State Aid – Cases 1

Case 1

1 By decision of 7 July 1997, received at the Court on 15 July 1997, the Tribunal de Commerce (Commercial Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 Those questions were raised in proceedings in which the Tribunal de Commerce was examining the question whether it should of its own motion declare Déménagements-Manutention Transport (hereinafter `DMT'), established in Brussels, insolvent.

3 Under the version of Article 442, paragraph 1, of the Belgian Commercial Code which was applicable at the material time, insolvency is pronounced by judgment of the Tribunal de Commerce upon application by the insolvent trader, or on the application of one or several creditors, or of its own motion.

4 An investigation into the possible insolvency of an undertaking is initially carried out by the investigating judge who, once he has sufficient information to suggest that the undertaking may be insolvent, refers the matter to the Tribunal de Commerce. That is what happened in the main proceedings.

5 According to the decision of the national court, DMT's balance sheet as at 31 December 1996 shows that, at best, DMT has BEF 12.8 million available in current assets to meet current liabilities of approximately BEF 21.5 million. The debts owed by DMT in respect of tax, wages and social security contributions amount to a total of BEF 18.48 million, of which BEF 18.1 million are owed to the Office National de Sécurité Sociale (National Social Security Office, hereinafter `the ONSS'), a public body guaranteed by the Belgian State to which the State has delegated responsibility for collecting mandatory employers' and workers' social security contributions and ensuring the financial management and efficient financing of the social security system (Article 5 of the Law of 27 June 1969, as amended by the Law of 30 March 1994, hereinafter `the Law').

6 The contributions payable by a worker are withheld from each wage packet by the employer who must, within the time-limits set by the King, forward those contributions to the ONSS (Article 23 of the Law). Employers who do not comply with their obligations are liable to

criminal sanctions. Furthermore, employers who do not pay the contributions within the time-limits are liable to pay the ONSS an additional contribution plus interest at a rate fixed by law (Article 28 of the Law). However, it is accepted that the ONSS may, on its own responsibility, grant periods of grace to employers and vary such periods.

7 The Tribunal de Commerce points out that the ONSS appears to have shown `exceptional patience' towards DMT in exercising that power, inter alia, in authorising it, by letter of 17 December 1996, to pay off its debts at the rate of `[BEF] 600 000 per month from 25 December 1996' and `to pay new contributions from the fourth quarter of 1996 within the periods laid down by law'; those periods of grace were confirmed by the ONSS in its letter to DMT of 24 February 1997.

8 The Tribunal de Commerce, Brussels, took the view that, by those payment facilities, the ONSS contributed to sustaining artificially the business of an insolvent undertaking which was unable to obtain funding under normal market conditions. It accordingly decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

`1. Is Article 92 of the Treaty to be interpreted as meaning that measures in the form of payment facilities granted by a public body such as the ONSS enabling a commercial company to retain over a period of at least eight years a proportion of the sums collected from staff and to use those sums in support of its commercial activities, when that undertaking is unable to obtain funding under normal market conditions or to increase its capital, are to be considered State aid within the meaning of that article?

2. If the first question is answered in the affirmative, is Article 92 of the Treaty to be interpreted as meaning that such aid is compatible with the common market?'

Case 2

On 9 July 1992 the Diputación … and the Ministry of Trade and Tourism of the Basque Government, of the one part, and Ferries Golfo de Vizcaya, now P&O European Ferries (Vizcaya) … of the other part, signed an agreement (hereinafter “the original agreement”) relating to the establishment of a ferry service between Bilbao and Portsmouth. That agreement provided for the purchase by the signatory authorities between March 1993 and March 1996 of 26 000 travel vouchers to be used on the Bilbao-Portsmouth route. The

maximum financial consideration to be paid to P&O Ferries was fixed at ESP 911 800 000 and it was agreed that the tariff per passenger would be ESP 34 000 for 1993-94 and, subject to alteration, ESP 36 000 for 1994-95 and ESP 38 000 for 1995-96. The Commission was not notified of the original agreement.

2 By letter of 21 September 1992, Bretagne Angleterre Irlande, a company which has, under the name "Brittany Ferries", operated a shipping service between the ports of Plymouth in the United Kingdom and Santander in Spain for a number of years, lodged a complaint with the Commission concerning the large subsidies which were to be granted by the Diputación and the Basque Government to P&O Ferries.

3 By letter of 30 November 1992, the Commission requested the Spanish Government to provide all the relevant information concerning the subsidies in question. Its reply reached the Commission on 1 April 1993.

4 On 29 September 1993 the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC). It took the view that the original agreement was not a normal commercial transaction given that it concerned the purchase of a predetermined number of travel vouchers over a period of three years, that the agreed price was higher than the commercial rate, that the vouchers would be paid for even in respect of journeys which were not made or were diverted to other ports, that the agreement included an undertaking to absorb all losses during the first three years of operation of the new service and that the element of commercial risk was therefore eliminated for P&O Ferries. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to P&O Ferries constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and did not fulfil the conditions necessary for it to be declared compatible with the common market.

5 The Commission notified the Spanish Government of this decision by letter of 13 October 1993, requesting it to confirm that it would suspend all payments of the aid in question until the Commission adopted its final decision, to submit observations and to provide all the information necessary for assessing the aid.

6 By letter of 10 November 1993, the Basque Government informed the Commission that implementation of the original agreement had been suspended.

7 The decision to initiate a procedure concerning the aid granted by the Kingdom of Spain to P&O Ferries was the subject of a communication of the Commission addressed to the other Member States and the interested parties, which was published in the Official Journal of the European Communities (OJ 1994 C 70, p. 5).

8 In the course of the administrative procedure, P&O Ferries and the Commission discussed the type of agreement which could be negotiated by the parties. In particular, the discussions related to proposed amendments to the original agreement and proposals for replacing it with a new one.

9 By letter of 27 March 1995 to an official in the Directorate-General for Transport responsible for State aid in the transport sector, P&O Ferries sent the Commission a copy of a new agreement (hereinafter "the new agreement") which had been concluded on 7 March 1995 by the Diputación and P&O Ferries and would apply from 1995 to 1998. It is apparent from a letter enclosed by P&O Ferries that the Diputación was to receive interest on the sums which had been made available to P&O Ferries under the original agreement.

10 Under the new agreement, the Diputación undertook to purchase, for the period from January 1995 to December 1998, a total of 46 500 travel vouchers to be used on the Bilbao-Portsmouth route operated by P&O Ferries. The maximum financial consideration to be paid by the public authority was fixed at ESP 985 500 000, of which ESP 300 000 000 were to be paid in 1995, ESP 315 000 000 in 1996, ESP 198 000 000 in 1997 and ESP 172 500 000 in 1998. The agreed tariff per passenger was ESP 20 000 for 1995, ESP 21 000 for 1996, ESP 22 000 for 1997 and ESP 23 000 for 1998. Those tariffs were discounted to reflect the long-term purchasing commitment entered into by the Diputación and were calculated on the basis of a reference tariff of ESP 22 000, that is to say the published commercial tariff for 1994, plus 5% per annum, increasing the tariff to ESP 23 300 in 1995, ESP 24 500 in 1996, ESP 25 700 in 1997 and ESP 26 985 in 1998.

11 Clause 5 of the new agreement reads as follows:

"... the [Diputación] hereby confirms that all necessary steps have been taken to comply with all applicable laws in respect of the agreement and in particular that it does not contravene internal legislation, the Law on the Protection of Competition, nor Article 92 of the Treaty of Rome, and all necessary steps have been taken to comply with Article 93(3) of the Treaty of Rome."

12 On 7 June 1995 the Commission adopted a decision terminating the review procedure initiated in relation to aid to P&O Ferries (hereinafter "the decision of 7 June 1995").

13 The decision of 7 June 1995 stated that the new agreement introduced a number of significant modifications in order to meet the Commission's concerns. The Basque Government was not a party to this agreement. According to the information supplied to the Commission, the number of travel vouchers to be purchased by the Diputación was based on the estimated take-up of the offer by certain low-income groups and those covered by social and cultural programmes, including school groups, young people and the elderly. The cost of the vouchers was below the advertised brochure price of tickets for the period in question, in accordance with the normal market practice of volume discounts for large users of commercial services. It was also stated in the decision that the remaining elements of the original agreement which had caused concern had been deleted from the new agreement.

14 In the decision of 7 June 1995, the Commission also found that the viability of the service offered by P&O Ferries had been proven by its commercial results and that the latter had established its business without any benefit from State support. According to the new agreement, P&O Ferries had no special rights to use the port of Bilbao and its priority on the berth was limited to the scheduled arrival and departure times of its vessels, which meant that other vessels could in fact use the berth at other times. The Commission considered that the new agreement, which was designed for the benefit of local people using local ferry services, appeared to reflect a normal commercial relationship, with arm's length pricing for the services provided.

15 The Commission thus considered that the new agreement did not constitute State aid and decided to terminate the procedure initiated on 29 September 1993.

16 By judgment of 28 January 1999 in Case T-14/96 BAI v Commission [1999] ECR II-139 …, the Court of First Instance annulled the decision of 7 June 1995 on the ground that the Commission had founded the decision on a misinterpretation of Article 92(1) of the EC Treaty when concluding that the new agreement did not constitute State aid.

17 On 26 May 1999 the Commission decided to initiate the procedure provided for in Article 88(2) EC in order to enable interested parties to submit their comments on the position adopted by the Commission in the light of the BAI v Commission judgment (OJ 1999 C 233, p. 22). It informed the Kingdom of Spain thereof by letter of 16 June 1999. It received

comments from some interested parties and forwarded them to the Spanish authorities for their comments. The Spanish authorities made their submissions by letter of 21 October 1999, supplemented by further comments on 8 February and 6 June 2000.'

3 The judgment under appeal gave the following account of the contested decision:

'18 By [the contested decision], the Commission terminated the procedure under Article 88(2) EC, declaring the aid in question incompatible with the common market and ordering the Kingdom of Spain to require its recovery.

19 According to the contested decision, the Diputación sought, by purchasing travel vouchers, first, to subsidise trips for senior citizens resident in Vizcaye, under a programme of made-to-measure holiday packages called "Adineko", and second, to facilitate access to transport for people and institutions in Vizcaye in need of special arrangements for travel (for example, local authorities, associations, vocational schools and universities). It is also apparent from the contested decision that the Adineko programme was set up by the autonomous Basque authorities in order to replace, from 1996, the national subsidised travel programme called "Inserso" from which approximately 15 000 Vizcaye residents had benefited each year (paragraphs 32, 33, 34, 48 and 51 of the decision).

20 In its assessment of the aid, the Commission observes that the total number of travel vouchers purchased by the Diputación was not fixed by reference to its actual needs. In the Commission's view, contrary to the explanations given to it by the Diputación, the number of vouchers purchased from P&O Ferries could not have been estimated from the Inserso programme figures. It states (paragraph 49):

"The [Diputación] decided to purchase 15 000 vouchers from [P&O Ferries] in 1995 while it was still participating in the Inserso programme, itself designed to benefit approximately 15 000 people of Biscay in 1995. The autonomous Basque authorities did not explain why Biscay'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 [Diputación] 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 [even though the Diputación had stopped contributing to this programme] 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."

21 As regards the number of vouchers distributed, the decision states that under Adineko a total of 3 532 vouchers were distributed between 1996 and 1998, and that 12 520 vouchers were distributed between 1995 and 1998 under the programme for facilitating access to transport for the people and institutions of Vizcaye (paragraphs 50 and 51).

22 Finally, the Commission observes that the new agreement contains several provisions which a normal commercial agreement concerning the purchase of travel vouchers would not include. The Commission mentions, by way of example, the fact that the agreement specifies the weekly and annual number of crossings to be made by P&O Ferries, the fact that the consent of the Diputación is needed for P&O Ferries to change the vessel providing the service and the fact that the agreement lays down certain conditions, such as the nationality of the crew and the sources of goods and services (paragraph 52).

23 The Commission concludes therefrom as follows (paragraph 53):

"[The new 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 [original agreement and the new agreement] remained at approximately the same level reinforces this conclusion. The authorities managed to design a second scheme allowing the ferry company to keep the amount of aid promised in 1992."

24 According to the Commission, none of the derogations provided for in Article 87(2) and (3) EC applies in the present instance (paragraphs 56 to 73).

25 As regards recovery of the aid, the Commission rejects the argument that recovery would frustrate the legitimate expectations of the Diputación and P&O Ferries. In this connection it relies on paragraphs 51 to 54 of the judgment in Case C-169/95 Spain v Commission [1997] ECR I-135, citing them in full. It also relies on the fact that the decision of 7 June 1995 was challenged in due time and subsequently annulled by the Court of First Instance, that the aid was implemented before the Commission adopted its final decision on it

and that the Member State never made a valid notification under Article 88(3) EC (paragraphs 74 to 78).

26 Article 1 of the contested decision states:

“The State aid which Spain has implemented in favour of [P&O Ferries], to the sum of ESP 985 500 000, is incompatible with the common market.”

27 Article 2 of the contested decision is worded as follows:

“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.”’

Case 3

1 By application lodged at the Court Registry on 6 September 1991, Matra SA (hereinafter "Matra") brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of a decision of the Commission, notified to it on 30 July 1991, not to raise any objection in relation to an aid scheme of the Portuguese Government for a joint venture between Ford of Europe Inc. (hereinafter "Ford") and Volkswagen AG (hereinafter "VW") to set up a manufacturing unit for multi-purpose vehicles at Setúbal (Portugal).

2 It is apparent from the case file that on 26 March 1991 the Portuguese Republic, in accordance with Article 93(3) of the Treaty and the Community framework on State aid to the motor vehicle industry (OJ 1989 C 123, p. 3), notified to the Commission an aid scheme for Newco, an undertaking set up by Ford and VW in equal shares, for the establishment of a factory for multi-purpose vehicles at Setúbal for the period from 1991 to 1995.

3 The aid notified amounts to ESC 97 440 million against a total investment cost of ESC 454 000 million, of which ESC 297 000 million confers entitlement to aid. It consists of a regional subsidy of ESC 89 100 million paid under the Sistema de Incentivos de Base Regional (SIBR), the Portuguese regional aid system approved by the Commission in 1988, and tax reliefs of ESC 8 340 million granted as from 1997. Also envisaged are a training programme for employees organized jointly by the Portuguese Government and Newco, costing ESC 36 000 million, of which 90% is to be financed by the Portuguese Government, and various investments in infra-structure relating to road construction, water and electricity supply and waste-processing.

4 Following a complaint lodged by Matra on 26 June 1991 alleging infringements of Article 92 et seq. of the Treaty by the Portuguese Government and of Article 85 of the Treaty by Ford and VW, a meeting took place between the Commission and Matra at which the latter was heard and the Commission explained why the procedure under Article 93(2) of the Treaty had not been initiated.

5 On 16 July 1991 the Commission informed the Portuguese Government that it had no objections to the aid scheme notified.

6 On 30 July 1991 the Commission sent Matra, for information, the decision of 16 July 1991.

7 By order of 4 December 1991 (Case C-225/91 R Matra v Commission [1991] ECR I-5823), the President of the Court dismissed Matra' s application for suspension of operation of the decision whose annulment is sought in the present application.

8 By orders of 8 April 1992 the Portuguese Republic and Ford of Europe Inc., Ford-Werke AG and Volkswagen AG were given leave to intervene in the proceedings in support of the form of order sought by the Commission.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Case 4

It is apparent from paragraphs 1 to 12 of the judgment under appeal that Leipzig-Halle airport is operated by FLH which is a subsidiary of MF, whose shareholders are the Länder of Saxony and Saxony-Anhalt and the cities of Dresden (Germany), Halle (Germany) and Leipzig. On 4 November 2004, MF decided to construct a new runway ('the new southern runway') which was to be financed by capital contributions of EUR 350 million to MF or FLH by their public shareholders.

3 The DHL group ('DHL'), operating in the express parcel delivery sector, which is wholly-owned by Deutsche Post AG, decided, after carrying out negotiations with several airports, to move its European air freight hub from Brussels (Belgium) to Leipzig Halle from 2008. On 21 September 2005, FLH, MF and DHL Hub Leipzig GmbH ('DHL Hub Leipzig') signed a framework agreement, under which FLH was required to construct the new southern runway and to honour other commitments for the duration of that framework agreement, such as the guarantee that DHL be granted continuous access to that runway and the assurance that at least 90% of the flights made by or for DHL could be carried out at any time from that runway.

4 On 21 December 2005, the Land of Saxony issued a comfort letter in favour of Leipzig airport and DHL Hub Leipzig ('the comfort letter'). That letter seeks to guarantee the financial performance of FLH during the framework agreement and commits the Land of Saxony to pay compensation to DHL Hub Leipzig in the situation where it is no longer possible to use Leipzig-Halle airport as envisaged.

5 On 5 April 2006, the Federal Republic of Germany, in accordance with Article 2(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), notified the framework agreement and the comfort letter to the Commission of the European Communities.

6 By letter of 23 November 2006, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 88(2) EC. That procedure concerned the framework agreement, the comfort letter and the capital contributions.

7 On 23 July 2008, the Commission adopted the contested decision. It found, in that decision, that the capital contributions constituted State aid compatible with the common market, in accordance with Article 87(3)(c) EC. On the other hand, it considered that the comfort letter and the unlimited warranties provided for in the framework agreement

constituted State aid which were not compatible with the common market and requested the Federal Republic of Germany to recover the part of the aid already put at DHL's disposal pursuant to those warranties.

8 As is apparent from paragraphs 62 and 67 of the judgment under appeal, the capital contributions were granted prior to the contested decision. That was confirmed by the Commission at the hearing.

The proceedings before the General Court and the judgment under appeal

9 By applications lodged at the Registry of the General Court on 6 October 2008, the Freistaat Sachsen and the Land Sachsen-Anhalt, in Case T-443/08, and MF and FLH, in Case T-455/08, brought actions for annulment of Article 1 of the contested decision in so far as the Commission declares in it, first, that the capital contributions constitute State aid for the purpose of Article 87(1) EC and, secondly, that that State aid amounts to EUR 350 million.

10 By orders of 30 March 2009 and 24 June 2010, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene submitted by the Federal Republic of Germany and the Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV ('ADV') in the two cases and also decided to join those cases for the purposes of the oral procedure.

11 In support of their action, MF and FLH, supported by ADV, raised eight pleas alleging, essentially, as to the first, infringement of Article 87(1) EC, as to the second, that FLH could not be the recipient of State aid, as to the third, that it is impossible to treat FLH at the same time as both the donor and recipient of State aid, as to the fourth, infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, as to the fifth, infringement of primary law by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) ('the 2005 Guidelines'), as to the sixth, put forward in the alternative, a breach of procedure, as to the seventh, an infringement of the division of competences as it follows from the EC Treaty and, as to the eighth, that the decision on the amount of the alleged aid was inherently contradictory and insufficient reasons were stated for it.

12 By the judgment under appeal, the General Court joined Cases T-443/08 and T-445/08 for the purposes of the judgment, dismissed the action in the former case as inadmissible and annulled, in the latter case, Article 1 of the contested decision in so far as it fixes at EUR 350 million the amount of the State aid which the Federal Republic of Germany intended to grant

to Leipzig-Halle airport for the purposes of the construction of the new southern runway and related airport infrastructure, dismissing the action as to the remainder.

13 In dismissing the first plea, in support of which the applicants in Case T-455/08 argued, inter alia, that the concept of 'undertaking', within the meaning of Article 87(1) EC, did not apply to regional airports so far as concerns the financing of airport infrastructure, the General Court first held, for the reasons set out at paragraphs 87 to 100 of the judgment under appeal, that, in so far as it was operating the new southern runway, FLH was engaged in an economic activity, from which that consisting in the construction of that runway could not be dissociated.

14 Next, at paragraphs 102 to 107 of the judgment under appeal, the General Court rejected the argument put forward by the applicants that the construction of the new southern runway constituted a measure falling within regional, economic and transport policy which the Commission could not review under the rules of the EC Treaty on State aid, in accordance with the Commission's Communication on the application of Articles [87 EC] and [88 EC] and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5) ('the 1994 Communication'). It observed, in this connection, that the airports sector had undergone developments, in particular so far as concerns its organisation and its economic and competitive situation, and that the case-law following from Case T-128/98 Aéroports de Paris v Commission [2000] ECR II-3929, confirmed by Case C-82/01 P Aéroports de Paris v Commission [2002] ECR I-9297, ('the Aéroports de Paris judgments') had acknowledged, since 2000, that the managers of airports carried out an economic activity for the purposes of Article 87(1) EC.

15 Likewise, the General Court rejected, at paragraphs 108 to 116 of the judgment under appeal, the applicants' arguments concerning the alleged dissociability of the activities of construction and operation of airport infrastructure. It observed, inter alia, first, that the construction of the new southern runway was a precondition for its operation, second, that the entities concerned were in the present case the same, third, that, by basing its findings on the fact that the infrastructure at issue was operated by FLH for commercial purposes and that it was therefore infrastructure which could be used for such a purpose, the Commission had adduced enough evidence to substantiate the link between the construction and the operation of the new southern runway and, fourth, that the construction of that new southern runway was an activity which could be directly linked with the management of airport infrastructure

and the fact that an activity was not carried out by private operators or the fact that it was not profitable were not relevant criteria for the purposes of ruling out characterisation of it as an economic activity.

16 Lastly, the General Court discounted, at paragraphs 117 to 119 of the judgment under appeal, the applicants' arguments seeking to cast doubt on the relevance of the Aéroports de Paris judgments before concluding, at paragraph 120 of that judgment, that the Commission had been fully entitled to consider the capital contributions to be State aid for the purposes of Article 87(1) EC.

17 In dismissing the fourth plea raised by the applicants in Case T-455/08 and alleging the infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, the General Court observed, at paragraphs 157 to 164 of the judgment under appeal, that the Commission had not, contrary to what the applicants claimed, applied the 2005 Guidelines, but that it had implemented the principles stemming from the Aéroports de Paris judgments. Consequently, at paragraphs 166 to 172, 181 and 182 of the judgment under appeal, the General Court also dismissed the claims relating to infringement of the principles of protection of legitimate expectations, legal certainty and equal treatment, and the fifth plea put forward in that case, alleging an infringement of primary law by the 2005 Guidelines.

18 The General Court also rejected, at paragraphs 192 and 201 to 209 of the judgment under appeal, the applicants' sixth plea in that case, alleging a breach of procedure, in which the applicants argued, in the alternative, that the capital contributions should be treated as 'existing aid' within the meaning of Article 1(b)(v) of Regulation No 659/1999, and the seventh plea that they submitted in that case, alleging an infringement of the division of competences as it follows from the EC Treaty.

19 By contrast, the General Court upheld the eighth plea put forward by the applicants in support of their action in Case T-455/08, which alleged that the decision on the amount of the aid was inherently contradictory and that insufficient reasons were stated for it. The General Court held, in that connection, at paragraph 230 of the judgment under appeal, that the amount of EUR 350 million, set out in the operative part of the contested decision, was incorrect in the light of the recitals in the preamble to that decision in so far as it was apparent from those recitals that the sums covering public service duties did not constitute State aid and should therefore be deducted from the capital contributions.

Forms of order sought

20 MF, FLH and ADV claim that the Court should:

– set aside point 4 of the operative part of the judgment under appeal, by which the action brought in Case T-455/08 was dismissed as to the remainder, and the decision as to the costs;

– rule definitively on the dispute, allowing the action brought in Case T-455/08 in so far as that action seeks the annulment of the contested decision in so far as the Commission declares therein that the measure by which the Federal Republic of Germany provided capital contributions for the construction of the new southern runway and related airport infrastructure constitutes State aid for the purposes of Article 87(1) EC, and

– order the Commission to pay the costs relating to the appeal and to the proceedings at first instance.

21 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs of the appeal.

Case 5

By application lodged at the Court Registry on 10 November 2000, the Kingdom of Spain sought, under Article 230 EC, the annulment of Commission Decision 2001/605/EC of 26 July 2000 on the aid scheme implemented by Spain for the purchase of commercial vehicles under the Cooperation Agreement of 26 February 1997 between the Ministry for Industry and Energy and the Instituto de Crédito Oficial (OJ 2001 L 212, p. 34, hereinafter the contested decision).

The facts and the contested decision

On 26 February 1997 the Spanish Ministry for Industry and Energy and the Instituto de Crédito Oficial (ICO) concluded a cooperation agreement setting up an aid scheme for the purchase of commercial vehicles (the Agreement). The Agreement entered into force retrospectively on 1 January 1997 and came to an end on 31 December 1997.

The Agreement succeeded a similar aid scheme, which was the subject of Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial aid

scheme for the purchase of commercial vehicles (August 1994 ─ December 1996) (OJ 1998 L 329, p. 23). According to Article 2 of that decision, the aid granted in the form of subsidies to natural persons or to small and medium enterprises (SME) engaged in a business other than transport on a solely local or regional level for the purchase of commercial vehicles of Category D does not constitute State aid. In Articles 3 and 4 of that decision, the Commission found that all other aid granted to natural persons and SMEs constitute[d] State aid within the meaning of Article 92(1) of the Treaty, that it was illegal and incompatible with the common market and that the Kingdom of Spain must accordingly recover it.

The Kingdom of Spain brought an action before the Court seeking the annulment of Articles 3 and 4 of Decision 98/693. By judgment of 26 September 2002 in Case C-351/98 Spain v Commission [2002] ECR I-8031, the Court upheld that action.

In the present case, the Agreement is intended to support the renewal of the commercial vehicle fleet in Spain by encouraging natural persons who are self-employed and undertakings which meet the Community definition of SME to acquire new vehicles to replace their old ones.

To that end, the Agreement provides that natural persons registered for Spanish commercial tax and SMEs are entitled to a loan for a maximum duration of four years, without a grace period, to cover up to 70% of the eligible costs. The loan is subsidised to a maximum of ESP 85 000 for each ESP 1 000 000 borrowed, or approximately EUR 511 for each EUR 6 010 borrowed. The subsidy equivalent of the measure is thus 8.5%.

The grant of such a loan is subject to three cumulative conditions. First, the natural person or SME concerned must purchase a new commercial vehicle or lease it with the intention to purchase. Second, it must present a document issued by the Directorate-General for Traffic to certify that another commercial vehicle has been irrevocably withdrawn for scrapping. The vehicle concerned must have been registered in Spain for at least seven years in the case of tractor units and for ten years in all other cases. Third, the vehicle sent for scrapping must, as a rule, have a load capacity equal to that of the vehicle purchased.

In order to facilitate application of the last condition, the Agreement identifies six categories of vehicles: tractor units and lorries with a maximum authorised weight of 30 tonnes (Category A), lorries with a maximum authorised weight of between 12 and 30 tonnes (Category B), lorries with a maximum authorised weight of between 3.5 and 12 tonnes

(Category C), car-based vehicles, vans and lorries with a maximum authorised weight of up to 3.5 tonnes (Category D), buses and coaches (Category E) and trailers and semi-trailers (Category F).

As regards the financing and conditions of award of the loans, the Agreement provides that the ICO will open a line of credit of a maximum amount of ESP 35 billion and conclude contracts with public and private financial bodies which will grant subsidised loans to natural persons and SMEs. The difference between the rate of interest applied by the ICO and the rate of interest normally applied to this type of transaction will be compensated up to a maximum of 4.5 percentage points, by the Ministry for Industry and Energy. The total amount of the intervention by the Kingdom of Spain involved is estimated at ESP 3 billion, or approximately EUR 18 million.

By letter of 26 February 1997, the Spanish authorities informed the Commission of the Agreement, in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC).

By letter of 3 April 1997, the Commission requested further information from the Spanish authorities, who asked on three occasions for extra time to send the information. However, on expiry of the last time-limit granted by the Commission the Spanish authorities had not sent any further information.

By letter of 20 November 1997 the Commission informed the Spanish authorities, first, that as the aid scheme was retroactive it would be treated as non-notified aid and second, of its decision to open the procedure laid down in Article 93(2) of the Treaty. The Commission published that letter in the Official Journal of the European Communities (OJ 1999 C 29, p. 14) and invited interested parties to submit their observations.

By letter of 22 February 1999, the Kingdom of Spain submitted its observations to the Commission. No other Member State or third party sent observations. In those circumstances the Commission adopted the contested decision.

Having set out the procedure, described the general scheme of the Agreement and summarised the observations made by the Kingdom of Spain, the Commission found in part IV of the grounds for the contested decision that the aid scheme for the purchase of commercial vehicles must be treated as State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

The Commission pointed out, first, that the credits allocated for the financing of the aid scheme came from the budget of the Ministry for Industry and Energy. The financial support at issue was thus granted through State resources.

Second, the Agreement favoured certain undertakings. The scope ratione materiae of the Agreement was limited to the six categories of commercial vehicles listed in it, and only the natural persons or undertakings who engaged in transport operations either on their own account or for others, by means of a vehicle belonging to one or other of those categories, were entitled to the loans at issue. The aid scheme was therefore selective as to the scope and beneficiaries.

Third, the aid scheme introduced a mechanism with an effect equivalent to that of a subsidy, in so far as it had the effect of reducing the costs normally born by the natural persons and SMEs who were the beneficiaries. The aid scheme therefore distorted competition to the detriment of the other economic operators in the sector.

Fourth, the aid scheme introduced discrimination as between carriers established in Spain and non-resident carriers, and that discrimination took effect in the road transport sector, which had been opened to intra-Community competition by measures concerning both international transport and cabotage. As a consequence, the Commission found that the aid scheme affected trade between Member States.

However, in Article 1 of the contested decision the Commission recognised that when the beneficiary was engaged in a business not in the transport sector and operated on a solely local or regional level and the financial support granted to that beneficiary was confined to the purchase of small commercial vehicles in Category D, which are generally used for short journeys, that support could not be considered to affect trade between Member States. It concluded that financial support of that type was not State aid within the meaning of Article 92(1) of the Treaty.

Finally, in relation to financial support other than that described in the preceding paragraph, the Commission stated that it could not be justified on the basis of the de minimis rule, under which aid which is small and therefore unlikely to distort competition or to affect trade between Member States does not fall within Article 92(1) of the Treaty. It was clear from the Commission's notice of 1992 on Community guidelines on State aid for small and medium-sized enterprises (OJ 1992 C 213, p. 2, 1992 Guidelines on aid for SMEs), and the

Commission notice on the de minimis rule for State aid (OJ 1996 C 68, p. 9, the de minimis notice) that the rule did not apply to the transport sector, on the ground that that sector is characterised by the presence of a high number of small undertakings and that relatively small sums are thus likely to have repercussions on competition and on trade between Member States. The aid scheme at issue ultimately benefited undertakings effecting transport operations on their own account or for others. It followed that the de minimis rule was not applicable.

The Commission concluded that the financial aid granted under the Agreement to natural persons registered for Spanish commercial tax or to SMEs, other than the aid referred to in paragraph 19 above, must be considered to be State aid and was thus, in principle, incompatible with the common market.

The Commission also stated that the aid was illegal. In particular, it was not possible for it to be covered by the derogation provided for by Article 92(3)(c) of the Treaty, under which aid intended to facilitate the development of certain activities or of certain economic regions, when it does not affect trading conditions to an extent contrary to the common interest, can be considered to be compatible with the common market. The aid scheme at issue did not satisfy the conditions laid down by that provision. It was not intended to facilitate the development of an economic activity and its effect on trade went beyond what was justified by the common interest.

As to the intended use of the aid at issue, the Commission recalled that its information on Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3, Guidelines on environmental aid) made it clear that State aid could be covered by the derogation provided for in Article 92(3)(c) of the Treaty on the ground that it improved road safety and contributed to the protection of the environment only if the aid was for the additional investment costs necessary to attain higher standards imposed by law or to satisfy new environmental standards. The aid scheme at issue was only intended to encourage replacement of the fleet of commercial vehicles, without regard to objectives relating to the environment or to road safety.

As to the effect of the aid at issue on trade, the Commission held that in a market such as road transport, which was characterised by overcapacity, aid for the purchase of vehicles was generally contrary to the common interest even if its sole aim was to replace the existing means of transport. Moreover, the aid intended to relieve certain undertakings of the costs

which they would normally bear in the course of their business was considered to be by its very nature contrary to the common interest. It could not, therefore, come within the scope of the derogation provided for by Article 92(3)(c) of the Treaty.

Consequently, the Commission held, in Article 2 of the contested decision, that the aid at issue ─ with the exception of that referred to in paragraph 19 above ─ was incompatible with the common market and, in Article 4, that the Kingdom of Spain must recover it without delay.

Forms of order sought

The Kingdom of Spain claims that the Court should: annul the contested decision;