II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

## of 29 November 2000

## on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya

*(notified under document number C(2000) 3931)*

**(Only the Spanish text is authentic)**

**(Text with EEA relevance)**

(2001/247/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 on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having, in accordance with the abovementioned Articles, called on interested parties to submit their comments [1], and having regard to those comments,

Whereas:

### I. PROCEDURE

(1) By complaint lodged on 21 September 1992, the Commission was informed that Spain had introduced an aid scheme in favour of the shipping company Ferries Golfo de Vizcaya (letter of intent of 9 July 1992). Three further complaints were made on 16 March, 13 April and 19 April 1993. By letter dated 1 April 1993, Spain furnished the Commission with additional information.

(2) By letter dated 13 October 1993, the Commission informed Spain of its decision to initiate the procedure laid down in Article 93(2) (now Article 88(2)) of the Treaty in respect of this aid (case C 32/93). On 10 November 1993 Spain indicated that the aid would be suspended. The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid. The Commission received comments from interested parties. The Spanish authorities submitted their arguments by letter dated 25 January 1994.

(3) The lawyers of Ferries Golfo de Vizcaya informed the Commission on 27 March 1995 that the aid scheme had been amended on 7 March 1995. On 7 June 1995 the Commission decided to close the procedure concluding that no aid was involved. It informed the Spanish Government of its decision by letter of 11 July 1995 [3].

(4) In its judgment of 28 January 1999 in Case T-14/96, *Bretagne Angleterre Irlande (BAI)* v *Commission* [4], the Court of First Instance of the European Communities annulled the Commission Decision of 7 June 1995.

(5) Following the Court judgment, the Commission decided on 26 May 1999 to extend the procedure initiated in 1993 in respect of the Agreement of 9 July 1992 (the first Agreement) to include the Agreement concluded between the District Council of Vizcaya and Ferries Golfo de Vizcaya on 7 March 1995 (the second Agreement) and informed Spain of its decision by letter of 16 June 1999.

[1] OJ C 70, 8.3.1994, p. 5; OJ C 233, 14.8.1999, p. 22.

[2] See first reference in footnote 1.

[3] OJ C 321, 1.12.1995, p. 4.

[4] 1999 ECR II-139.

(6) This decision was published in the *Official Journal of the European Communities* ([5]). The Commission invited interested parties to submit their comments on the aid. The Commission received comments from interested parties and forwarded them to Spain, which was given the opportunity to react.

(7) The Spanish authorities submitted their arguments by letter dated 21 October 1999 and some further observations on 8 February 2000 and 6 June 2000.

## II. DETAILED DESCRIPTION OF THE AID

(8) The original Agreement of 9 July 1992 between the District Council of Vizcaya and the Department of Commerce, Consumption and Tourism of the Basque Government of the one part and Ferries Golfo de Vizcaya of the other part was suspended and replaced by the Agreement between the District Council of Vizcaya and Ferries Golfo de Vizcaya of 7 March 1995.

### II.1. **The original Agreement (letter of intent of 9 July 1992) between the District Council of Vizcaya and the Department of Commerce, Consumption and Tourism of the Basque Government of the one part and Ferries Golfo de Vizcaya of the other part**

(9) The Agreement concluded in 1992 by the autonomous Basque authorities and the shipping company Ferries Golfo de Vizcaya ([6]) provided that the latter would start to operate a scheduled service between Bilbao and Portsmouth at the rate of two round trips per week (except for three weeks in the low season) and would ensure that, when choosing the crew and the goods and catering services on board the vessel, preference would be given to people and companies from the territory of Vizcaya and the autonomous Community of the Basque Country. The Agreement also stipulated that Ferries Golfo de Vizcaya would install tourist information offices in each of its berthing points.

(10) The Agreement also provided that the District Council of Vizcaya and the Basque Government would undertake to buy a number of travel vouchers from the company between 1993 and 1996. The autonomous Basque authorities intended to distribute these vouchers, exchangeable for tickets within the same month, among low-income groups as part of a cultural and social policy. In total, the autonomous Basque authorities' commitment amounted to ESP 911 800 000 for 26 000 vouchers over the period from March 1993 to March 1996. The said authorities undertook to pay for the vouchers even if voyages were not made for reasons beyond the control of Ferries Golfo de Vizcaya.

(11) The Agreement further stated that, should the results of the operation of the service be positive, the amount corresponding to such positive results would be deducted from the monthly payments that the autonomous Basque authorities would make. On the contrary, if a negative result were shown, the said authorities agreed to pay Ferries Golfo de Vizcaya the difference between the partial sums of the payments made and the total value of the global amount agreed.

(12) Following the initiation of the procedure, the original Agreement was suspended and Ferries Golfo de Vizcaya was asked to establish a provision of the amounts it had received plus interest. On 7 March 1995; the District Council of Vizcaya concluded a new agreement with Ferries Golfo de Vizcaya.

### II.2. **The Agreement of 7 March 1995 between the District Council of Vizcaya and Ferries Golfo de Vizcaya**

(13) The second Agreement covered a period of four years (January 1995 to December 1998). It provided that the Ferries Golfo de Vizcaya company would maintain and promote a scheduled service between Bilbao and Portsmouth at the rate of two round trips per week (except for three weeks in the low season) using a mixed British/Spanish crew and local British and Spanish sources for goods and services.

(14) It also provided that the District Council of Vizcaya would buy vouchers from the company and would distribute them among disadvantaged groups in order to provide them with foreign travel opportunities. The vouchers were exchangeable for tickets, even outside their prescribed conversion period provided that the conversion took place during the low season and that there was sufficient capacity. In total, the autonomous Basque authorities undertook to buy 46 500 vouchers between January 1995 and December 1998 for ESP 985 500 000. The price was calculated on the basis of the estimated low-season commercial price of the tickets for the years concerned and discounted in order to reflect the District Council's long-term purchasing commitment.

### II.3. **Grounds for initiating the procedure**

(15) The Commission took the view on 29 September 1993 that the first Agreement involved aid because the shipping company was being financed by the autonomous Basque authorities under conditions not available on the market and that the element of commercial risk was eliminated for Ferries Golfo de Vizcaya. The following four points were emphasised:

(a) the fact that the autonomous authorities had agreed to purchase a set number of vouchers over a three-year period rather than on the basis of need;

([5]) See second reference in footnote 1.

([6]) Ferries Golfo de Vizcaya was a subsidiary of P & O European Ferries of the United Kingdom and Vapores Suardiaz of Spain. Since 1994, Ferries Golfo de Vizcaya has been 100 % owned by P & O European Ferries.

(b) the fact that they guaranteed for these vouchers a price higher than the agreed commercial price;

(c) the fact that the autonomous authorities had undertaken to pay for the vouchers even if voyages were not carried out or were diverted to other ports for reasons beyond the control of Ferries Golfo de Vizcaya;

(d) the fact that they had undertaken to cover the company's losses.

(16) The Commission also stated that the aid scheme did not seem to qualify for exemption under any of the categories of Article 92(2) and (3) (now Article 87(2) and (3)) of the Treaty.

(17) As far as the second Agreement is concerned, following the judgment of the Court of First Instance of 28 January 1999, the Commission considered, in its decision of 26 May 1999 extending the procedure, that this Agreement also appeared to fall within the scope of Article 92(1) (now Article 87(1)) of the Treaty.

(18) The Commission pointed out that the autonomous Basque authorities had not demonstrated why they needed more vouchers within the framework of the second Agreement than within that of the first (46 500 instead of 26 000). It assumed that the number of vouchers had been artificially increased to offset the decrease in the price of the vouchers and so maintain the public financial contribution at the level originally agreed, and it concluded that the Agreement did not constitute a normal commercial transaction. It also emphasised that the number of vouchers actually distributed did not correspond, even approximately, to the number of vouchers pre-purchased by the public authorities. It added that the fact that Ferries Golfo de Vizcaya had been allowed to keep the money it had received under the first Agreement until the entry into force of the second Agreement also suggested the 'non-commercial' nature of the Agreement.

(19) The Commission also stated that the aid granted by the autonomous Basque authorities to Ferries Golfo de Vizcaya was likely to affect trade between Member States and to distort competition since the company operated between two Member States and competed with other Community operators. Finally, it indicated that it was of the preliminary view that the scheme did not qualify for any of the exemptions provided for by Article 92(2) and (3) (now Article 87(2) and (3)) of the Treaty.

## III. **COMMENTS FROM INTERESTED PARTIES**

(20) After the procedure was initiated, comments were received from Ferries Golfo de Vizcaya, the recipient of the aid, in favour of both the Agreements, and from Brittany Ferries, a competitor operating on the Plymouth/Santander route, against the two Agreements. The Association of Pensioners Evacuated during the Civil War and the Automobile Association Services indicated their support for the first Agreement.

(21) The following comments were made on the second Agreement.

*Brittany Ferries*

(22) Brittany Ferries argued that the 1995 Agreement did not constitute a normal commercial transaction and that the aid affected trade between Member States.

(23) In addition to supporting the analysis the Commission presented when initiating the procedure, it pointed out the following peculiar features of the Agreement which clearly indicate that it does not constitute a normal commercial transaction:

(a) the uneven purchase of vouchers between different months and years;

(b) the provision according to which the tariffs would be revised if the vessel used by Ferries Golfo de Vizcaya was changed;

(c) the fact that the autonomous Basque authorities were not obliged to convert the purchased vouchers into tickets;

(d) the conditions relating to the nationality of the crew and the regularity of the service.

(24) Brittany Ferries further claimed that the aid did not qualify for any of the exemptions provided for by Article 92 (now Article 87) of the Treaty.

*Ferries Golfo de Vizcaya*

(25) Ferries Golfo de Vizcaya argued that the 1995 Agreement did have a commercial nature and did not involve aid. It claimed that the advance bulk purchase of tickets by the District Council of Vizcaya at a volume discount price was no different from the practice of commercial bulk tourist ticket purchasers. It explained the increase in the number of vouchers by:

(a) the discount in their price,

(b) the expectations of the District Council, based on its experience with the national Inserso programme, and

(c) the fact that its budget had already been allocated.

As far as the incomplete conversion of vouchers is concerned, the shipping company emphasised that the process was not yet over and would be pursued (the Agreement allows vouchers to be converted beyond the period covered by the Agreement).

(26) Furthermore, Ferries Golfo de Vizcaya submitted that it derived no financial benefit from the retention of the monies which were to be repaid following the cancellation of the Agreement because it had repaid them with interest.

(27) Ferries Golfo de Vizcaya also submitted that if the Commission were to find that the 1995 Agreement was not an arm's length commercial transaction and involved State aid, such aid should nevertheless be approved.

(28) As far as Article 87(2)(a) of the Treaty is concerned (aid having a social character), Ferries Golfo de Vizcaya argues that, to its knowledge, the District Council of Vizcaya had approached other international ferry service operators with a view to establishing their interest in running the service.

(29) As far as Article 87(3)(c) of the Treaty is concerned, Ferries Golfo de Vizcaya submits that the aid should be approved because it facilitated the development of the Vizcaya region without distorting competition. The company argues that 'Ferries Golfo de Vizcaya's operation "doubled" the size of the market for ferry services between Spain and the United Kingdom without any negative impact on Brittany Ferries' carryings'.

(30) Finally, Ferries Golfo de Vizcaya argued that if the Commission were to find that the 1995 Agreement involved State aid that could not be approved, the Commission should not make a recovery order as the aid was granted lawfully at that time. It states that the 1995 Agreement had been notified to the Commission in due time and that the aid had been granted only after the Commission's favourable decision of 7 June 1995.

## IV. **COMMENTS FROM SPAIN**

(31) The autonomous Basque authorities claimed they were pursuing two goals when they concluded the 1992 Agreement with Ferries Golfo de Vizcaya (the first Agreement, which was cancelled). Firstly, they acted like a private investor by financing a company and expecting a reasonable return on their investment. They stated that they had chosen a reliable company and that their agreement with Ferries Golfo de Vizcaya included a provision according to which they were entitled to 10 % of the profits made by the company after the first three years of operation. Secondly, they wanted to promote trade and tourism and help the regional development of the Basque Country. In their view, the Basque Government authorities' participation in the Agreement did not fall under Article 92(1) (now Article 87(1)) of the Treaty. However, they argued that if it were considered to fall under that Article, the aid would qualify for an exemption under Article 92(3) (now Article 87(3)) of the Treaty.

(32) The autonomous Basque authorities further indicated that there was no aid element in the 1995 Agreement with Ferries Golfo de Vizcaya, which was intended to meet the genuine need to provide subsidised trips for Vizcaya's senior citizens and facilitate access to transport for the people and institutions of Vizcaya.

(33) On the first point, they explained that the District Council of Vizcaya had participated since 1988 in the national Inserso programme of subsidised travel, but had decided to terminate its arrangement with Inserso in 1993 (1995 in practice) owing to problems that had arisen in the implementation of the programme. The autonomous Basque authorities explained that the arrangement with Inserso had to be terminated on account of the way places were distributed and the limited number of destinations. To replace the Inserso programme, the District Council of Vizcaya set up its own travel programme, 'Adineko', in 1996. The District Council of Vizcaya stated that its estimate of the quantity of vouchers needed was based on data from the Inserso programme and indicated that the fact that Adineko had enjoyed only limited success had no bearing on the genuine need to conclude the Agreement. The District Council of Vizcaya also emphasised that it would continue to implement the Agreement, after its termination date, as there was no limitation on the period for converting the vouchers.

(34) On the second point, the autonomous Basque authorities referred to their obligation to help people whose particular requirements, income level or social background meant that special arrangements were needed for them to travel. In practice, transport vouchers were distributed to a wide range of people and institutions (e.g. local authorities, associations, vocational schools and universities).

(35) The autonomous Basque authorities also submitted that if the Commission were to find that the 1995 Agreement involved State aid, such aid should be approved because the agreement facilitated economic development in the Historic Territory of Vizcaya as provided for by Article 87(3)(c) of the Treaty and/or because it was conceived with social objectives, as provided for by Article 87(2)(a) of the Treaty.

(36) In justifying their first argument, the autonomous Basque authorities explained that in the early 1990s Vizcaya was suffering serious economic problems. The District Council decided to promote a ferry service between Bilbao and Portsmouth in order to stimulate the tourism-related sectors of the Vizcaya economy. The District Council ordered a viability study from KPMG and decided to purchase vouchers as an incentive to get a new high quality, regular, mixed ferry service.

(37) The autonomous Basque authorities claimed that their contribution was in the nature of an investment aid and did not constitute an operating aid. They explained that they wanted to make a minimum contribution to the initial investment costs borne by Ferries Golfo de Vizcaya and that when the 1992 voucher scheme was cancelled, the District Council sought to conclude a new agreement with Ferries Golfo de Vizcaya in order to meet its undertaking to contribute to the initial investment costs for the ferry service. They also pointed out that the aid was not linked to the annual costs of Ferries Golfo de Vizcaya and that the service was viable.

(38) The autonomous Basque authorities concluded that any hypothetical element of State aid which the Commission could see in the 1995 Agreement should be considered State aid for investment in Vizcaya granted on an ad hoc basis ([7]) [...] but as a fundamental part of the District Council's policy for development of the Vizcaya economy. According to them, the 'aid' meets the conditions laid down by Article 87(3)(c) of the Treaty since:

(a) it is substantially below the maximum rate of State aid allowed for Vizcaya in 1995 (the amount paid by the District Council is equivalent to approximately 6,7 % of Ferries Golfo de Vizcaya's investment costs in relation to the service),

(b) the aid contributed to economic development in Vizcaya (they claimed that, to date, the service had led to the creation of 706 jobs in Vizcaya and the Basque Country),

(c) the aid is of interest to the Community (the Commission promotes short sea shipping and co-finances transport projects within the framework of its regional policy), and

(d) the scheme has had no adverse effect on trade and competition (every operator potentially interested in the service was approached by the District Council; the autonomous Basque authorities claimed that the Bilbao/Portsmouth service had led to no reduction in activity on the Santander/Plymouth route operated by Brittany Ferries).

(39) With respect to their second argument, the autonomous Basque authorities submitted that Article 87(2)(a) of the Treaty (aid having a social character) provides an alternative legal basis for approval of any element of State aid the Commission could hypothetically see in the 1995 Agreement. They stated that the vouchers purchased were distributed to citizens applying under specific social programmes run by the District Council. In addition, they explained that the Agreement entailed no discrimination against other ferry operators since no other operator showed interest in establishing the Bilbao/Portsmouth service. They also pointed out that the KPMG viability study had been forwarded to all operators potentially interested in establishing the service and that contact had been maintained with them between 1989 and 1991.

(40) Lastly, the autonomous Basque authorities argued that if, despite all their arguments, the Commission were to find that the 1995 Agreement involved State aid that could not be approved, the Commission should not make a recovery order as this would be contrary to the principles of legal certainty and legitimate expectation. They insisted on the fact that the 1995 Agreement had been implemented lawfully at that time.

## V. **ASSESSMENT OF THE AID**

### V.1. **Legal basis for the assessment**

(41) The only Agreement that was fully implemented, the second Agreement concluded on 7 March 1995, covered the period 1995 to 1998. It was concluded at a time when the Guidelines for the examination of State aids to Community shipping companies of 3 August 1989 were in force ([8]). These guidelines were revised in 1997 following the publication of the Community guidelines on State aid to maritime transport on 5 July 1997 ([9]).

### V.2. **Existence and compatibility of the aid**

#### V.2.1. *Existence of aid*

(42) Article 92(1) of the Treaty (now Article 87(1)) prohibits aid granted through State resources which distorts or threatens to distort competition by favouring certain undertakings, in so far as it affects trade between Member States.

(43) The first Agreement concluded by the autonomous Basque authorities and Ferries Golfo de Vizcaya was repealed and the monies received by Ferries Golfo de Vizcaya reimbursed. Therefore the case became devoid of purpose.

(44) As far as the second Agreement is concerned, the Commission takes the view that it falls under Article 92(1) of the Treaty (now Article 87(1)).

([7]) They referred to the judgment of the Court of First Instance of the European Communities of 14 September 1994 in Cases C-278/92, C-279/92 and C-280/92, *Spain* v *Commission* (1994 ECR I-4103).

([8]) Annex 1 to 'Financial and fiscal measures concerning shipping operations with ships registered in the Community', SEC(89)921 final.

([9]) OJ C 205, 5.7.1997, p. 5.

(45) As a preliminary point, it must be recalled that, in its judgment of 28 January 1999 on the case, the Court of First Instance ruled that 'a State measure in favour of an undertaking, which takes the form of an agreement to purchase travel vouchers cannot be excluded in principle from the concept of State aid in the sense contemplated in Article 92 of the Treaty, merely because the parties undertake reciprocal commitments' (ground 71). To determine whether the 1995 Agreement falls within the scope of Article 92(1) of the Treaty (now Article 87(1)), it must be considered whether it constitutes a 'normal commercial transaction' (see, for instance, ground 75 of the Court of First Instance's judgment).

(46) The autonomous Basque authorities argued that the number of vouchers provided for in the Agreement (15 000 in 1995 and in 1996, 9 000 in 1997 and 7 500 in 1998) had been calculated on the basis of the annual number of beneficiaries of the Inserso programme in Vizcaya (around 15 000 in practice), i.e. the programme which they wanted to terminate and replace with their own Adineko programme.

(47) On the basis of the data submitted, the Commission upholds its view that the total number of vouchers purchased by the District Council of Vizcaya was not fixed by reference to the District Council's actual needs and that the second Agreement does not constitute a normal commercial transaction but was designed to maintain at its original level the aid contained in the first Agreement, as is shown below.

V.2.1.1. Subsidised holiday trips

(48) It cannot be asserted that the needs of the District Council of Vizcaya in this field were derived from the Inserso figures (around 15 000 beneficiaries per year in Vizcaya) as the following shows.

(49) The District Council of Vizcaya decided to purchase 15 000 vouchers from Ferries Golfo de Vizcaya in 1995 while it was still participating in the Inserso programme, itself designed to benefit approximately 15 000 people of Vizcaya in 1995. The autonomous Basque authorities did not explain why Vizcaya's needs were double in that particular year. Nor did they indicate why the scheme only provided for 9 000 and 7 500 vouchers (instead of 15 000) in 1997 and 1998. When the District Council of Vizcaya decided to commit itself to buying this number of vouchers, it did not know that the Inserso programme would continue to benefit people from the area [10] and that its own scheme would not be successful. Furthermore, no indication was given by the autonomous Basque authorities of why the number of vouchers purchased had to differ significantly from month to month (e.g. 750 vouchers were purchased in January 1995 compared with 3 000 in February 1995).

(50) The District Council of Vizcaya's own Adineko travel programme was not adopted until 1996 and thus post-dates the conclusion of the 1995 Agreement. Furthermore, it appears from the data supplied by the autonomous Basque authorities that this programme, which was supposed to replace the Inserso programme and to make use of the vouchers bought by the District Council of Vizcaya, only offered a very limited number of trips to the United Kingdom: 2 132 in 1996 (i.e. 14 % of the total number of vouchers purchased that year), 1 000 (11 %) in 1997, 400 (5 %) in 1998 — 3 532 in total.

V.2.1.2. Access to transport for the people and institutions of Vizcaya

(51) No indication was given by the autonomous Basque authorities of how the needs relating to the other part of the scheme (facilitation of access to transport for the people and institutions of Vizcaya, which is different from the made-to-measure holiday packages provided through Inserso and Adineko) had been estimated. In practice, according to the said authorities, 12 520 travel vouchers were distributed under the scheme between 1995 and 1998.

(52) In addition, the Agreement contains several provisions that a normal commercial agreement to purchase travel vouchers would not include, such as the following:

(a) it specifies the weekly and annual number of crossings to be made by Ferries Golfo de Vizcaya, and indicates the days when vessels should operate (see Article 3b of the Agreement) [11], it also stipulates that the consent of the District Council of Vizcaya is needed for Ferries Golfo de Vizcaya to change the vessel providing the service (see Article 1 — Article 3a specifies the level of amenities required on board);

(b) Article 3a of the Agreement lays down certain conditions, such as the nationality of the crew and the sources of goods and services.

(53) The Commission concludes from the above that the purchase of vouchers from Ferries Golfo de Vizcaya under the second Agreement did not correspond to the autonomous Basque authorities' genuine social needs and did not constitute a normal commercial transaction but rather constituted aid to the shipping company. The fact that the amount of money provided for under the first and the second Agreements remained at approximately the same level [12] reinforces this conclusion. The autonomous authorities managed to design a second scheme allowing the ferry company to keep the amount of aid promised in 1992.

[10] Even though the District Council of Vizcaya had stopped contributing to this programme.
[11] Ferries Golfo de Vizcaya may alter its sailing schedule for commercial reasons only after notifying the District Council of Vizcaya.
[12] ESP 911 800 000 under the first Agreement and ESP 985 500 000 under the second Agreement.

(54) Finally, the money granted by the District Council of Vizcaya to Ferries Golfo de Vizcaya was likely to affect trade between Member States and distort competition, as the company operates between two Member States (the United Kingdom and Spain) and competes with other Community operators. International maritime transport services have long since been liberalised (see, in particular, 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 ([13])). Ferries Golfo de Vizcaya competes directly with at least one other company, Brittany Ferries, which provides services between Plymouth (United Kingdom) and Santander (Spain). It should also be pointed out that Ferries Golfo de Vizcaya's parent company, P & O, operates and competes with other Community operators on various intra-Community routes. The fact that Brittany Ferries' passenger carryings increased over the period does not mean that the aid did not distort competition, as that increase might have been greater had the aid not existed.

(55) As the Court of First Instance points out in its judgment of 28 January 1999, 'as the travel vouchers purchased by the Spanish authorities can be used only in the low season, the improved service supplied by the undertaking does not in principle entail significant additional costs for it and, consequently, the effects of the new Agreement on competition and trade between Member States are the same as those which could be attributed to the 1992 agreement. It is settled case law that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected' (grounds 76 and 77).

V.2.2. *Article 92(2) and (3) (now Article 87(2) and (3)) of the Treaty*

(56) As a derogation from the prohibition laid down by Article 92(1) of the Treaty (now Article 87), paragraphs 2 and 3 of the Article provide that certain types of aid are compatible or may be considered compatible with the common market. The Commission takes the view that none of the exceptions listed in these paragraphs can be invoked in the present case.

(57) Points (b) and (c) of Article 92(2) (now Article 87(2)) concerning natural disasters and the Federal Republic of Germany are manifestly not applicable in the present case.

([13]) OJ L 378, 31.12.1986, p. 1.

(58) Article 92(2)(a) (now Article 87(2)(a)) provides that 'aid having a social character, granted to individual consumers' is compatible with the common market 'provided that such aid is granted without discrimination related to the origin of the products concerned'. The aid granted by the autonomous Basque authorities benefits individual consumers with special needs and might therefore have been considered an 'aid having a social character, granted to individual consumers'. However, the condition laid down by the Treaty (the absence of discrimination related to the origin of the products concerned) is not met in the present case. Vouchers have only been purchased from Ferries Golfo de Vizcaya and the autonomous authorities have failed to prove that the company was selected in a transparent manner.

(59) The autonomous Basque authorities argued that the scheme is not discriminatory. However, the evidence submitted is weak: they explained that they had sent the viability study produced by KPMG to all possible operators and that they had been in contact with them between 1989 and 1991 in order to see whether they would be willing to start to operate a regular service between Bilbao and Portsmouth. However, they never claimed or demonstrated that they had contacted companies other than Ferries Golfo de Vizcaya when they decided to purchase vouchers in 1995 as part of their social scheme. In view of all the above, it may be concluded that the aid favoured Ferries Golfo de Vizcaya.

(60) Furthermore, other companies might have been willing to carry these passengers to the United Kingdom via a different route. The autonomous Basque authorities might have achieved identical social goals with a diversified travel offer (for instance, to other regions of Spain or, if it had to be international, by organising trips to other neighbouring countries such as France or Portugal).

(61) Therefore, the aid cannot qualify under Article 92(2)(a) of the Treaty (now Article 87(2)(a)).

(62) Article 92(3) of the Treaty (now Article 87(3)) provides that some other types of aid may be considered to be compatible with the common market. Points (a), (b), (d) and (e) are not applicable to the present case.

(63) Point (c) provides that 'aid to facilitate the development of certain 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 compatible with the common market.

(64) For the reasons given above, the Commission takes the view that the aid the autonomous Basque authorities granted to Ferries Golfo de Vizcaya cannot be considered to be aid of a regional or sectoral nature compatible with the common market, as it is operating aid ([14]) with no incentive effect, having been granted well after the service began to operate ([15]).

(65) From the regional policy perspective, the autonomous Basque authorities and Ferries Golfo de Vizcaya argue that the aid could be authorised as it facilitates the economic development of Vizcaya without any distorting effect on competition on British-Spanish ferry routes.

(66) The Commission takes the view that the aid, granted to a specific company, cannot be considered to be an aid to the Vizcaya region even though it may have had an impact on the region's economy ([16]). Any activity carried out in a region has an impact on that region's economy. Any aid to a company in a given region will necessarily have some kind of impact but that does not make it a proper regional aid.

(67) The figures provided by the Spanish authorities refer to the impact of the new ferry service on the economy. However, the aid that is being examined was granted between 1995 and 1998, well after the date when Ferries Golfo de Vizcaya started its service. The autonomous authorities did not explain what the impact of the aid might have been nor did they show that the impact of the ferry service on the economy would have been very different in the absence of the aid. It is therefore difficult to argue that the aid facilitated the development of the region.

(68) In any case, even if the aid were a 'regional' aid, it could not be considered compatible with the common market as it is an operating aid and not an investment aid as the autonomous Basque authorities have argued.

(69) The aid was not linked to any specific investment made by the company. Besides, it cannot be maintained that the autonomous Basque authorities contributed in 1995 to investments made by Ferries Golfo de Vizcaya around 1992 for starting the service. The autonomous authorities merely raised the company's income by buying tickets. Therefore, the aid is clearly an operating aid.

(70) From the sectoral policy perspective, the Commission takes the view that the aid cannot be considered compatible with the common market on the grounds that it would 'facilitate the development of certain activities' without 'adversely affecting trading conditions to an extent contrary to the common interest'.

(71) The aid does not fulfil the criteria laid down by the Commission in its Guidelines for the examination of State aids to Community shipping companies of 3 August 1989 and its Community guidelines on State aid to maritime transport of 5 July 1997, as referred to in recital 41.

(72) The 1989 Guidelines stated that whereas certain types of aid listed therein, such as the special taxation of certain shipping activities, could be considered compatible with the common market, 'any other kind of operating aid … is in principle incompatible with the common market'. This basic principle is upheld in the 1997 Guidelines. The type of aid granted to Ferries Golfo de Vizcaya does not correspond to the types of aid authorised in the Guidelines (relief of taxation and social charges for shipping companies and seafarers).

(73) The fact that the service was viable and that the aid was not linked to the annual costs or losses of Ferries Golfo de Vizcaya has no bearing on this conclusion.

### V.3. **Recovery of the aid**

(74) The autonomous Basque authorities and Ferries Golfo de Vizcaya argued that even if the Commission were to find that the 1995 Agreement involved State aid that could not be approved, the Commission should not make a recovery order as this would frustrate their legitimate expectations. The Commission cannot share this view. As the Court of First Instance held in its judgment of 14 January 1997 in case C-169/95 *Kingdom of Spain* v *Commission* ([17]), 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. A diligent operator should normally be able to determine whether that procedure has been followed. In this case, it is not contested that, contrary to the obligations imposed on the Member States by Article 93(3) of the Treaty, the aid in question was granted without prior notification. The fact that the Commission initially decided not to raise any objections to the aid at issue cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time

([14]) See the judgment of 8 June 1995 of the Court of First Instance in Case T-459/93, *Siemens* v *Commission*, 1995 ECR II-1675.
([15]) See judgment of 17 September 1980 of the Court of Justice in Case 730/79, *Philip Morris Holland BV* v *Commission*, 1980 ECR 2671.
([16]) See point 2 of the Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).
([17]) 1997 ECR I-0135.

before the Court, which annulled it. However regrettable it may be, the Commission's error cannot erase the consequences of the unlawful conduct of the Kingdom of Spain. The contested Decision cannot therefore be regarded, either in so far as it requires repayment of the aid in issue or in so far as it requires payment of interest thereon, as frustrating the legitimate expectations of the recipient undertaking' (grounds 51 to 54).

(75) Generally speaking, for an aid to be granted in accordance with Article 93(3) (now Article 88(3)) of the Treaty, it has to be notified by the Member State concerned and cannot be put into effect before the Commission has reached a final decision on the case. These conditions have not been fulfilled in the present case.

(76) The Commission's 1995 Decision regarding Ferries Golfo de Vizcaya was challenged in the Court of First Instance in due time and was subsequently annulled by the Court. It follows from the jurisprudence that annulment of authorisation deprives the aid of its basis in Community law and should in principle render it unlawful from the outset.

(77) In any event, even if the payments to Ferries Golfo de Vizcaya were effectively made only after the Commission's positive Decision of 7 June 1995, the Agreement, which provides for payments as from January 1995, was concluded on 7 March 1995, a few months before the Commission adopted its Decision. The aid was therefore implemented before the Commission reached its Decision ([18]). In accordance with the aforementioned judgment of 14 January 1997, the Commission's error cannot erase the consequences of the unlawful conduct of the autonomous Basque authorities.

(78) The Commission also observes that the aid was not formally notified. The Guide to procedures in State aid cases and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([19]) clearly set out that notifications should be made by the Member States themselves (at central government level, even if the aid is granted by regional authorities). The Commission takes the view that the 1995 Agreement was not formally notified as it was only sent to the Commission by the lawyers of the recipient of the aid on 27 March 1995.

## VI. **CONCLUSIONS**

(79) The Commission finds that Spain has unlawfully implemented aid to Ferries Golfo de Vizcaya in breach of Article 93(3) (now Article 88(3)) of the Treaty. The aid, for a total sum of ESP 985 500 000, will have to be recovered from the recipient,

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid which Spain has implemented in favour of Ferries Golfo de Vizcaya, to the sum of ESP 985 500 000, is incompatible with the common market.

*Article 2*

1. Spain shall take all the necessary measures to recover from the recipient the aid referred to in Article 1 made available to it unlawfully.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

*Article 3*

Spain shall inform the Commission, within two months following the date of notification of this Decision, of the measures taken to comply with it.

*Article 4*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 29 November 2000.

*For the Commission*

Loyola DE PALACIO

*Vice-President*

([18]) This notion was explained by the Commission in its letter to the Member States of 27 April 1989 (ref. SG(89)D/5521).

([19]) OJ L 83, 27.3.1999, p. 1.