II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 2000

on the State aid implemented by Spain in favour of the maritime transport sector (new maritime public service contract)

(notified under document number C(2000) 2447)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2001/156/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement establishing the European Economic Area, and in particular Article 62(1)(a) thereof,

Having, pursuant to the abovementioned Articles, given notice to the parties concerned to submit their comments [1], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In a complaint received on 8 January 1998, the Commission was informed that Spain had issued an invitation to tender for the performance of maritime services involving public service obligations (hereinafter PSOs) between the Spanish mainland and the Spanish islands. By letter dated 26 January 1998, the Commission informed the Spanish authorities of its concerns regarding the contract and the way it had been awarded.

(2) By letter dated 5 March 1998, the Commission informed Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the abovementioned contract, concluded between Spain and Compañía Trasmediterránea (hereinafter 'Trasmed') on 20 January 1998. The Commission gave the Spanish authorities one month in which to reply to the concerns raised on the basic substantive issues at stake and at the same time requested them to confirm within 10 working days of notification of the letter that State aid payments had been suspended.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested third parties to submit their comments on the contract.

[1] OJ C 147, 13.5.1998, p. 10.
[2] See footnote 1.

(4) The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react, and received comments from Spain in letters dated 18 March, 7 April and 23 July 1998. Several meetings also took place, including a meeting on 3 June 1999.

II. **DETAILED DESCRIPTION OF THE AID**

THE DECREE

(5) By letter dated 30 July 1997 the Spanish authorities notified the Commission, pursuant to Article 9 of Council Regulation (EEC) No 3577/92 [3], of their intention to alter the regime applying to maritime cabotage in Spain. The Spanish authorities were informed that the Commission's services had a number of problems both with the concepts behind the draft decree amending the regime and with the phrasing used. The Spanish authorities did revise some of the articles, but on 19 September 1997 they proceeded to adopt Royal Decree 1466/97 [4] without re-consulting the Commission. This being considered a failure to comply with obligations, a letter was sent to the Spanish authorities on 22 October 1997, to which they replied on 9 December 1997. A letter of formal notice was sent to them on 20 April 1998, replies to which were received in letters dated 27 May and 8 July 1998.

(6) The Decree establishes an authorisation scheme for scheduled maritime cabotage lines with and between the non-peninsular territories; provision of these services requires prior authorisation, the validity of which is conditional upon compliance with the PSOs (as specified in Article 4 of Regulation (EEC) No 3577/92) which the Spanish maritime authorities may see fit to impose upon a carrier. The Decree also establishes that, should the authorisation scheme not ensure a sufficient level of service on the abovementioned scheduled cabotage lines, the Spanish authorities may conclude the necessary public service contracts while leaving these lines open to other interested operators.

THE CONTRACT

(7) In a letter dated 2 October 1997, the Spanish authorities provided the Commission services with a copy of the administrative and technical specifications to be used in awarding a contract to provide PSO services on nine lines with the non-peninsular territories. The 20-year PSO contract with Trasmed, still in force at that time, was set to expire on 31 December 1997 [5].

(8) A series of meetings were held on 10, 15 and 16 October 1997 to discuss the issues of both the revised Decree and the new PSO contract. As there was disagreement on the compatibility of both the Royal Decree and the new PSO arrangement, the Commission services sent a series of questions to the Spanish authorities and a number of meetings took place to discuss and clarify these matters more fully.

(9) In a letter dated 27 November 1997 addressed to the Spanish Minister for Internal development, the Commission stated that if the Spanish authorities were not in a position to use the procedure for PSO contracts set out in the Community guidelines on State aid to maritime transport [6] then they were obliged to notify any new PSO contract as a State aid. The Spanish authorities did not follow up this request.

(10) The main features of the contract as concluded were as follows:

— the contract was for the provision of scheduled passenger and accompanying car maritime transport services on routes (nine compensated and one non-compensated) between Barcelona-Valencia and the Balearic Islands, Cadiz and the Canary Islands, Almería-Malaga and Melilla, and Algeciras and Ceuta (the latter indicated to be without compensation),

[3] OJ L 364, 12.12.1992, p. 7.
[4] BOE 226, 20.9.1997, p. 27712.
[5] In connection with this contract, the Commission decided, on 5 November 1997, to propose to the Spanish authorities, under Article 93(1) of the Treaty, that they take appropriate measures to bring the arrangements governing financial aid to Trasmed into line with Community law. This was communicated to the Spanish authorities in a letter dated 3 December 1997 (ref. 10045).
[6] OJ C 205, 5.7.1997, p. 5.

— a compensation budget was established of ESP 6 600 million for a six-year period beginning in 1998,

— the contract was 'packaged', all lines to be offered by tender to a single operator. However, this did not imply exclusivity on the routes, which would be open to other operators. These other operators would have to meet conditions in order to qualify for authorisation; these conditions were indicated as being in the form of PSOs,

— the contract was indicated to be for a duration of six + two + two (10) years, the second extension being subject to prior consultation of the Commission.

(11) The invitation to tender was published in the *Boletín Oficial del Estado* (Spanish Official State Gazette) of 17 December 1997 and, in summarised form, in Lloyd 's List on 23 December 1997. The closing date for bids was 31 December 1997. On 8 January 1998 the Commission received a complaint from an aggrieved operator which felt it had not been given enough time to prepare its bid.

(12) As, in the opinion of the Spanish administration, the contract was in line with the guidelines on aid to maritime transport, it was not notified under Article 88(3) of the Treaty as a State aid.

(13) In initiating the procedure, the Commission, on the basis of the information at its disposal, expressed serious doubts as to the measure's compatibility with the common market in respect both of the substance of the contract and of the manner in which it was awarded. The Commission had concerns regarding the following:

1. publicity and the absence of a proper tendering procedure: given the size, duration and importance of the contract, the publicity given to the invitation to tender and the time allowed for submission of tenders were insufficient;

2. the conditions applicable to other service providers operating on the same lines in parallel and in competition with the compensated PSO provider were not set out adequately and in advance;

3. the Algeciras-Ceuta line: this route is currently served by a number of private operators working on a commercial basis. The contract reserved the right for a State financial contribution to be granted to the successful bidder for the PSO contract in the future should there be an instability in the service on this line. In effect, there would be no real invitation to tender for this service and hence no adequate method of determining the appropriate level of State financial compensation for any PSOs;

4. duration: the contract duration was set at six years, with the possibility of two extensions of two years each. The first two-year extension was to be elected if, on at least five of the 10 lines covered by the contract, no commercially parallel supply of services has appeared. The second extension would take place after notification of the Commission. The period between invitations to tender (minimum effective contract duration) would thus be between six and 10 years. In the Commission's opinion this was overlong and would unnecessarily hinder the development of the market. Furthermore, concerns were expressed regarding the packaging/globalisation of the contract meaning that, in practice, only the biggest of companies or a group of companies could apply.

(14) With respect both to its duration and to the packaging of all the routes, the contract as formulated effectively counteracted the implementation of the right of freedom to provide cabotage services between the Spanish islands as of 1 January 1999 as provided for in Regulation (EEC) No 3577/92.

III. **COMMENTS FROM INTERESTED PARTIES**

COMPAÑÍA TRASMEDITERRÁNEA

(15) In its submission to the Commission dated 11 June 1998, Trasmed disputed the existence of any effect on trade between Member States, in that the market for maritime transport of passengers and ferries and for insular cabotage in Spain was not yet liberalised. Article 6 of Regulation (EEC) No 3577/92 exempted Spain (among other Member States) from the obligation to liberalise maritime

cabotage until the beginning of 1999, meaning that there was no competition between Spanish maritime transport companies and shipowners established in other Member States having their ships registered in other Member States in the market in question. Therefore, trade between the Member States had not in any way been affected. It referred to the case-law of the Court of Justice of the European Communities, which has pointed out that subsidies granted to undertakings producing goods or services in a sector in which no intra-Community trade takes place do not fall within the scope of Article 87 of the Treaty (judgment of 21 January 1976 in Case 40/75, *Produits Bertrand SA* v *Commission*, and judgment of 3 February 1977 in Case 52/76, *Benedetti* v *Munari*) ([7]).

(16) It also argued that the steps taken by Spain were perfectly in line with the guidelines on aid to maritime transport. As regards the duration of the contract, the guidelines invoked the general principle of reasonableness and set an indicative time limit, thereby granting a certain margin of discretion to the Member States.

(17) Regarding the extensions to the contract duration, the first extension depended on the fulfilment of certain conditions; non-emergence of a parallel offer in commercial terms for five of the 10 lines covered by the contract. The possibility of a second extension was contingent and exceptional, it could be applied only for reasons of public interest and had to be notified to the Commission, which could oppose it.

(18) On the question of the publicity and the invitation to tender, Trasmed stated that in its opinion neither the guidelines nor Regulation (EEC) No 3577/92 (maritime cabotage) lay down requirements regarding the publicising or contents of public invitations to tender issued by the Member States. It was therefore up to the Member States to determine the conditions of such publicity.

(19) It pointed out that the publicity requirements laid down by Spanish legislation were suitably adapted to the Community rules and that 'the time limit of 13 days provided for in the Spanish legislation for urgent procedures is not as short and discriminatory as the Commission seems to claim. Indeed, even though not applicable to the present case, it is worth mentioning Article 20' of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ([8]), as last amended by Directive 97/52/EC of the European Parliament and of the Council ([9]). In Trasmed's opinion, the payment at issue was not a State aid within the meaning of Article 87(1) of the Treaty, but rather a PSO which Spain was obliged to compensate.

(20) Regarding the application of Article 86(2) of the Treaty, Trasmed repeated its willingness to provide the Commission with information on the costs incurred in providing these public services on each of the maritime lines in the contract, which would prove to the Commission that the compensation awarded by Spain did not exceed these extra costs. It pointed out that the Court of Justice, in its judgment of 19 March 1991 in Case 202/88, *France* v *Commission* ([10]), held that two conditions have to be met for the derogation provided for under Article 86(2) to be applied: (a) application of the competition rules would obstruct the undertaking in question in the performance of its task and (b) trade between Member States is not affected to an extent contrary to the Community interest.

(21) In the present case, it considered that the compensation paid by the State under the contract was for the provision of necessary services and that application of the competition rules would prevent those services being provided, and, since Trasmed did not operate in sectors open to Community competition ([11]), that trade between Member States was not affected.

(22) In the decision initiating the procedure, the Commission asked the Spanish authorities to confirm that payments of compensation had been suspended. Trasmed pointed out that total and automatic suspension of the payment of such compensation would seriously threaten the continuity of the service.

([7]) [1976] ECR, p. 1 and [1977] ECR, p. 163, respectively.
([8]) OJ L 209, 24.7.1992, p. 1.
([9]) OJ L 328, 28.11.1997, p. 1.
([10]) [1991] ECR I, p. 1223.
([11]) Until 1 January 1999 only Community shipowners having their vessels registered in Spain had the right of access to provide the services in question.

ANAVE (SPANISH SHIPOWNERS' ASSOCIATION)

(23) ANAVE pointed out that, by virtue of Article 6(1) of Regulation (EEC) No 3577/92, the Regulation was not applicable to the market in question. They also pointed out that the five-year period for the duration of a PSO contract was given merely as a guideline: the text actually said 'normally in the order of five years', so that a duration of six years seemed entirely reasonable and consistent with the guidelines.

(24) ANAVE complained that the Commission had made no distinction between the part of the compensation which might possibly be described as State aid and the public service compensation part, and that it had failed to evaluate the two components. Without this compensation Trasmed would face economic problems such as would prevent it providing the service to the requisite standards of continuity, regularity and quality.

(25) It also pointed out that the same companies which had complained to the Commission about this contract went to the ANAVE Scheduled Lines Committee (made up of 21 shipping companies, many of which compete with Trasmed for freight or passenger traffic) and raised the possibility of the Association bringing an appeal against the contract before the Spanish courts. The Committee had looked at the matter in detail, found no basis for such an appeal and so rejected the proposal.

FRED OLSEN SA

(26) Fred Olsen SA is a Spanish maritime operator and a competitor of Trasmed on inter-Canary Island routes (though not on any of the routes covered by the contract in question). In the opinion of Fred Olsen SA, the best and most efficient way for Spain to disburse State aid for maritime transport links would be by subsidising ticket prices irrespective of the carrier used, as this would avoid price distortion between carriers. Fred Olsen SA has taken an action against Spain in the Spanish courts in respect of the contract at issue.

ASEMAR (ASSOCIATION OF SHIPPING COMPANIES)

(27) Asemar is an association of Spanish private commercial companies including shipowners, tugboat operators and other providers of maritime services.

(28) With reference to the publicity, deadlines and due form of the invitation to tender, it pointed out that 13 calendar days coinciding with the Christmas holiday period was quite insuffcient, as evidenced by the fact that apart from the incumbent no other operator had submitted its tender on time. Further, hardly any publicity had been given to this tendering procedure outside Spain. All that was published was a brief summary in Lloyd's List on 23 December 1997.

(29) Asemar considered that the Spanish authorities should have allowed a reasonable minimum period of time, and in any case not less than one month, for bidders to prepare and submit their tenders, especially since the contract in question covered 10 shipping lines. It also pointed out that the invitation to tender (published in the Spanish Official State Gazette and in summary form in Lloyd's List on 23 December 1997) contained no contractual details but simply a reference to the contract specifications document — which, moreover, had to be obtained from the Directorate-General for Merchant Shipping.

(30) Asemar considered that three separate invitations to tender should have been issued for the existing services, namely mainland/Balearic Islands, mainland/Canary Islands and mainland/North Africa. This would have enabled groups or consortiums to be formed for the purposes of submitting bids. The group making the best offer could then have been awarded one or more of the contracts, considered independently, which would have encouraged competition and given consumers a greater choice.

(31) In its opinion, the duration of the abovementioned contract, namely six years plus a two-year extension and a further exceptional two-year extension, was unacceptable under the guidelines then in force on aid to maritime transport and had serious effects on free competition within the relevant cabotage market, which was due to be completely liberalised on 1 January 1999.

(32) Further, it alleged that the Directorate-General for Merchant Shipping, in exercising its responsibility for regulating the tendering process, lacked the necessary objectivity and independence, which were vital for ensuring fair competition. The Directorate-General was directly involved in the management of Trasmed.

(33) Asemar pointed out that as Article 86(2) provides for an exception to the application of the competition rules, it must be interpreted in a restrictive manner. In Asemar's view, Spain had never proved conclusively that the services in question could not be provided on a commercial basis without compensation.

(34) Asemar stated that it had taken an action against the Spanish authorities in the Spanish courts in respect of the contract at issue in the present case as, in its opinion, the invitation to tender and award procedure infringed Spanish law.

FLEBASA

(35) Flebasa, a provider of maritime transport services on the Spanish market, pointed out, with reference to the 'geographical market' for scheduled maritime cabotage lines in Spain, that this market was composed of three geographical reference markets comprising maritime cabotage between (a) mainland Spain/Balearic Islands, (b) Strait/North Africa, and (c) mainland Spain/Canary Islands. In its opinion, therefore, it was illogical to contend that the tender contract formed a single package and award all the lines to a single company. Flebasa accordingly considered that the public tender should, as a minimum, be divided into single lots for each of the geographical reference markets indicated, this being the appropriate split in view of the possibility of using other transport modes. In the markets of the Balearic Islands and Canary Islands, consumers had a choice between sea transport and air transport in most cases. They did not have this choice in the case of North Africa, where the only option available was sea transport.

(36) Flebasa also contended that the regulatory body in Spain (the Directorate-General for Merchant Shipping) lacked the necessary independence in a system of fair competition.

(37) In its opinion the conditions applicable to other economic operators needed to be objective and non-discriminatory, and it was not clear what criteria the Spanish maritime authorities would use for authorising other companies wishing to operate lines in parallel with those operated by the successful bidder. Before entering the market, economic operators in the 'non-reserved' sectors needed to know what their tasks and obligations would involve and these had to be transparent, objective and non-discriminatory. This was not the case at present, where the authorities could impose requirements at their discretion.

(38) Flebasa pointed to further indications of the existence of the three geographical reference markets in the scheduled maritime cabotage sector in Spain which could also be inferred from Trasmed's company report, where economic results related to the three trades it designates 'Balearic Islands', 'Strait' and 'Canary Islands'.

IV. **COMMENTS FROM SPAIN**

(39) The Spanish authorities indicated that the Commission's request for all State aid payments under the contract to be suspended would not be possible for practical and legal reasons. They took the view that the sums payable to Trasmed under the contract were compensation for a public service and did not constitute State aid. Even if State aid were involved, the Commission had not indicated or provided any assistance to determine what portion of the payment constituted such aid. Further, if the State was to suspend payment under the contract, Trasmed would be entitled to suspend the services under the contract, which were life-line services to outlying non-peninsular territories which the State was legally obliged to provide.

(40) The Spanish authorities referred to a series of meetings and an exchange of letters which took place between Commission departments and the Spanish Ministry of Internal Development, and the contention that the Spanish authorities had always sought to cooperate in this matter.

(41) In the opinion of the Spanish authorities, as the Community guidelines on State aid to maritime transport did not lay down precise rules for publicising public service contracts, stating only that 'adequate publicity must be given to the call for tender', and given that the contract was awarded in accordance with the rules laid down in Articles 72 and 79 of Law No 13/1995 of 18 May on public administration contracts ([12]) (a law specifically incorporating Council Directives 92/50/EEC ([13]), 93/36/EEC ([14]) and 93/37/EEC ([15]) on public procurement, as last amended by Directive 97/52/EC), the legal deadlines required by both Community and domestic law had been complied with in this case.

(42) Recourse had to be made to the emergency procedure provided for in the Spanish legislation as the preceding contract was due to expire and the Spanish authorities wished to avoid a gap in the provision of services, which would have had extremely serious consequences.

(43) On the question of the Algeciras-Ceuta route, the Spanish authorities felt the Commission had failed to appreciate the real purpose of this measure, which was a precautionary one designed to provide a minimum level of service on this route. It arose from the fact that one of the three private operators currently serving the route had recently experienced technical difficulties while another had had financial problems. This clause was, in the opinion of the Spanish authorities, 'a hypothetical possibility, it is not a tangible and real situation'.

(44) Following further contacts with the Commission services the Spanish authorities undertook to remove this line from those covered by the contract, and should the need arise to have a compensated service on this route at some stage in the future, this will only be put in place following a full open public tender in accordance with the procedure set out in the State aid guidelines.

(45) On the question of the conditions applicable to other operators within the context of Royal Decree 1466/1997, the Spanish authorities confirmed in their letter of 7 April 1998 that these conditions 'will be less stringent than those required of the lines served by this contract'. A series of meetings was held with the Spanish authorities to resolve the outstanding issues regarding the Decree. Having sent a written undertaking in December 1998 that the aforementioned Royal Decree would be amended to take account of the Commission's objections, the Spanish authorities submitted a revised draft Decree, which is being examined under the relevant infringement procedure.

(46) As to the duration of the contract, as the State aid guidelines stated that the duration of the contract should be limited to 'a reasonable period, normally in the order of five years', the Spanish authorities felt this meant there might be grounds which made it reasonable to impose a longer period. However, following discussions with the Commission services the Spanish authorities have undertaken to limit the duration of the contract to 42 months, meaning that the contract will run until 26 July 2001.

(47) On the question of the packaging or globalisation of the contract, the Spanish authorities indicated that the choice of routes in the contract respected the rules laid down in Regulation (EEC) No 3577/92. Once the routes had been selected, an exhaustive study was launched with the aim of determining the level of supply and frequency of services which had to be guaranteed to satisfy the expected demand. An economic analysis of the three viable alternatives for the contract was then carried out, with the options as follows: (a) individual contracts for each route; (b) maritime range contracts, meaning 3 separate contracts for traffc to the Balearic Islands, Ceuta and Melilla, and the Canary Islands respectively; and (c) a global package contract. Once all the alternatives were examined it was concluded that a single contract would prove to be the lowest burden on State resources.

(48) The Spanish authorities took issue with what they saw as the indeterminate character of the Commission's imputation of State aid, since it did not distinguish or indicate what part of the sum paid to Trasmed could be construed as State aid. Nor did they accept that the payments made to Trasmed would place the company in an advantageous position with regard to others. In their opinion, the content of the contract placed it in the category of a non-notifiable contract in the public interest.

([12]) BOE 119, 19.5.1995, p. 14601.
([13]) See footnotes 8 and 9.
([14]) OJ L 199, 9.8.1993, p. 1.
([15]) OJ L 199, 9.8.1993, p. 54.

(49) In accordance with the procedure laid down in Article 88(2) of the Treaty, the Spanish authorities were given the opportunity to comment on the observations made by the interested third parties.

V. **ASSESSMENT OF THE AID**

(50) The main points discussed in initiating investigation procedure C 10/98 were the publicity and the absence of a proper tendering procedure, the Algeciras-Ceuta line, the conditions applicable to other service providers, the duration of the contract and the packaging/globalisation of the contract.

EXISTENCE OF AID

Publicity and the absence of a proper tendering procedure

(51) The Community guidelines on State aid to maritime transport state that 'adequate publicity must be given … to ensure that all Community carriers with the right of access … have had an equal chance to bid'. In addition, Regulation (EEC) No 3577/92 states that 'whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners' (second subparagraph of Article 4(1)) and 'where applicable, any compensation for public service obligations must be available to all Community shipowners' (second subparagraph of Article 4(2)).

(52) The invitation to tender for the contract was published in the *Boletín Oficial del Estado* of 17 December 1997 and, in summarised form, in the shipping newspaper Lloyd 's List on 23 December 1997. The closing date for bids was 31 December 1997.

(53) In initiating the procedure the Commission expressed the view that, given the size, duration and importance of the contract, the time given for bidders to apply was insufficient. The procedure adopted was insufficient both as regards operators inside Spain and other Community operators.

(54) The Spanish administration and Trasmed have both pointed out that the guidelines on aid to maritime transport do not lay down precise rules for publicising public service contracts. They further point out that the invitation to tender took place in accordance with the rules laid down in Spanish law, which specifically incorporates Directives 92/50/EEC, 93/36/EEC and 93/37/EEC. The Spanish Government and Trasmed both feel the invitation to tender was publicised in accordance with the relevant applicable law.

(55) They further feel that the urgency of the award procedure was fully justified, the previous contract having expired on 31 December 1997. In publishing the invitation to tender on 17 December 1997 the Spanish authorities had wished to avoid a hiatus in the provision of services, which they felt would have occurred rapidly with extremely serious consequences.

(56) The notice given was too short for operators to prepare their bids properly. The fact that no offers were received from any party other than the incumbent supports the Commission's view that the tendering procedure was inadequate in terms of the insufficient publicity and time for interested parties to prepare their bids.

(57) The Commission takes note of the Spanish authorities' argument that they were forced to use this procedure to avoid a suspension of these 'life-line' services. Nevertheless, it cannot agree on this point, since the Spanish authorities could have initiated the procedure sufficiently in advance to allow for tendering without jeopardising the abovementioned services.

(58) Accordingly, and for the reasons stated above, it is the Commission's opinion that the procedure followed in publicising the invitation to tender and awarding the contract is not in conformity with the guidelines on State aid.

The Algeciras-Ceuta line

(59) In initiating the procedure the Commission noted that Spain had reserved the right to grant Trasmed a compensated PSO on this route for reasons and at a price which were within its own discretion and without a public tender. This despite the fact that the route is currently served by three operators other than Trasmed.

(60) Though this route was not included in the invitation to tender, in the specifications of the contract it was included in the list of PSO routes to be covered by the service provider, though the latter is currently obliged to provide a given level of service on this route without compensation.

(61) The Spanish authorities have taken note of the concerns expressed by the Commission and removed this line from those included in the contract. They have also informed the Commission that Trasmed is operating the line without any financial compensation. The Commission considers this aspect of the case to be closed.

The conditions applicable to other service providers

(62) In initiating the procedure the Commission noted that the conditions applicable to other service providers operating on the same lines in parallel competition with the compensated PSO provider had not been set out adequately.

(63) Following a number of meetings on this point, the Spanish authorities undertook to revise the legal framework in this area (Royal Decree 1466/1997) in order to take account of the concerns expressed by the Commission services. A revised draft of the text, which in principle is in conformity with Regulation (EEC) No 3577/92, has been submitted to the Commission services. The Commission has nevertheless temporarily postponed an infringement procedure concerning the Spanish Royal Decree, in the light of the preliminary ruling pending before the Court of Justice concerning the same issue ([16]).

(64) Therefore, as regards the above points, and in particular that concerning publicity and the absence of a proper tendering procedure, it must be noted that not all of the relevant conditions set out by the Community guidelines on State aid to maritime transport have been met in the current case. The procedure followed falls short of the requirements, particularly regarding the level of publicity given to the invitation to tender. In addition, the notice given to interested parties to prepare their bids was too short.

(65) It must be borne in mind that the public service contract entered into force at the beginning of 1998, that is, prior to the full liberalisation of cabotage in Spain pursuant to Regulation (EEC) No 3577/92. However, it must also be taken into account that Trasmed was not only engaged in cabotage operations but also provided international maritime services (such as those for passengers and cargo on the line between Algeciras in Spain and Tangiers in Morocco). As international maritime services had already been liberalised before 1998 ([17]), such trade was necessarily open to competition from other Community operators during that year.

(66) Accordingly, on the basis of the Order of the Court of Justice of 25 March 1998 in Case C-174/97, *FFSA and others* v *Commission (La Poste)* ([18]), which dismissed the appeal against the judgment of the Court of First Instance of 27 February 1997 in Case T-106/95 ([19]), it is considered that Spain has granted State resources (as a consequence of incorrect application of the procedure) which threaten to distort competition by favouring a certain undertaking (Trasmed), thus affecting trade between Member States since the beginning of 1998. Consequently, the abovementioned contract constitutes State aid within the meaning of Article 87(1) of the Treaty. Such aid must be notified in accordance with Article 88 for assessment under the general rules on State aid. In this respect, the contract in question was concluded without prior notification by the Spanish authorities and as such is in breach of Article 88(3) of the Treaty.

([16]) Case C-205/99; reference to the Court under Article 234 of the Treaty by the Spanish Supreme Court, dated 12 May 1999, for a preliminary ruling on the proceedings pending before the Court, concerning Royal Decree 1466/1997.
([17]) Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).
([18]) [1998] ECR I, p. 1303.
([19]) [1997] ECR II, p. 229.

COMPATIBILITY

(67) Though it falls under Article 87(1) of the Treaty, it must be examined whether the aid may qualify for derogation or exception under Article 87(2) or (3) or Article 86(2) of the Treaty.

(68) The aid in question cannot be considered to be covered by Article 87(2) of the Treaty as it is not aid of a social character granted to individual consumers, nor was it put in place to make good the damage caused by a natural disaster nor is it aid granted to compensate for the effects of the division of Germany.

(69) Article 87(3) of the Treaty states that certain aid may be considered compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in the context of a single Member State. To ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3(g) of the Treaty, the exceptions provided for in Article 87(3) must be construed narrowly when any aid scheme or individual aid award is scrutinised. Not to do so would be to confer advantages on industries or firms of certain Member States whose financial position would be artificially strengthened and to affect trade between Member States and distort competition without any justification based on the common interest as required by Article 87(3).

(70) Article 87(3)(a) exempts aid which promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Although several parts of Spain are eligible for regional aid under Article 87(3)(a), the aid in question was not granted under an aid scheme designed primarily to promote regional development. In any case, Article 87(3)(a) does not authorise aid schemes which, as in the present case, are not in line with the Community guidelines on aid to specific sensitive sectors such as maritime transport.

(71) With regard to the exception provided for in Article 87(3)(b), the aid at issue is not intended to promote the execution of an important project of common interest nor to remedy a serious disturbance in the Spanish economy, nor does it have any of the features of such projects.

(72) As to the exception provided for in Article 87(3)(c) relating to aid to facilitate the development of certain economic activities, the aid under examination is not considered to qualify for this as it is in the nature of operating aid.

(73) Thus the aid under examination does not qualify for an exception, nor have the Spanish authorities invoked any of these exceptions in their contacts with the Commission.

(74) In any event, even if it were to fall under one of these categories this would not obviate the need to notify the aid to the Commission under Article 88 before bringing the aid scheme into effect, and this has not been done by the Spanish authorities.

The Article 86(2) exception

Service of general economic interest

(75) In initiating the procedure the Commission stated that it did not have enough elements to decide whether Article 86(2) of the Treaty applied to the contract under examination.

(76) Article 86(2) provides that:

'Undertakings entrusted with the operation of services of general economic interest …shall be subject to the rules in this Treaty, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them ([20]).'

(77) The Court of Justice pointed out in its judgment of 10 December 1991 in Case C-179/90 *Merci convenzionali porto di Geova* ([21]), that 'it does not appear either from the documents supplied by the national court or from the observations submitted by the national court or from the observations submitted to the Court of Justice that dock work is of general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such tasks.'

(78) In the present case the contract put out to tender provides for a whole series of particular tasks to be fulfilled by the bidder. These criteria are either specific to the different lines operated or to the winter or summer season, or are general criteria regarding vessel requirements. It must also be indicated that the public service contract concerns passenger/car traffic. The following table lists some of the main specific conditions to be fulfilled by the company entrusted with carrying out the public service contract:

Table 1

Line	No trips week		Capacity: No passengers/week (60 % cabin)		Capacity: No vehicles/week		Maximum price (in ESP)			± 24 hour vessel replacement
Season	Low	High	Low	High	Low	High	Seat	Cabin	Vehicle	
Barcelona - Palma de Mallorca	7	7	4 000	6 500	600	1 650	6 500	10 900	17 500	Required
Barcelona - Ibiza	3	6	1 000	4 750	250	1 225	6 500	10 900	17 500	Required
Barcelona - Mahon	2	6	450	5 200	100	1 300	6 500	10 900	17 500	Required
Valencia - Palma de Mallorca	6	6	1 100	3 000	210	700	6 500	10 900	17 500	Required
Valencia - Ibiza	1	3	200	2 250	25	500	6 500	10 900	17 500	Required
Valencia - Mahon	1	1	100	500	30	130	6 500	10 900	17 500	Required
Malaga - Melilla	6	7	1 200	7 000	180	1 300	3 600	6 200	18 400	Required
Almeria - Melilla	6	7	1 800	11 500	270	2 300	3 600	6 200	18 400	Required
Cadiz - SC de Tenerife - Las Palmas	1	1	350 (100 % cabin)	350 (100 % cabin)	170	170	non	23 900	28 200	Required

([20]) The Court of Justice indicated, in Case 127/73, *BRT-II*, ([1974] ECR, p. 313) that Article 86(2) only applies if the undertaking has actually been entrusted by an act of the public authority with a task of general economic interest. The Court has provided some indications of what constitutes a service of general economic interest: in Case C-66/86 *Ahmed Saeed Flugreisen* ([1989] ECR, p. 803) it held that the operation of air routes that are not commercially viable constitutes such a service.

([21]) [1991] ECR I, p. 5889.

(79) Following the reasoning of the abovementioned Case C-179/90 *Merci convenzionali porto di Genova*, the first question is to what extent the public service contract tasks entrusted to Trasmed can be described as services of general economic interest.

(80) It was submitted by the Spanish authorities that, in the absence of compensation, market forces would not furnish the level of service needed to guarantee the provision of life-line maritime transport services under specific conditions of regularity, continuity, capacity, quality and price on a year-round basis.

(81) The Community guidelines on State aid to maritime transport define public service obligations as 'any obligation imposed upon a carrier to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the carrier would not assume if it were solely considering its economic interest. PSOs may be imposed for scheduled services … in cases where the operation of market forces would not ensure a sufficient service level.'

(82) On the basis of the information available to it ([22]), the Commission found that the competition faced by Trasmed on the lines in question is in fact that of cargo carriers, which do not come within the scope of the public service contract and whose ships in any case do not meet the criteria for passenger capacity set out therein. Furthermore, it should be recalled that in the course of the procedure none of Trasmed's potential competitors claimed to be able to meet the minimum criteria set out in the contract concluded with Spain without receiving compensation.

(83) The Spanish authorities provided the Commission with a study ([23]) carried out by an independent party, the Universidad Politécnica de Madrid, on the extra costs incurred in fulfilling the public service contract.

(84) According to this analysis, the two main disadvantages entailing extra costs which the shipping company would not incur if these public service obligations were not applied are:

— the obligation for the contractor to run the service all year round throughout the period for which it is awarded the lines, with the variations in service specified in the invitation to tender between the high and the low season, and

— the need to replace, within a minimum period of time, any vessel no longer fit for service (not because of normal fleet maintenance but because of breakdown, accident, etc.); the maximum time allowed for making the replacement is the full round-trip time, if this is over 24 hours, or 24 hours if the round trip is shorter.

(85) According to information from the Spanish authorities, all the lines put out to tender are highly seasonal, with an enormous concentration of passengers and accompanying vehicles in the high season. Analysis of the numbers of passengers and vehicles carried on the lines in question in 1993, 1994, 1995 and 1996 — the period studied before going out to tender — shows that 55 to 60 % of annual demand for passenger and vehicle services is generated in the high season, mainly during the summer holidays ([24]), leaving 40 to 45 % of demand for the rest of the year (i.e. around seven months). This explains the low occupancy rates during most of the year.

(86) But this is not all: in economic terms, the traffic is even more seasonal in that average fares outside the high season are far lower than those charged during the massive surge of passengers and vehicles. The cumulative effect in terms of revenue is that 60 to 65 % of total annual revenue is concentrated in the summer, leaving 35 to 40 % for the rest of the year.

([22]) Compared with data from the study, The impact of liberalisation of maritime cabotage in the Member States of the European Union (Regulation (EEC) No 3577/92); Third Report, October 1998 (*Bilbao Plaza Marítima, SL; Escuela Técnica Superior de Ingenieros Navales Universidad Politécnica de Madrid*).

([23]) Letter dated 30 March 1999 from the Permanent Representation of Spain to the Directorate-General for Energy and Transport.

([24]) The study made by the University of Madrid on which the figures presented are based suggests that the high season lasts around five months. This estimation is comparatively more cautious in respect of the duration of high and low season than the tender, which qualifies the high season as lasting three months starting on 15 June and ending on 15 September each year. Of course, the shorter the (unprofitable) low season, the less State compensation is expected.

(87) It follows that there is no significant competitor covering passenger/car traffc on the lines in question who could offer a service satisfying the criteria of frequency, capacity and continuity all year round and the ability to provide a replacement vessel in around 24 hours (hereinafter the 'core constraints') as required by the public service contract.

(88) The Commission therefore accepts the argument that the abovementioned core constraints differentiate the public service offered by Trasmed under the contract from services offered under market conditions (e.g. by competitors). The additional constraints on Trasmed can therefore be described as services of general economic interest.

(89) The core constraints, as well as the other constraints (maximum price, etc.) which must necessarily be carried out along with the core constraints as an intrinsic part of the public service contract, apply only to the company entrusted to carry out that contract, in the present case Trasmed.

(90) The costs incurred in fulfilling all these particular criteria in addition to the service offered under market conditions constitute the extra cost of the public service obligations imposed by the public service contract.

(91) In conclusion, in the absence of significant competitors providing passenger/car services on the lines in question, the Commission considered that the extra costs calculated by the expert, for which Trasmed needs to be compensated, are the extra costs incurred in providing the service during the low season (taking into account fulfilment of the core and other constraints) and the extra costs of providing for replacement vessels in around 24 hours.

Necessity — Equivalence

(92) In the absence of a proper tendering procedure (see recitals 51 to 58), the compensation paid to Trasmed cannot be presumed to be equivalent to the price which would have been established by market forces under the same conditions. It must therefore be verified whether the compensation awarded exceeds the amount necessary to compensate for the cost of the PSOs in the framework of the public service contract.

(93) In the abovementioned judgment in the 'La Poste' case ([25]), the Court of Justice held that 'the grant of State aid may, under Article 86(2) of the Treaty, escape the prohibition laid down in Article 87 of that Treaty provided that the sole purpose of the aid in question is to offset the extra costs incurred in performing the particular task assigned to an undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium.'

(94) It should be recalled that the Spanish authorities published the invitation to tender for the public service contract on 17 December 1999, allowing for a maximum budget of ESP 1 100 million (around EUR 6 600 000) per annum. Trasmed responded with a contract bid of ESP 950 million (EUR 5 700 000) per annum.

(95) With the specific nature of the PSOs under the public service contract established, it has further to be verified to what extent such service needs to be subsidised and whether such compensation may unduly hinder the development of Community trade.

(96) According to the aforementioned expert study, the method used to estimate the minimum necessary compensation is based on the extra costs incurred in ensuring compliance with the PSOs during the

([25]) See footnotes 18 and 19.

low season. The low season is the time span during which significant operating losses are deemed to take place as a result of the abovementioned PSOs (extra service during the low season while fulfilling the other constraints and ability to provide replacement vessels in around 24 hours) imposed by the public service contract ([26]).

(97) On the basis of these explanations, the expert indicated in the first column of the table below the extra costs for the seven lines (out of nine) he considered to be incurring an annual deficit. The other two columns reflect Trasmed's actual results in 1998-1999, either on all the lines or on those subject to a net annual deficit.

Table 2

Line	Public service contract extra costs in ESP million (estimation by expert)	Trasmed actual operating results (revenue-costs) all lines		Trasmed actual results (revenue-costs) only loss-making lines	
		Approach chosen by Trasmed			
		1998	1999	1998	1999
Variable costs	Extra VC	including FC + VC	including FC + VC	including FC + VC	including FC + VC
Barcelona - Palma de Mallorca		[...] (*)	[...]	[...]	[...]
Barcelona - Ibiza	96	[...]	[...]	[...]	[...]
Barcelona - Mahón	59	[...]	[...]	[...]	[...]
Valencia - Palma de Mallorca		[...]	[...]	[...]	[...]
Valencia - Ibiza	24	[...]	[...]	[...]	[...]
Valencia - Mahón	46	[...]	[...]	[...]	[...]
Malaga - Melilla	180	[...]	[...]	[...]	[...]
Almería - Melilla	106	[...]	[...]	[...]	[...]
Cadiz - Canary Islands	188	[...]	[...]	[...]	[...]
Subtotal	699	[...]	[...]	[...]	[...]

([26]) The expert analysis was conducted primarily with a view to determining the costs which the State would have had to cover in various contract scenarios for the nine lines covered by the public service contract. Only in a second stage, on the basis of the existing cost-benefit concept, was the analysis pursued with a view to establishing the minimum extra costs associated with the public service contract during the low season.
Tables 2 and 3 show the extra costs and revenue incurred in fulfilling the PSOs imposed by the public service contract. Calculation of these costs and revenues is based on the concept of a 'standard ship' (e.g. 'standard ferry') having the basic features corresponding to the operational and technical requirements.
Revenue has been established on the basis of the average income received on the lines in question on such a 'standard ferry' during the past two years, taking into account observed trends. The different revenue elements considered were: passengers, accompanying cars, service level on board and freight.
Direct costs (DC) result from passengers, vehicles, service provision on board and freight.
Variable costs (VC) are the parts of fuel and port dues in proportion to navigation time and port calls.
Fixed costs (FC) of the vessel were calculated on the basis of operating time of 5 400 hours in the year (350 days), except for amortisation, financial costs and insurance, which were calculated on the natural year (365 days). The FC incurred by independent operation of the various lines are calculated on the basis of the abovementioned 'standard ferry'. The FC of all lines taken together are proportional to the minimum number of port calls required by the technical description on each line.
Costs for a replacement vessel to guarantee continuity of service was estimated on the basis of a stand-by vessel. Several options were calculated, reflecting whether such a vessel is owned or chartered, leading to an average result of ESP 631 million per year.

Line	Public service contract extra costs in ESP million (estimation by expert)	Trasmed actual operating results (revenue-costs) all lines		Trasmed actual results (revenue-costs) only loss-making lines	
		Approach chosen by Trasmed			
		1998	1999	1998	1999
	Extra FC	[...]	[...]	[...]	[...]
Fixed costs	631	[...]	[...]	[...]	[...]
Subtotal	631	[...]	[...]	[...]	[...]
Total extra costs	**1 330**	**[...]**	**[...]**	**[...]**	**[...]**
Total extra costs + VAT (16 %)		**[...]**	**[...]**	**[...]**	**[...]**
Bid made by Trasmed	**950**	**[...]**	**[...]**	**[...]**	**[...]**

(*) Certain parts of this act have been amended to ensure that confidential information is not divulged; the said parts are contained within square brackets.

(98) The Commission takes note that certain of the lines are not subject to a net annual deficit. Nevertheless, even on these lines the public service contract imposes an additional burden in terms of continuity, frequency and capacity which generates costs and reduces the company's profits. Even if these lines cannot be described as subject to PSOs, they serve to alleviate the total financial burden of Trasmed, and thus the amount of State resources needed for compensation.

(99) In this context, even though no exclusive market access rights have been granted to Trasmed, it is useful to refer to the judgment of the Court of Justice of 19 May 1993 in Case C-320/91 ('Corbeau') ([27]), in which the Court established that the obligation on the part of the undertaking entrusted with [the] task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

(100) Indeed to authorise individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

(101) Taking into account cross-subsidies between lines, it is apparent from the above table that the State aid granted to Trasmed does not go beyond the minimum compensation necessary to compensate the extra costs incurred in fulfilling the public service contract's core constraints. The total actual deficit incurred by Trasmed in 1998 and 1999 was ESP 931 million and ESP 1 002 million respectively. These amounts are (roughly) matched by the ESP 950 million in State aid received each year and are less than the expected total extra costs of ESP 1 330 million, as calculated by the expert.

(102) The figures of the above table also show that the method chosen by Trasmed for calculating the losses incurred — taking into account the results of all the lines in the package — requires fewer State resources (less compensation) than a mechanism based on line-by-line compensation, which would not take advantage of the profits made on the two profitable lines.

(103) At the Commission's request, with a view to verifying the results obtained under the method followed in table 2, the expert provided an overall estimate of the total costs and revenue incurred by a company fulfilling the public service contract (taking account of overall activity on the lines in question, including freight traffic) during the low and high seasons ([28]).

([27]) ECR 1993, p. I-2533.
([28]) Letter from Spain dated 10 June 1999: 'Memorandum relating to the meeting with DG VII in Brussels on the contract to provide scheduled maritime cabotage passenger and accompanying car services'.

Table 3

(million ESP)

	Low season (7 months)	High season (5 months)	Full year (12 months)
Passengers/cars			
Revenue	3 775	6 287	10 062
Direct costs	– 1 325	– 1 943	– 3 268
Gross sales margin (subtotal 1)	2 450	4 344	6 794
FC	– 5 950	– 3 967	– 9 917
VC	– 700	– 1 708	– 2 408
FC + VC (subtotal 2)	– 6 650	– 5 675	– 12 325
Operating result passengers/cars (1 + 2)	– 4 200	– 1 331	– 5 531
Additional Freight			
Revenue	4 081	2 721	6 802
Direct costs	– 1 684	– 1 123	– 2 807
Gross sales margin	2 397	1 598	3 995
Operating result additional freight	2 397	1 598	3 995
Operating result passengers/cars + freight	– 1 803	267	– 1 536

(104) As can be seen from table 3, the operating results of pure passenger/car crossings (covered by the public service contract) are negative during both the low and the high season. Nevertheless, taking into account full tragic flows [29], this deficit is to a large extent offset by simultaneous provision of freight service (not included in the public service contract), which still leads to a low-season deficit (ESP — 1 803 million) but to a high-season surplus (ESP 267 million). This confirms the pronounced seasonality of ferry traffic under the public service contract, as outlined above.

(105) To calculate under this approach the extra costs of the PSO element of the public service contract, it must be recalled that low-season passenger/car traffic produces a deficit of ESP 4 200 million. Though reduced by positive freight results, the overall deficit is still ESP 1 803 million during the low season. Offsetting the low season's deficit against the high season's profit produces an overall loss of ESP 1 536 million. Since this amount only reflects losses made by passenger/car traffic in particular during the low season as offset by all other results over the full year, the operating loss of ESP 1 536 million can be qualified as the extra cost corresponding to the PSO element of the public service contract.

(106) It can therefore be concluded that both the method followed in table 2 and that followed in table 3 lead to comparable results in terms of extra PSO costs: ESP 1 300 million and ESP 1 536 million.

(107) Since both the expert's calculations are consistent with each other and since the second method — which takes account of total costs and revenue during low and high seasons — confirms the validity of the somewhat more pragmatic line chosen in the first method, the Commission can accept the expert's analysis. It should be noted that no interested party presented any comparative study of this type during the procedure.

[29] Ferries able to carry passengers and their cars can also take on board lorries and a certain amount of other freight even if the public service contract does not require the provision of such services.

(108) It has further to be recalled that Trasmed submitted a bid of ESP 950 million, which was accepted by the Spanish authorities and which lies below the expert's lowest result of ESP 1 300 million.

(109) Therefore, since the Commission agrees with the method used to estimate the extra costs incurred under the public service contract, it can be concluded that the ESP 950 million granted to Trasmed does not exceed the minimum amount necessary to fulfil the PSO in its core constraints and in the other constraints attached to it in the framework of the public service contract.

(110) It can further be concluded that the public service contract under examination does not include elements of overcompensation and, hence, that the mechanism of compensation does not permit for cross-subsidisation to other routes (not covered by the public service contract) operated by Trasmed.

(111) Thus, although the aid has not been granted following a proper tendering procedure as already mentioned, it is needed to ensure the provision of a life-line service and is proportionate to its objectives, as demonstrated above.

IMPACT ON INTER-STATE TRADE

(112) Furthermore, as stipulated by Article 86(2) of the Treaty, any derogation, in particular to competition rules, must not affect the development of trade to an extent as would be contrary to the interests of the Community. Regarding the effect on the development of trade, the Commission takes note of the following elements.

— *First year of the contract (1998)*: During the first year of the contract, the lines in question are or were reserved to vessels flying the Spanish flag, in accordance with Regulation (EEC) No 3577/92 ([30]).

— *Duration*: In initiating the procedure the Commission pointed out that, in the invitation to tender, the duration of the contract was set out as being six years, with the possibility of two extensions of two years each. In the contract specifications the second extension (after eight years) is made contingent on prior consultation of the Commission. Such a contract duration would have impeded the liberalisation of maritime cabotage as set out in Regulation (EEC) No 3577/92. [...] Furthermore, this is at variance with the provisions of the guidelines on State aid to maritime transport as these relate to PSOs. Under the guidelines, contract duration 'should be limited to a reasonable and not overlong period (normally in the order of five years) … After expiration of the contract period, such contracts should be subject to re-tendering in accordance with the procedure described above.'

  The Spanish authorities have therefore undertaken to adjust the contract duration so that the contract does not extend beyond 26 July 2001 (42 months). Any contract replacing it will enter into force when the current contract ends and will have to comply with the relevant Community legislation (a tendering procedure would therefore be subject to the principles of publicity, transparency and non-discrimination). The Spanish authorities have undertaken to cease to pay aid in respect of this contract on or before this date.

— *Packaging/globalisation of the contract*: In initiating the procedure the Commission pointed out that the Spanish authorities had failed to show satisfactorily why all nine (or ten) lines had to be packaged and tendered under a single contract which entailed the risk that, in practice, liberalisation of maritime cabotage (as laid down by Regulation (EEC) No 3577/92) might be obstructed.

  The Commission submits that, in seeking to reach a balance between public budget considerations and the requirements of access to the market, Member States have a margin of appreciation in deciding to tender contracts relating to PSOs on a route-by-route basis or to combine certain

([30]) Regulation (EEC) No 3577/92 applies the principle of freedom to provide services to maritime transport within Member States. Article 6 stipulates that scheduled passenger and ferry services carried out, for example, in the Mediterranean and along the coast of Spain were exempted from the implementation of the Regulation until 1 January 1999.

routes in a package. As the Commission indicated in initiating the procedure, it was concerned that the contract as then formulated, both with respect to its duration and the packaging of the routes into one contract, was liable to obstruct liberalisation of cabotage and minimise competition ([31]). However, as the contract is now limited to 42 months' duration, the risk of it having an adverse effect on the development of trade and competition is minimised and the Commission has decided not to pursue this point further.

— The Spanish authorities have also undertaken that any successor contract will take account of the relevant Community requirements (i.e. not exceed five years, satisfactory unbundling of routes and strict respect of the requirement not to overcompensate/not to cross-subsidise towards competitive activities) and that it must only enter into force once adequate time and publicity have been given to allow all Community shipping companies a fair opportunity to prepare their bids.

— The Spanish authorities have agreed that the route between Algeciras and Ceuta, which Trasmed operates without financial compensation, will be withdrawn from the present contract immediately.

(113) Moreover, the Commission notes that it will take some time to fully enact the abovementioned undertakings. The contract at issue therefore will be allowed to continue until 26 July 2001 (giving the contract a duration of 42 months). This time lag was chosen so as to permit the regulatory framework and successor contracts to be fully drawn up in consultation with the Commission services and with the maritime industry. It will also allow adequate time to potential bidders to prepare their bids for the successor contracts.

(114) Furthermore, the aid period has been substantially shortened with a view to ensuring its limitation in time. The transitional character of the aid will also allow for a change to the system formerly prevailing in Spain (which ensured the island services) and a proper system of public tendering for any future contract.

(115) Given that the core and other constraints (PSOs) imposed on Trasmed under the public service contract can be qualified as a 'service of general economic interest', given that the public financing of the contract corresponds to the extra costs incurred by the operator and that this contract does not therefore entail elements of overcompensation, and given that its duration, and therefore its possible effect on the development of trade, have been severely curtailed, the compensation can be said not to have hindered the development of Community trade to an extent contrary to the Community interest, as required in the context of Article 86(2) of the Treaty.

VI. **CONCLUSIONS**

(116) The Commission finds that Spain has unlawfully implemented a State aid in favour of Compañía Trasmediterránea in breach of Article 88(3) of the Treaty. The compensation, while falling under Article 87(1) and not eligible for an exception under Article 87(2) or (3), may nevertheless be authorised under Article 86(2).

(117) The scope of this Decision is restricted to State aid aspects and is without prejudice to the application of other Community rules,

HAS ADOPTED THIS DECISION:

Article 1

Spain has unlawfully implemented a State aid in favour of Compañía Trasmediterránea contrary to Article 88(3) of the Treaty. The compensation may nevertheless be authorised under Article 86(2) provided that the conditions laid down in Article 2 are met.

Article 2

Spain shall terminate the current contract on or before 26 July 2001, suspending any payment of aid on or before that date.

([31]) With regard to Trasmed's share of the total Spanish passenger and ferry service market, the abovementioned cabotage report (see table 3) indicates that Trasmed operates 25 out of a total of 68 ships, corresponding to 179 102 GT operated by Trasmed out of a market total of 287 160 GT.

Any successor contract must meet the relevant Community requirements (the contract must not exceed five years, routes must be unbundled and the obligation not to provide overcompensation or allow cross-subsidising of competitive activities must be strictly observed). Such a contract may enter into force only after adequate time and publicity have been given to allow all Community shipping companies a fair opportunity to prepare their bids.

The line between Algeciras and Ceuta does not form part of the current contract and Compañía Trasmediterránea may not receive financial compensation in respect thereof.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 19 July 2000.

For the Commission

Pedro SOLBES MIRA

Member of the Commission