

OPINION OF ADVOCATE GENERAL

ALBER

delivered on 15 May 2003¹

I — Introduction

1. The Italian Republic applies in the present action for the annulment of a Commission decision of 30 July 1997.² In the contested decision the Commission declared State aid granted by the Friuli-Venezia Giulia Region between 1981 and 1995 to road haulage undertakings to be partly incompatible with the common market and to that extent ordered that it be recovered.

2. In parallel with the action brought by the Italian Republic, numerous undertakings affected by the recovery order and also the Friuli-Venezia Giulia Region instituted proceedings in the Court of First Instance. In judgments delivered on 15 June 2000 (hereinafter the '*Alzetta* judgment')³ and 4 April 2000 (hereinafter the '*Friuli-Venezia Giulia Region* judgment'),⁴ the Court of

First Instance annulled the decision in part. The Italian Republic has appealed against the *Alzetta* judgment (action pending under reference C 298/00 P),⁵ seeking to have that judgment set aside in so far as it confirms the Commission's decision.

3. The main point at issue is the extent to which the aid in question was such as to distort competition in the markets concerned, which at least in the early part of the period in which the aid was paid had not yet been fully liberalised, and whether the conditions for a derogation from the prohibition on aid obtained. Another point at issue is whether the principle of the protection of legitimate expectations and the principle of proportionality conflict with the requirement that the aid be recovered.

1 — Original language: German.

2 — Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the region (OJ 1998 L 66, p. 18) — hereinafter 'the contested decision'.

3 — Joined Cases 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 *Alzetta Mauro and Others* [2000] ECR II-2319.

4 — Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia v Commission* [2001] ECR II-1169.

5 — In Case C 298/00 P the Opinion is also being delivered on 15 May 2003 ([2004] ECR I-4092).

II — Legal framework and background to the dispute

carrier established in another Member State.

A — Community law

4. In the area of transport the general provisions concerning State aid contained in Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Articles 93 and 94 of the EC Treaty (now Articles 88 and 89 EC) are applicable save where the special provisions of Article 77 of the EC Treaty (now Article 73 EC) apply. Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterways⁶ sets out the conditions under which the Member States may grant permissible aid within the meaning of Article 77 of the EC Treaty.

5. During the period in which the aid at issue was granted, road haulage in the Community was still in the process of liberalisation. In this connection a distinction must be made between, on the one hand, the international road haulage market for cross-border transport and, on the other, cabotage, that is to say the carriage of goods within one Member State by a

6. The international road haulage market was opened up between 1969 and 1992, beginning with Council Regulation (EEC) No 1018/68 of 19 July 1968 concerning the establishment of a Community quota for road haulage between the Member States (hereinafter 'Regulation No 1018/68').⁷ The Community quota provided for in the regulation and subsequently expanded by stages was divided among the Member States. Undertakings were entitled to provide, within the quotas allocated to their respective Member States, cross-border haulage services. This market was fully liberalised as from 1 January 1993.⁸

7. Liberalisation of cabotage did not begin until 1 July 1990. Here again quotas were established in the first instance; these were expanded by stages through to complete opening of the market on 1 July 1998.⁹

7 — OJ 1968 L 175, p. 13.

8 — See Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ 1992 L 95, p. 1).

9 — See Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1989 L 390, p. 3) and Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

6 — OJ 1970 L 130, p. 1, most recently amended by Council Regulation (EEC) No 543/97 of 17 March 1997 (OJ 1997 L 84, p. 6).

B — *The contested aid provisions established by the Friuli-Venezia Giulia Region*

8. Friuli-Venezia Giulia Regional Law No 28 of 18 May 1981, on action to promote and develop transport of concern to the Friuli-Venezia Giulia Region and the carriage of goods by road for hire or reward (hereinafter 'Law No 28/1981'), provided for certain aid measures in favour of road haulage contractors established within that region.

9. The scheme introduced by this law was replaced by Regional Law No 4 of 7 January 1995 on action to promote and develop transport of concern to the Friuli-Venezia Giulia Region and the carriage of goods by road for hire or reward (hereinafter 'Law No 4/1985'), which essentially contained the same provisions on aid.

10. The above laws provided for three measures, which in simplified terms can be described as follows:

- subsidies in respect of interest on loans contracted for the purpose of the development of infrastructures (construction, purchase and modernisation

of premises) and for the purchase of equipment, including road transport vehicles (Article 4 of Law No 4/1985);

- financing of the cost of leasing vehicles, trailers and semi-trailers, together with equipment for the maintenance and repair of vehicles and for the handling of goods (Article 5 of Law No 4/1985) and,

- in favour of groups and other forms of association, financing of up to 50% of investment in the construction or purchase of particular installations and equipment (Article 6 of Law No 4/1985).

11. Between 1981 and 1995 2 202 applications were accepted and aid totalling in excess of EUR 22 million was disbursed.

12. The Friuli-Venezia Giulia Region suspended allocation of the aid concerned with effect from 1 January 1996 and, between September and December 1997, sent letters to the undertakings concerned notifying them of the Commission's decision and informing them that the aid was to be recovered.

C — *The contested decision*

Article 3

13. On 30 July 1997 the Commission adopted the contested decision,¹⁰ on completion of the administrative procedure. The operative part of that decision is worded as follows:

The subsidies for financing equipment specifically adapted for, and used solely for, combined transport constitute aid within the meaning of Article 92(1) of the Treaty but are compatible with the common market by virtue of Article 3(1)(e) of Regulation (EEC) No 1107/70.

‘Article 1

Article 4

Subsidies granted under Laws No 28/1981 and No 4/1985 ... up to 1 July 1990 to companies exclusively engaged in transport operations at local, regional or national level do not constitute State aid within the meaning of Article 92(1) of the Treaty.

The subsidies granted from 1 July 1990 onwards to companies engaged in transport operations at a local, regional or national level and to companies engaged in transport operations at an international level are incompatible with the common market since they do not fulfil any of the conditions for derogation provided for in Article 92(2) and (3) of the Treaty, or the conditions provided for in Regulation (EEC) No 1107/70.

Article 2

Article 5

The subsidies not covered by Article 1 of this Decision constitute aid within the meaning of Article 92(1) of the Treaty and are illegal since they were introduced in breach of Article 93(3).

Italy shall abolish and recover the aid referred to in Article 4. The aid shall be reimbursed in accordance with the provisions of domestic law, together with interest, calculated by applying the reference

¹⁰ — Cited in footnote 2.

rates used for assessment of regional aid, as from the date on which the aid was granted and ending on the date on which it is actually repaid.

...

14. In the statement of reasons, the Commission explained *inter alia* that the subsidies covered by Article 1 did not constitute aid within the meaning of Article 92(1) of the Treaty because the cabotage market had been closed to competition until 1 July 1990. Otherwise, however, competition had already existed in the markets concerned — albeit in the framework of quota arrangements — and the measures at issue were potentially such as to affect that competition.

15. The Commission made the point that the aid measure was not allowable as compensation for alleged disadvantages suffered by the transport undertakings in relation to competitors in Austria. Nor did the fact that the beneficiaries were for the most part small undertakings operating at local or regional level preclude distortion of intra-Community trade. Lastly, the Commission considered that the conditions for derogations from the prohibition on aid laid down by Articles 77, 92 and 93 of the Treaty and by Article 3 of Regulation No 1107/70 were not met.

III — Proceedings and forms of order sought

16. By an application lodged with the Court of Justice on 28 October 1997, the Italian Republic has initiated proceedings against the Commission's decision. The action relies on the following four pleas in law:

- infringement of Article 92(1) of the Treaty and failure to provide sufficient reasons as the Commission did not state the extent to which the measures actually distort or threaten to distort competition nor the extent to which they actually affect intra-Community trade;
- erroneous refusal of a derogation under Article 92(3)(c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70 (aid in the framework of a rationalisation plan directed at reducing overcapacity);
- infringement of Article 93 of the Treaty in that the aid was characterised as new aid; and
- infringement of the principle of the protection of legitimate expectations and of the principle of reasonableness

(principio di ragionevolezza) by the order that the aid be recovered and a failure to provide sufficient reasons in that respect.

19. A more detailed presentation of the pleas in law and arguments of the parties is provided in conjunction with the legal assessment.

17. The Italian Republic claims that the Court should:

20. By order of the Court of 24 November 1998, the proceedings were stayed until the Court of First Instance had delivered the *Alzetta* judgment. They subsequently resumed.

- (1) annul in its entirety the contested decision;

in the alternative, annul the part of that decision which imposes the obligation to recover the aid granted as from 1 July 1990, plus interest; and

IV — Legal assessment

A — Preliminary comment on the subject-matter of the proceedings

- (2) in either case, order the Commission to pay the costs.

21. Before the individual pleas in law are looked at more closely, the point should first be made that the present action has become partly devoid of purpose.

18. The Commission contends that the Court should:

- (1) dismiss the action; and
- (2) order the Italian Republic to pay the costs.

22. This is because the contested decision has already been annulled in part by the *Alzetta* judgment and the *Friuli-Venezia Giulia Region* judgment. The Court of First Instance has annulled Article 2 of the decision in so far as it declares aid to be illegal that was granted from 1 July 1990 onwards to companies engaged solely in transport operations at a local, regional or national level. The corresponding order in Article 5 of the contested decision for the

aid to be abolished and recovered was also annulled. As the Commission considers that subsidies accorded to this group of undertakings prior to 1 July 1990 do not in any case constitute aid, it follows that all subsidies which were granted to undertakings engaged solely in transport operations within the national territory are no longer affected.

discrete part of the decision relating to the region alone. It follows that the case-law of the Court, according to which the matter to be tried by the Community judicature relates only to those aspects of the decision which concern the applicant, whereas unchallenged aspects concerning other addressees do not form part of the matter to be tried,¹² does not stand in the way of the partial discontinuance of the present dispute.

23. While it is true that the *Alzetta* judgment does not become binding until the Court has delivered its judgment in Case C 298/00 P, this does not apply to the *Friuli-Venezia Giulia Region* judgment, against which no appeal has been lodged.

26. Consequently, the Court now needs to judge the action only in so far as it does not concern those parts of the decision that are already definitively annulled. The case is thus now limited to aid granted to undertakings providing international road haulage services to third parties. The arguments of the parties that are no longer relevant on account of the partial discontinuance of the action are not reproduced.

24. Following delivery of the *Alzetta* judgment, the Commission consequently refrained from further defending those parts of the decision which the Court of First Instance had annulled.¹¹

B — *Infringement of Article 92(1) of the Treaty*

25. The annulment declared by the *Friuli-Venezia Giulia Region* judgment extended to the entire decision rather than to a

1. Arguments of the parties

11 — The Commission does, however, explain that 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) envisages, in Article 1(b) (v), another category of measures, which have only become illegal aid in the course of a liberalisation process. It therefore retreats from its original legal position only in respect of the legal situation prior to the entry into force of Regulation No 659/1999.

27. According to the Italian Government, the measures at issue were not such as to

12 — Case C 310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 53.

affect competition or distort intra-Community trade as they were only on a very modest scale and as the beneficiaries were in the main very small undertakings with a modest market share. Prior to full liberalisation, competition did not exist in respect of cross-border transport.

28. The Commission has not investigated the extent to which the recipients of the aid were able to bolster their market position in relation to their competitors. Nor has the Commission taken account of the Friuli-Venezia Giulia Region's difficult geographical situation as an immediate neighbour of Austria, Croatia and Slovenia. The Commission has likewise failed to establish the extent to which the measures actually distorted intra-Community trade and represented a real threat to competition. At all events, sufficient reasons have not been stated.

29. The Commission objects that, according to case-law, intra-Community trade must be regarded as affected by aid when financial assistance granted by a Member State strengthens the position of an undertaking compared with other undertakings.¹³ Moreover, neither the relatively small amount of aid nor the relatively small size of the undertaking which receives it

excludes at the outset the possibility that intra-Community trade might be affected.¹⁴ Nor need actual distortion of intra-Community trade be proved.

30. The Commission observes that the road haulage sector is characterised by a large number of very small undertakings. Very small amounts of aid can thus affect competition and intra-Community trade. It is because of this special structure that the road haulage sector has been excluded from the scope of application of the *de minimis* rule.¹⁵ Nor does the small market share held by the recipient undertakings preclude the possibility of the aid having affected intra-Community trade. The Commission contends, finally, that it has not failed to give sufficient reasons.

2. Assessment

31. For it to be possible for aid to distort competition, it is a precondition that

13 — Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11.

14 — Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 43 — *Tubemeuse*.

15 — Community guidelines of 20 May 1992 on State aid for small and medium-sized enterprises (OJ 1992 C 213, p. 2) as amended by the Community notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) and by the 1996 Community guidelines (OJ 1996 C 213, p. 4).

competition exist in the sector concerned. Cross-border road haulage was only partly opened up in the Community between 1969 and 1 January 1993. In the framework of quota arrangements, transport undertakings received a licence, usable for only one vehicle and valid for a period of one year.

32. An effective competitive situation did exist within the limit of the quotas laid down.¹⁶ The aid recipients operating from the Friuli-Venezia Giulia Region that were in possession of a licence were in competition with undertakings from other parts of Italy and with undertakings from other Member States. The Italian Government's complaint that competition existed in the international road haulage sector only from the date of full liberalisation of the markets must therefore be rejected.

33. The Italian Government complains further that the Commission has not brought forward any proof of actual distortion of competition and adverse effect on trade. At all events, the decision fails to state sufficient grounds in this respect

34. According to case-law, the very circumstances in which aid is granted may be sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition; in such cases, it is sufficient for the Commission to set out those circumstances in the statement of reasons for its decision.¹⁷ In the contested decision the Commission explained that the aid strengthened the position of the recipient undertakings in relation to competitors that were not beneficiaries by improving their financial situation and hence their scope for action. The result was also adversely to affect intra-Community trade. It follows that the Commission has complied with the requirements of case-law.

35. The Commission was not obliged to demonstrate the actual effect of aid already granted and in particular the disadvantages suffered by competitors that were not beneficiaries of such aid. If it were required to do so, this would favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage.¹⁸ This complaint must therefore be rejected.

16 — See the *Alzetta* judgment, cited in footnote 3, paragraphs 92 and 94.

17 — Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 18, Case C-113/00 *Spain v Commission* [2002] ECR I-7601, paragraph 54, and Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 58.

18 — Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 33, and Case C-113/00 *Spain v Commission*, cited in footnote 17, paragraph 54. See also the *Alzetta* judgment, cited in footnote 3, paragraphs 76 to 82.

36. The Italian Government complains further, in support of this plea, that in assessing the effect on competition the Court of First Instance failed to take sufficient account of the small size of the recipient undertakings and the small amount of aid allocated.

37. The Court has consistently held¹⁹ that even aid of a small amount is liable to distort competition and affect trade.

38. The Court has, in a recently delivered judgment, confirmed the cited case-law and has stated further that '[o]ther factors may be decisive when assessing the effect of aid on trade, such as ... whether the undertakings that receive it are operating in a sector that is particularly exposed to competition'.²⁰

39. In another ruling, Case C-351/98 *Spain v Commission*, the Court did however conclude that 'a small amount of aid to an

undertaking over a given period does not affect trade between Member States in particular economic sectors'.²¹

40. In that case, however, that finding related to undertakings not operating in the transport sector. Elsewhere in the same judgment, the Court took the view that professional road transport is a sector whose particular market structure, characterised by overcapacity and a large number of small undertakings, is such that even aid of a relatively low amount to small undertakings is liable to affect competition.²²

41. It follows then from the Court's more recent case-law that even aid of a relatively low amount to small undertakings in the transport sector may be such as to affect competition and distort trade between Member States.

42. The point must however be made that the Commission did not, in setting out the reasons for the contested decision, expressly mention the particular market structure

19 — *Tubemeuse*, cited in footnote 14, paragraph 43, Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27, Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 42, and Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraphs 46, 49 and 50.

20 — Case C-113/00 *Spain v Commission*, cited in footnote 17, paragraph 30, and Case C-351/98 *Spain v Commission*, cited in footnote 17, paragraph 51.

21 — Cited in footnote 17, paragraph 51.

22 — Paragraphs 63 to 65.

characterising the road transport sector. It did however point out that the de minimis rule (in so far as it had yet been adopted at all at the time the aid was granted) was not applicable in the road transport sector, where separate provisions on competition existed.

of a measure, to approximate the competitive conditions prevailing in a particular economic sector in the Member State concerned to those prevailing in other Member States cannot remove from the measure in question the character of an aid.²³

43. In view of the unambiguous case-law on this point, there is no need to place particularly severe demands on the statement of reasons for the decision. It was not, therefore, of critical importance that the Commission did not, in the matter of the extent to which competition in the road haulage sector may be affected despite the low amount of the aid and the small size of the recipient undertakings, discuss the special structure of the road transport market.

46. The first plea in law must therefore be rejected.

44. This complaint together with the assertion in this connection that adequate reasons were not stated must therefore be rejected.

C — Erroneous refusal of a derogation under Article 92(3)(c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70

1. Arguments of the parties

45. Concerning the argument put forward by the Italian Government that the aid served only in the final instance to compensate for disadvantages suffered by the recipient undertakings in relation to undertakings from the neighbouring countries, it has to be concluded that the Commission correctly rejected this objection with reference to the relevant case-law. The Court has ruled in this connection that the fact that a Member State seeks unilaterally, by means

47. According to the Italian Government, it had been made clear by the regional authorities that the measures were in furtherance of a restructuring process, whose purpose was to enhance safety, limit environmental pollution and provide better

23 — Joined Cases 6/69 and 11/69 *Commission v France* [1969] ECR 523, paragraph 21, and Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 21.

service. The derogation provisions under Article 92(3)(c) of the Treaty and Article 3(1)(d) of Regulation No 1107/70 had thus been applicable.

2. Assessment

(a) Article 3(d) of Regulation No 1107/70

50. Article 3 of Regulation No 1107/70²⁴ states *inter alia*:

48. The Commission objects that a derogation under Article 3(1)(d) of Regulation No 1107/70 was not available because the aid did not form part of a reorganisation plan for the sector and there was no excess capacity. Nor had the Italian authorities, in the course of the administrative procedure, provided any detailed justification for a derogation under Article 92(3)(c) of the Treaty. The measures should be viewed rather as operational aid, which could not as a rule be exempted from the prohibition on aid. The fact that the aid was such as to augment road haulage capacities is in itself sufficient to preclude a derogation.

‘... Member States shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty except in the following cases or circumstances:

...

49. The Commission also rejects the contention that it failed to give sufficient reasons. It is incumbent on the Member State to demonstrate that the conditions for a derogation obtain. The extent of the requirement to state reasons depends on the arguments put forward by the Member State.

(d) until the entry into force of Community rules on access to the transport market, where aid is granted as an exceptional and temporary measure in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems, and thus to contribute towards meeting more effectively the needs of the transport market.’

²⁴ — Cited in footnote 6.

51. It follows, in the first place, that this provision only concerns aid relating to coordination measures or obligations inherent in the concept of a public service. In the second place, in cases covered by (d) above, a reorganisation plan directed at reducing excess capacity must be present.

52. In the statement of reasons in the contested decision, the Commission maintained that the aid had not been granted as part of any reorganisation plan and that excess capacity did not exist in the transport sector. In the proceedings before the Court, the Italian Government did not put forward any arguments that might call that assertion into question. As the conditions for a derogation from the prohibition on aid under Article 3(d) of Regulation No 1107/70 are therefore not met, the Commission was right not to invoke that provision.

(b) Article 92(3)(c) of the Treaty

53. Under Article 92(3)(c) of the Treaty, 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 may be considered to be compatible with the common market.

54. As regards the application of Article 92 (3) of the Treaty the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context.²⁵ Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers.²⁶

55. The Commission took the view in the 13th paragraph of section VIII of the contested decision that aid for leasing new vehicles is operating aid as such aid relieves the undertaking of expenses it would normally have to bear in pursuit of its

25 — Case C-303/88 *Italy v Commission*, cited in footnote 19, paragraph 34, Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 55 — *Maribel*, and Case C-351/98 *Spain v Commission*, cited in footnote 17, paragraph 74.

26 — Case C-303/88 *Italy v Commission*, cited in footnote 19, paragraph 34, and Case C-351/98 *Spain v Commission*, cited in footnote 17, paragraph 74.

usual activities. With reference to the judgment of the Court of First Instance in *Siemens v Commission*,²⁷ the Commission argued further that operating aid may be declared incompatible with the common market.

56. The Italian Government has not established, nor is it apparent, in what way the Commission's view on this point could be regarded as wrong.

57. The Commission further based the refusal of a derogation under Article 92(3) (c) of the Treaty on the view that the aid did not form part of a measure of general interest, such as a restructuring plan. The Italian Government has, admittedly, argued on this point that the purpose of the aid was to promote the development of a specific economic sector, since it was directed at restructuring and the provision of improved service. It has not, however, established the existence of a corresponding plan in the interests of the Community.

58. It follows, moreover, from the above considerations that the Commission has also given sufficient reasons for its refusal to exempt the measures from the prohibition on State aid.

59. This plea in law must therefore be rejected.

D — *Infringement of Article 93 of the Treaty*

1. Arguments of the parties

60. The Italian Government contends that the measures in favour of undertakings engaged in international road haulage should not have been characterised as new aid as the transport market concerned was not (fully) liberalised until after the regional laws of 1981 and 1985 entered into force. Existing aid may be prohibited by the Commission only *ex nunc* and it may not order its recovery.

61. The Commission, on the other hand, maintains that competition existed in the market for international road haulage services as from the inception of liberal-

²⁷ — Case T-459/93 [1995] ECR II-1675, paragraph 48, confirmed by the judgment of the Court in Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507, paragraph 20 et seq. See also Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraphs 89 and 90.

isation in 1969. The fact that quotas existed does not preclude this. It follows that aid introduced after the market was opened up can on no account be regarded as existing aid.

64. The third plea in law must therefore be rejected.

E — Infringement of the principle of the protection of legitimate expectations and of the principle of reasonableness (principio di ragionevolezza)

2. Assessment

1. Arguments of the parties

62. The Italian Government's argument that the aid already existed at the time of liberalisation rests on the incorrect assumption that competition did not come into being until quotas for cross-border transport services were abolished on 1 January 1993.

65. The parties are in dispute, firstly, as to the interpretation of Article 4 of the contested decision. The Italian Government contends that the objection is restricted, as regards companies engaged in international transport operations, to aid granted from 1 July 1990 onwards. The Commission, on the other hand, takes the view that this time-limit relates only to aid in favour of companies engaged in operations at a local, regional or national level.

63. As established in the assessment of the first plea in law, competition did however already prevail, at least between the holders of licences, from the time the market for cross-border road haulage began to be opened in 1969. The subsidies granted by the Friuli-Venezia Giulia Region from 1981 and 1985 to undertakings in that economic sector thus constituted State aid from the outset and were rightly characterised by the Commission as new aid that had to be notified rather than as existing aid. The order for recovery of the aid is consequently also unobjectionable.

66. The Italian Government maintains that the region and the undertakings concerned did, moreover, entertain an expectation as to the lawfulness of the aid. It would infringe the principle of the protection of legitimate expectations and that of legal certainty for the undertakings now to be required, many years after the subsidies were granted, to reimburse them.

67. The total amount of the disbursements is, admittedly, small but it would, for the individual undertaking, be an extremely heavy burden to have to reimburse the subsidy together with interest. The obligation to reimburse would in all likelihood result in many undertakings leaving the market, with serious consequences for the social situation and the employment market. The Commission ought, in any case, to have provided better justification for the recovery order.

the Commission give further reasons for recovery.³⁰

2. Assessment

(i) Interpretation of the contested decision

68. The Commission objects that, according to the Court's consistent case-law, a Member State whose authorities have granted aid in breach of Article 93 of the Treaty may not rely on the legitimate expectations of the recipient undertaking in order to dispense with implementing a decision.²⁸

70. The finding in Article 4 of the contested decision³¹ that the subsidies granted from 1 July 1990 onwards to undertakings engaged in transport operations at local, regional or national level and to undertakings engaged in transport operations at an international level are incompatible with the common market has to be interpreted in the overall context of the operative part of that decision.

69. The Italian authorities did not give notification of the measure and the Commission did not have any grounds for approving the measures. Recovery of unlawful aid is the logical consequence of the finding that it is unlawful and cannot be regarded as disproportionate.²⁹ The fact that undertakings may have to leave the market as a result of the recovery order does not stand in the way of that order. Nor, in accordance with the case-law, need

71. The date specified in Article 4 is connected with the finding in Article 1, where the Commission states that subsidies granted up to 1 July 1990 to undertakings engaged in transport operations at local, regional or national level do not constitute aid. This statement, which relates only to internal transport operations, has to be taken into account for the time-limit specified in Article 4 to have any meaning.

28 — Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 48, and Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 17.

29 — *Tubemeuse*, cited in footnote 14, paragraph 66.

30 — Joined Cases C-278/92 to C-280/92 *Spain v Commission*, cited in footnote 19, paragraph 78.

31 — See point 13 above.

72. Where international road haulage was concerned, there was, on the other hand, no need for such a time restriction since subsidies at this level constituted aid as from the time they were first granted. Moreover, the cabotage market was opened up on the above date. This fact does, however, have implications for the assessment regarding internal transport only. There does not appear to be any meaningful argument in favour of the view that the 1 July 1990 cut-off date relates also to aid in favour of international road haulage.

73. It can be seen, then, from a systematic analysis of the operative part of the contested decision that Article 4 is to be interpreted as meaning that the Commission therein declares all aid granted in favour of international transport to be incompatible with the common market and not just aid granted after 1 July 1990. This understanding is borne out by the reasons given in the 16th paragraph of section VIII of the contested decision.

(ii) The principle of the protection of legitimate expectations

74. The Italian Government does not call into question the Court's consistently held view that recipients may not entertain a legitimate expectation that aid is lawful

unless it has been granted in compliance with the procedure laid down in Article 93 of the Treaty,³² which was not however the case in the present instance. The Italian Government's assertion that the aid in favour of international transport operations was lawful in the beginning because competition did not, at the outset, prevail in that market sector is unfounded, as established above.³³

75. The Italian Government argues further that the long period of time that elapsed between when the aid was granted and when its recovery was ordered gave rise on the part of the recipients to legitimate expectations worthy of protection. The mere lapse of time is not however sufficient to allow the recipients of illegal aid to rely on the protection of legitimate expectations in respect of the recovery order.

76. The Court has, admittedly, found that the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers.³⁴ The Court has further held that a dilatory approach by the Commission during the administrative procedure could in certain circumstances estab-

32 — See Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 14, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25.

33 — See points 31 and 32 above.

34 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140, and Case 52/69 *Geigy v Commission* [1972] ECR 787, paragraph 21.

lish a legitimate expectation on the applicant's part that the Commission would refrain from ordering the recovery of the aid.³⁵

aid, from taking account in individual cases of the principle of the protection of legitimate expectations within the limits established by the Court's decisions.³⁶

77. In the case of aid that has not been notified, the extent to which the Commission is late in taking action can however be calculated only from the date on which it learnt of the measures concerned. In the present instance, the Commission did not learn of the aid scheme at issue until September 1995. The Italian Government has not raised the matter of the Commission delaying the procedure until the adoption of the contested decision on 30 July 1997.

78. It should be noted further that the supposedly minor impact on competition of the aid in question is not a fact that could cause the recipients to entertain a legitimate expectation as to the lawfulness of that aid.

79. This complaint must, therefore, also be rejected. This does not, however, prevent the national authorities, in recovering the

(iii) The principle of reasonableness or proportionality

80. Finally, the Italian Government claims a breach of the principle of reasonableness. It is clear from its arguments that it finds it above all disproportionate that the recovery of aid should be ordered when, on the one hand, its adverse effect on competition was only small and, on the other hand, the obligation to reimburse would have severe consequences for the undertakings concerned.

81. The Court has consistently held that 'recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted for the purpose of re-establishing the previously existing situation cannot in principle be regarded as

35 — Case 223/85 *RSV v Commission* [1987] ECR 4617, paragraph 17.

36 — See, for example, Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraphs 12 and 13, and *Alcan Deutschland*, cited in footnote 32, paragraphs 24 and 25.

disproportionate to the objectives of the Treaty in regard to State aids'.³⁷

aid in question, the Commission did not, moreover, need to justify that order further.³⁸

82. This does not prevent the Commission refraining from recovery where the circumstances are exceptional. What in fact the Court has done in the case-law cited has simply been to provide the Commission with a guideline for the exercise of its discretion in the normal case.

85. As the complaint of infringement of the principle of proportionality is also unsuccessful, the plea must be dismissed in its entirety.

V — Costs

83. The Italian Government has not, however, put forward any persuasive arguments in favour of refraining from recovery of the aid. It has simply referred, without giving details, to serious consequences for the recipients of the aid and to the implications for the employment market. The Commission cannot therefore be regarded as having failed to exercise proper discretion in ordering recovery of the aid and thereby giving precedence to the restoration of competitive conditions over the interests of the recipients of the aid.

86. Article 69(6) of the Rules of Procedure of the Court of Justice provides that where a case does not proceed to judgment the costs shall be in the discretion of the Court. According to Article 69(2) of those Rules the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 69(3) of the Rules provides that where 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. The contested decision having been annulled in part by the Court of First Instance, the dispute is in part discontinued. In so far as the case proceeds to judgment, the action brought by the Italian Republic has failed. In view of this outcome, it is appropriate that each party bear its own costs.

84. The recovery order being the logical consequence of the illegal granting of the

37 — *Tubemeuse*, cited in footnote 14, paragraph 66; see also Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 99.

38 — See Case C-310/99 *Italy v Commission*, cited in footnote 37, paragraph 106, and Joined Cases C-278/92 to C-280/92 *Spain v Commission*, cited in footnote 19, paragraph 78.

VI — Conclusion

87. In the light of the foregoing I propose that the Court should:

- (1) declare the dispute discontinued in so far as the applicant has claimed that the Court should:
 - annul Article 2 of Commission Decision 98/182/EC of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage undertakings in the Region in so far as it declares illegal the aid granted from 1 July 1990 onwards to undertakings exclusively engaged in transport operations at local, regional or national level, and
 - annul Article 5 of Decision 98/182 in so far as it requires the Italian Republic to recover that aid;
- (2) for the rest, dismiss the action;
- (3) order the parties to bear their own costs.