot, a fortiori, have the effect of regularising those measures through the passage of time.

89. In this context and with particular regard to the role of the national courts when dealing with such actions for damages in ‘stand-alone’ cases and to the level of independence of these courts from the Commission, it is evident that the concept of existing aid within the meaning of Article 1(b)(iv) of Regulation No 659/1999 is closely connected to the rules on limitation laid down in Article 15 of that regulation, which, as is clear from paragraph (1) of that article, relate to ‘the powers of the Commission in relation to the recovery of aid’.

90. This concept, as set out in Article 1(b)(iv) of the said regulation, covers all aid in respect of which the 10 year limitation period applicable to the specific powers of the Commission to recover aid has expired. This rule on limitation seeks to ensure that all decision-making by the Commission is carried out within a reasonable time-frame. Failure to do so is capable of giving rise to a legitimate expectation on the part of those concerned.²⁸

91. The expiry of the limitation period of 10 years provided for by Article 15(1) of Regulation No 659/1999 merely sets a time limit on the Commission’s powers regarding the recovery of unlawful aid. The subject whose power of suspensive action under paragraph (2) of that article is limited indicates, in my view, that the period in question only defines the temporal scope of the Commission’s powers of recovery of unlawful aid.²⁹

92. However, that temporal limitation on the Commission’s powers does not affect the possibility for the national court to find that aid is unlawful. The fact that the aid can become an existing aid by virtue of Article 15(3) of Regulation No 659/1999 does not remedy the unlawful act committed by the State as a result of the lack of notification.

93. In other words, the expiry of the limitation period cannot have the effect of creating an absolute and retroactive regularisation of the State aid concerned, transforming it into existing aid, thereby removing *ex post facto* the legal basis of an action brought against the Member State concerned by individuals and competitors affected by the grant of the unlawful aid.

²⁷ See judgments of 21 November 1991, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v Syndicat National des Négociants et Transformateurs de Saumon* (C-354/90, EU:C:1991:440, paragraph 16); of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 63); and of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 41).

²⁸ See, in particular, judgment of 24 November 1987, *RSV v Commission* (223/85, EU:C:1987:502, paragraph 17).

²⁹ See, in particular, judgment of 30 April 2002, *Government of Gibraltar v Commission* (T-195/01 and T-207/01, EU:T:2002:111, paragraph 130).

94. Any other interpretation would undermine the obligation to notify aid measures which constrains Member States³⁰ and would thus deprive Article 108(3) TFEU of its effectiveness.

95. Moreover, this would affect the rights of individuals who are also beneficiaries and direct recipients of the protection conferred by that provision. There is, in my view, no reason why the individuals who may have suffered loss as a result of the grant of the unlawful aid, in that such aid has caused a distortion of competition to their detriment, should see their claims for damages compromised because of inaction or lack of decision-making on the part of the Commission with regard to the measures in question.

96. In the present case, the classification of the measures in question as existing aid under Article 1(b)(iv) of Regulation No 659/1999 would reduce the effectiveness of the judicial oversight of the State aid unlawfully granted to Tirrenia, which would affect the legitimate expectations of FTDM which brought an action for damages against the Italian Republic on the basis of the principles and guidelines which comprised the *acquis communautaire* at the time when the State aid was granted.

97. In the present case, the annual grants which Tirrenia received from 1976 to 1980 constituted State aid which must be regarded as new aid. As such, the Italian Republic should have notified them prior to their implementation, in accordance with Article 93(3) of the EC Treaty (now Article 108(3) TFEU). Since such prior notification was not carried out, the aid from which Tirrenia benefited between 1976 and 1980 had to be classified as unlawfully granted State aid.

98. The fact that the aid can become an existing aid pursuant to Article 15(3) of Regulation No 659/1999 does not remedy the unlawfulness of the implementation of the aid.

99. The only limitation rules which might apply before the national court are those arising under national law, interpreted in the light of the principles of effectiveness and equivalence.³¹

100. A final clarification is required in this context regarding whether the provisions of Regulation No 659/1999 may be invoked before the national court.

101. The referring court took the view that the Court has already held, in its judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235), that Regulation No 659/1999 is applicable to the assessment by a national court of whether State aid is actually existing aid, even in a situation where the aid was granted before the entry into force of that regulation.

102. However, it is noted that, in the aforementioned case, the Court was asked, in particular, to consider whether, where privileges such as those at issue in that case fall within the scope of that provision, the Member State which introduced them was required to follow the preliminary examination procedure provided for in Article 88(3) EC (now Article 108(3) TFEU) on new aid. The case giving rise to that judgment did not concern an action for damages, but rather the possible non-application of national provisions establishing privileges which were potentially incompatible with the rules of State aid law.

103. No arguments can therefore be drawn from that case-law in order to rely on the definition contained in Article 1(b)(iv) of Regulation No 659/1999 in the context of the claim for damages at issue in this case.

³⁰ See, in this regard, judgments of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 60); of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraphs 41 and 42); and of 12 February 2008, *CELF v ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraphs 40).

³¹ See, by analogy, judgment of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraphs 31 to 46).

104. It follows from all those considerations that the definition of existing aid set out in Article 1(b)(iv) of Regulation No 659/1999 is not applicable to a situation such as that at issue in the main proceedings. In other words, the FEU Treaty provisions on State aid preclude the expiry of the limitation period for the recovery of aid referred to in Article 15 of Regulation No 659/1999 from excluding a claim before a national court of State liability for infringement of the obligation of prior notification provided for in Article 108(3) TFEU.

105. It remains to be examined, as the referring court has requested in the second part of its second question, whether, and, if so, to what extent, the Italian authorities may rely, in the context of the action for damages against them, on the principles of legitimate expectations and legal certainty.

Whether the principles of legitimate expectations and legal certainty can be invoked

106. In the present case, in the absence of a Commission decision in respect of the subsidies at issue, it will be for the referring court to determine, by reference to the date on which the State decided to grant such subsidies, whether, having regard to the circumstances of the main proceedings, the aid in question must be classified as existing aid or new aid and, in the latter case, whether that aid was unlawful or not.

107. In the event that it is confirmed that the aid measures at issue were granted in breach of the obligation of prior notification, which is, in principle, an absolute and unconditional obligation, I am of the view that State authorities cannot rely on the principles of protection of legitimate expectations and legal certainty to evade their obligations in the context of an action for damages brought by a competitor of the recipient of the aid.

108. As regards, first of all, the principle of legitimate expectations, it is sufficient to recall that the right to rely on that principle, which is, in principle, open to any person in regard to whom *an institution* has given rise to justified hopes, is irrelevant in the present case, since there were no precise assurances provided by such an institution.

109. In any event, it is settled case-law that the protection of legitimate expectations cannot be relied on by a person who has violated the law in force.³² It is also well established that 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 Article 108 TFEU. This finding is even more valid for the State entities that have in fact granted the aid, which in any event cannot take advantage of their failure or of the failure of the Commission to take a decision in respect of that aid.³³

110. Furthermore, those authorities cannot rely on the principle of legal certainty.

111. Indeed, the Court has ruled that, even in a situation in which the EU legislature has not laid down any limitation period, the fundamental requirement of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers.³⁴ In this regard, a delay by the Commission in deciding that a State aid is unlawful and that it must be abolished and recovered by the Member State, may, in certain circumstances, establish a legitimate expectation on the part of the beneficiaries of that aid so as to prevent the Commission from requiring the Member State to order the refund of the aid.³⁵

³² See, in this respect, judgment of 14 July 2005, *ThyssenKrupp v Commission* (C-65/02 P and C-73/02 P, EU:C:2005:454, paragraph 41).

³³ See, in particular, judgment of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 104 and the case-law cited).

³⁴ See judgments of 14 July 1972, *Geigy v Commission* (52/69, EU:C:1972:73, paragraphs 20 and 21); of 24 September 2002, *Falck et Acciaierie di Bolzano v Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 140 and 141); and of 22 April 2008, *Commission v Salzgitter* (C-408/04 P, EU:C:2008:236, paragraph 100).

³⁵ See judgment of 24 November 1987, *RSV v Commission* (223/85, EU:C:1987:502, paragraph 17).

112. However, apart from the fact that that case-law was intended to safeguard the legitimate expectations of the beneficiary of the aid — who is, in principle, irrelevant in the context of an action for damages against the State authorities providing the aid — it involved exceptional circumstances,³⁶ which do not seem to me to bear any resemblance to the situation at issue in the main proceedings.

113. In short, it seems to me that, although the principle of legal certainty may play a role in cases where the State concerned has duly notified the aid measures that it intends to implement, that is not the case where that State has not complied with the obligation of prior notification under Article 108(3) TFEU, even though reasonable doubts might be harboured as to the legality of those measures in the light of State aid law.

114. Accordingly, neither the principle of legitimate expectations — which cannot, in any event, be relied on by a person who has violated the law in force — nor the principle of legal certainty, which cannot be invoked where the competent national authorities have not notified new aid measures — can support the position adopted by the Italian authorities.

115. The answer to the second question should therefore be that Article 1(b)(iv) of Regulation No 659/1999 is not applicable to a situation such as that at issue in the main proceedings. Moreover, since the aid in question was not granted in compliance with the obligation to notify State aid to the Commission, the Member State cannot rely on the principles of protection of legitimate expectations and legal certainty in order to avoid the obligation of restitution in the context of an action for damages.

Conclusion

116. In view of all these considerations, I propose that the Court answer the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

- (1) Neither Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU], nor the rule laid down in paragraph 143 of the judgment of 15 June 2000, *Alzetta and Others v Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151), apply to a national measure constituting State aid within the meaning of Article 107(1) TFEU, when, at the time of its implementation, such a measure was liable to affect trade between Member States and to influence competition.
- (2) Article 1(b)(iv) of Regulation No 659/1999 is not applicable to a situation such as that at issue in the main proceedings. In other words, the provisions of the FEU Treaty on State aid preclude that the expiry of the limitation period for the recovery of aid, referred to in Article 15 of Regulation No 659/1999, excludes a claim before a national court that the State is liable on the ground that it infringed the obligation of prior notification laid down in Article 108(3) TFEU. Moreover, inasmuch as the aid in question was not granted in compliance with the obligation to notify State aid to the Commission pursuant to Article 108(3) TFEU, the Member State cannot rely on the principles of protection of legitimate expectations and of legal certainty to avoid liability in the context of an action for damages brought by individuals for breach of EU law.

³⁶ The measure at issue concerned a sector which had for some years been receiving State aid approved by the Commission and its object was to meet the additional costs of an operation which had already received authorised aid (judgment of 28 January 2003, *Germany v Commission* C-334/99, EU:C:2003:55 paragraph 44).